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CALCUTTA HIGH COURT
1918

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Puisne Judges :

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——Construction—Testator making bequest, that "on my death my brother's widow *B* and on her death her daughter *K* will get one-fourth share, etc." — Gift is of successive interest — Gift in favour of *B* is not gift of absolute interest but absolute interest cut down to life-estate—Succession Act (1865), Ss. 82 and 111 102

Words and Phrases
——"Package"—Meaning of, explained 796(2)*b*

COMPARATIVE TABLES

TABLE No. I.

Showing seriatim the pages of Other REPORTS, JOURNALS AND PERIODICALS for the year 1918, with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 denotes pages of OTHER JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 45 Calcutta=All India Reporter

ILR	AIR		ILR	AIR		ILR	AIR		ILR	AIR		ILR	AIR	
1	1917 *PC*	136	320	1917 *PC*	207	519	1918 *C*	925	685	1918 *C*	747	816	1918 *C*	238
17	" "	146	336	1918 *C*	927	525	" "	156	691	" "	446	818	1919 "	97
28	1918 *C*	830	343	1919 "	551	530	" "	705	697	" "	743	825	1918 "	289
60	" "	618	430	1918 "	966	538	" "	688	702	1919 "	951	835	1919 "	681
82	" "	822	434	" "	615	557	" "	88	720	" "	1021	862	" "	197
87	1917 *PC*	163	442	1917 *PC*	201	574	1919 "	922	727	1918 "	406	866	1918 "	328
94	" "	156	450	" "	181	585	1918 "	932	733	1917 *PC*	128	873	1919 "	1055
111	1918 *C*	858	469	1918 *C*	969	590	1917 *PC*	95	748	1918 "	3	878	1918 *PC*	11
138	" "	467	475	" "	326	606	1919 *C*	887	756	" *C*	950	905	" *C*	74
151	" "	626	481	" "	249	630	1918 "	977	765	" "	905	909	" *PC*	35
159	" "	971	486	1917 "	1	634	" "	895	769	1919 "	1046	920	" *C*	897
169	" "	988	490	" "	2	638	" "	695	774	1918 "	816	926	" "	435
259	" "	952	492	1918 "	111	641	" "	136	780	" "	39	930	1914 "	490
285	" "	979	496	" "	230	645	1919 "	939	785	1919 "	835	934	1918 "	278
294	1917 "	2	502	" "	191	653	" "	908	793	1918 *PC*	4	940	1919 "	942
301	1918 "	507	510	1917 *PC*	196	666	1917 *PC*	105	805	" "	8	950	" "	50
305	1919 "	904	515	1918 *C*	432									

27 Calcutta Law Journal=All India Reporter.

CLJ	AIR		CLJ	AIR		CLJ	AIR		CLJ	AIR		CLJ	AIR	
1	1919 *C*	551	191	1917 *PC*	197	326	1918 *C*	879	451	1918 *C*	457	538	1919 *C*	477
68	1917 *PC*	136	198	1918 *C*	906	334	" "	1	453	" "	411	540	1918 "	888
78	1918 *C*	307	201	" "	580	339	" "	336	459	" "	409	543	" *PC*	8
85	1917 "	1	205	" "	353	345	1917 *PC*	105	461	" "	187	548	" "	3
88	1918 "	94	210	" "	348	358	" "	101	463	" "	932	553	1919 *C*	512
89	" "	507	212	" "	933	363	" "	188	465	1919 "	930	556	" "	1080
91	1919 "	1021	226	1919 "	928	367	" "	121	474	1918 "	483	560	1918 "	432
96	1918 "	1037	228	*Too old*		374	1918 *C*	278	477	" "	479	563	1919 "	1091
100	" "	281	230	1919 *C*	501	377	" "	289	478	" "	132	569	" "	1046
101	1919 "	977	231	1917 *PC*	190	382	" "	887	480	" "	750	572	" "	623
104	1918 "	529	240	" "	181	385	" "	397	483	" "	941	576	1918 "	151
107	" "	807	253	" "	179	388	" "	358	486	" "	899	579	" "	849
110	" "	602	257	1918 *C*	360	392	1919 "	534	489	" "	229	583	" "	844
115	" "	435	274	" "	395	395	" "	533	491	" "	905	587	" "	114
117	" "	164	277	" "	969	398	1918 "	73	494	" "	747	590	" "	869
119	1919 "	800	281	" "	556	400	" "	301	497	" "	615	592	" "	883
125	1918 "	1024	284	" "	426	403	" "	294	502	1919 "	1075	594	" "	946
129	" "	582	289	" "	419	418	" "	415	506	" "	674	596	1919 "	1017
133	" "	536	293	" "	843	431	" "	475	511	" "	942	599	" "	672
137	" "	898	294	" "	896	434	" "	406	517	1918 "	98	603	1918 "	31
141	" "	477	296	1917 *PC*	95	436	" "	136	523	" "	601	605	" "	810
145	1919 "	545	303	" "	111	438	1919 "	997	525	" "	1026	607	" "	446
148	1918 "	88	311	1918 *C*	237	441	1918 "	393	528	" "	171	611	" "	889
158	" "	858	314	" "	892	443	1919 "	620	532	1919 "	1040	615	1917 *PC*	173
175	1917 *PC*	207	316	" "	927	447	" "	972	535	1918 "	404	623	" "	116
186	" "	196	320	" "	183							632	" "	128

28 Calcutta Law Journal=All India Reporter.

CLJ	AIR		CLJ	AIR		CLJ	AIR		CLJ	AIR		CLJ	AIR	
1	1917 *PC*	197	25	1919 *C*	702	84	1919 *C*	691	115	1919 *C*	647	142	1919 *C*	856
4	1918 *C*	5	32	" "	862	87	" "	1044	120	" "	588	144	" "	1020
18	" "	639	51	" "	625	91	1918 "	917	123	1918 "	13			
24	" "	145	77	" "	607	105	1919 "	696	141	1919 "	996	148	1918 "	826

28 Calcutta Law Journal=All India Reporter—(*Concld.*)

CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR			CLJ	AIR		
151	1919	*C*	1008	205	1919	*C*	958	262	1918	*C*	687	304	1918	*C*	74	476	1918	*PC*	37
152	1918	"	816	209	1918	"	967	264	"	"	696	306	"	"	363	483	1919	*C*	584
155	"	"	695	211	"	"	40	266	"	"	288	370	1919	"	654	485	"	"	1088
158	1919	"	993	213	"	"	61	268	"	"	160	394	1918	*PC*	70	492	1918	"	276
160	"	"	1010	216	1919	"	1025	271	"	"	41	403	"	"	74	494	1919	"	807
163	1918	"	812	219	1918	"	904	275	1919	"	1030	409	"	"	11	496	"	"	154
165	"	*PC*	41	220	"	"	233	278	1918	"	164	428	"	"	81	498	1918	"	467
173	1917	"	169	222	"	"	49	281	1919	"	927	437	"	"	1	507	1919	"	982
181	1918	"	53	223	1919	"	782	283	*Too old*			441	"	"	4	508	1918	*PC*	112
188	"	"	34	249	"	"	730	285	1918	*C*	328	447	"	"	84	519	"	"	87
192	"	"	35	250	"	"	650	289	1919	"	637	449	"	"	45	530	"	"	49
197	"	*C*	809	254	"	"	885	299	"	"	985	456	"	"	25	536	1919	*C*	192
201	"	"	286	256	1918	"	80	301	"	"	894	468	"	"	77	537	"	"	949
203	1919	"	946	261	"	"	233												

22 Calcutta Weekly Notes=All India Reporter.

CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR		
1	1919	*C*	551	282	1917	*PC*	66	477	1918	*C*	827	646	1918	*C*	289	846	1919	*C*	828
50	1917	*PC*	71	289	1918	*C*	512	478	1919	"	501	649	1917	*PC*	128	851	"	"	674
61	1918	*C*	109	297	"	"	947	479	1918	"	662	657	1919	*C*	471	853	"	"	586
63	"	"	595	301	"	"	865	481	1917	*PC*	179	659	"	"	1008	856	1918	"	263
66	"	"	899	304	"	"	848	484	"	"	188	660	"	"	1010	860	1919	"	895
69	"	"	485	305	1917	*PC*	167	487	1918	*C*	333	662	1918	"	95	866	1918	*PC*	53
72	"	"	966	310	1918	*C*	824	488	"	"	448	666	"	"	422	872	1919	*C*	768
74	1917	*PC*	146	312	"	"	969	491	"	"	358	669	"	"	159	891	1918	*PC*	35
86	1918	*C*	626	315	"	"	78	494	1919	"	1084	671	"	"	330	894	1919	*C*	986
89	"	"	961	318	"	"	960	499	"	"	930	674	"	*PC*	8	902	1918	"	221
96	1917	"	1	319	"	"	983	505	1917	*PC*	111	678	1919	*C*	1067	904	1919	"	611
	"	"	2	321	1920	"	564	512	1919	*C*	1075	685	"	"	989	910	"	"	647
97	"	*PC*	136	322	"	"	420	515	"	"	1055	689	1918	"	102	914	1918	*PC*	70
104	1918	*C*	294	323	1918	"	965	517	"	"	1014	693	"	"	434	919	"	*C*	488
115	"	"	895	325	"	"	982	520	"	"	533	695	"	"	136	922	1919	"	976
117	"	"	943	328	"	"	822	522	1918	"	923	697	"	*PC*	3	924	"	"	631
121	1917	*PC*	201	330	1917	*PC*	197	526	"	"	168	700	1919	*C*	970	927	1918	"	39
124	1918	*C*	452	335	1918	*C*	126	530	1917	*PC*	169	702	1918	"	147	929	"	"	114
126	1920	"	560	342	"	"	901	535	1919	*C*	1042	704	1919	"	965	931	"	"	137
128	1918	"	975	347	"	"	446	538	"	"	1020	709	1918	"	540	933	"	"	247
130	"	"	1027	350	"	"	876	540	1918	"	73	713	1919	"	506	936	"	"	687
131	"	"	265	353	1917	*PC*	181	543	"	"	80	719	"	"	959	937	"	*PC*	30
143	"	"	846	362	1918	*C*	318	547	"	"	353	721	"	"	782	943	1919	*C*	637
145	1917	*PC*	85	367	"	"	897	550	1919	"	1033	740	"	"	512	951	"	"	935
147	1918	*C*	111	372	"	"	526	552	1918	"	238	742	1918	"	217	958	"	"	900
149	1919	"	1037	374	"	"	1039	553	1917	*PC*	121	744	"	"	238	961	1918	*PC*	22
156	1918	"	526	376	"	"	280	558	1919	*C*	1044	745	1919	"	862	965	1919	*C*	798
158	"	"	866	377	1917	*PC*	105	563	1918	"	118	758	1918	"	165	967	1918	"	843
160	"	"	911	390	1918	*C*	913	564	1919	"	1012	760	"	"	148	972	1919	"	271
163	"	"	887	396	1919	"	922	566	"	"	1049	763	1919	"	1080	982	"	"	858
165	"	"	927	405	"	"	1021	568	1918	"	782	766	1918	"	332	985	1918	*PC*	77
168	"	"	169	408	"	"	69	571	"	"	322	769	1919	"	625	990	"	*C*	198
169	1917	*PC*	156	409	1917	*PC*	95	572	"	"	140	788	"	"	898	994	1919	"	671
179	1918	*C*	917	416	1918	*C*	249	575	1919	"	718	790	1918	"	232	996	"	"	1064
188	"	"	816	419	"	"	1024	577	1917	*PC*	94	792	1919	"	903	997	1918	"	432
190	"	"	891	422	"	"	326	580	1919	*C*	887	793	"	"	908	999	"	"	218
192	"	"	929	424	"	"	161	594	1918	"	986	800	"	"	1061	1001	1919	"	1088
197	"	"	743	427	"	"	82	596	"	"	237	802	"	"	819	1005	"	"	155
199	"	"	406	433	1917	*PC*	187	597	"	"	243	807	1918	"	253	1009	1918	*PC*	41
201	1917	*PC*	163	436	"	"	196	599*a*	1919	"	996	809	"	"	72	1018	1919	*C*	719
204	1918	*C*	467	439	"	"	197	599*b*	*Too old*			811	1919	"	1016	1021	"	"	593
210	"	"	615	441	1919	*C*	694	601	1917	*PC*	116	814	1918	"	4	1025	"	"	999
213	"	"	88	444	"	"	1024	611	1919	*C*	904	817	1919	"	949	1027	1918	"	976
226	"	"	557	446	1918	"	925	618	"	"	691	822	"	"	721	1028	1919	"	195
257	1917	*PC*	207	449	"	"	597	622	"	"	975	823	1918	"	38	1033	1918	*PC*	34
263	1918	*C*	360	451	"	"	138	625	1917	*PC*	101	824	"	"	328	1036	1919	*C*	546
275	"	"	799	455	"	"	201	627	1918	*C*	415	826	1919	"	1091				
278	"	"	978	457	1917	*PC*	190	637	1919	"	634	831	"	"	893	1042	"	"	540
279	"	"	941	463	1918	*C*	255	640	1918	"	878	834	"	"	696	1045	"	"	654
				474	"	"	312	641	"	"	411	841	1918	*PC*	37	1062	"	"	539

19 Criminal Law Journal & 43 to 48 Indian Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. I in A. I. R.* 1918 *Lahore*

TABLE No. II

Showing seriatim the pages of ALL INDIA REPORTER, 1918 CALCUTTA, with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column 1 denotes pages of the ALL INDIA REPORTER, 1918 CALCUTTA.
Column 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1918 Calcutta=Other Journals.

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	27	*C L J*	334	56	53	*I C*	90	107	45	*I C*	336	150 (2)46		*I C*	686
	45	*I C*	43		30	*C L J*	34	108	44	*I C*	225	151	46	*I C*	469
	46	*Cal*	160	57	47	*I C*	829	109 (1)43		*I C*	864		27	*C L J*	576
3	48	*I C*	687	58	53	*I C*	872		22	*C W N*	61	153	44	*I C*	445
	20	*Cr L J*	47		30	*C L J*	121	109 (2)44		*I C*	58	154	43	*I C*	344
4	47	*I C*	868	59	51	*I C*	690	110 (1)46		*I C*	39	156 (1)47		*I C*	105
	22	*C W N*	814		29	*C L J*	314		19	*Cr L J*	679	156 (2)47		*I C*	510
	19	*Cr L J*	968	61	47	*I C*	871	110 (2)47		*I C*	374		45	*Cal*	525
5	47	*I C*	111		28	*C L J*	213	111	44	*I C*	157	158 (1)46		*I C*	719
SB	28	*C L J*	4		19	*Cr L J*	971		22	*C W N*	147		19	*Cr L J*	799
8	48	*I C*	699	62	53	*I C*	882		45	*Cal*	492	158 (2)46		*I C*	721
9	44	*I C*	671		30	*C L J*	118	113 (1)45		*I C*	275	159	46	*I C*	165
11 (1)50		*I C*	91	63	44	*I C*	558		19	*Cr L J*	515		22	*C W N*	669
	29	*C L J*	207	64 (1)48		*I C*	692	113 (2)46		*I C*	355	160	48	*I C*	309
11 (2)44		*I C*	222	64 (2)53		*I C*	737	114	45	*I C*	747		28	*C L J*	268
13	48	*I C*	78		30	*C L J*	263		27	*C L J*	587	161	45	*I C*	187
SB	28	*C L J*	123	68	51	*I C*	123		22	*C W N*	929		22	*C W N*	424
19	44	*I C*	689		29	*C L J*	241	115	44	*I C*	152	162	45	*I C*	781
20	45	*I C*	49	70	51	*I C*	127	117	45	*I C*	845	163	46	*I C*	191
21	31	*I C*	424		29	*C L J*	237		19	*Cr L J*	653	164(1)	43	*I C*	374
	22	*C L J*	328	72	47	*I C*	811	118	45	*I C*	762		27	*C L J*	117
	28	*C W N*	540		22	*C W N*	809		22	*C W N*	563	164 (2)48		*I C*	330
28	29	*C L J*	11		19	*Cr L J*	959	119	43	*I C*	819		28	*C L J*	278
	40	*I C*	408	73	44	*I C*	553		19	*Cr L J*	227	165	44	*I C*	211
26	53	*I C*	39		27	*C L J*	398	120	45	*I C*	268		22	*C W N*	758
	30	*C L J*	1		22	*C W N*	540		19	*Cr L J*	508	166	46	*I C*	665
28	29	*C L J*	607	74	48	*I C*	687	121	44	*I C*	925	167	44	*I C*	413
	52	*I C*	650		44	*Cal*	905	122	46	*I C*	351	168	46	*I C*	142
30	51	*I C*	34		28	*C L J*	304	123	46	*I C*	708		22	*C W N*	526
	29	*C L J*	253		20	*Cr L J*	47		19	*Cr L J*	788	169	46	*I C*	157
31	45	*I C*	203	75	45	*I C*	669	125 (1)43		*I C*	376		22	*C W N*	168
	27	*C L J*	603	76	98	*I C*	837		21	*C W N*	1150		19	*Cr L J*	701
32	29	*C L J*	259		23	*C W N*	372	125 (2)45		*I C*	250	170	44	*I C*	983
	51	*I C*	70	77	48	*I C*	970	126	46	*I C*	196	171	46	*I C*	221
34	52	*I C*	825	78	43	*I C*	208		22	*C W N*	335		27	*C L J*	528
	29	*C L J*	577		22	*C W N*	315	132	44	*I C*	977	173	47	*I C*	917
38	47	*I C*	297	80	44	*I C*	521		27	*C L J*	473	175	46	*I C*	680
	22	*C W N*	823		28	*C L J*	256	133	45	*I C*	246		19	*Cr L J*	632
39	44	*I C*	229		22	*C W N*	543	134	43	*I C*	728	177	41	*I C*	1
	45	*Cal*	780	82	45	*I C*	441	136	45	*I C*	688	178	45	*I C*	878
	22	*C W N*	927		22	*C W N*	427		22	*C W N*	695	179	41	*I C*	181
40	47	*I C*	671	88	44	*I C*	321		27	*C L J*	436	180	48	*I C*	972
	28	*C L J*	211		45	*Cal*	557		19	*Cr L J*	640	182 (1)46		*I C*	816
	19	*Cr L J*	947		27	*C L J*	148		45	*Cal*	641	182 (1)46		*I C*	656
41	48	*I C*	295		22	*C W N*	213	137	43	*I C*	153	183	45	*I C*	59
	28	*C L J*	271		19	*Cr L J*	305		22	*C W N*	931		27	*C L J*	320
43	45	*I C*	532	94	43	*I C*	332	138	45	*I C*	284	186	45	*I C*	702
45 (1)48		*I C*	614		27	*C L J*	88		22	*C W N*	451	187 (1)44		*I C*	881
45 (2)52		*I C*	980		21	*C W N*	928		19	*Cr L J*	524		27	*C L J*	461
	29	*C L J*	416		19	*Cr L J*	108	140	45	*I C*	841	187 (2)46		*I C*	280
47	53	*I C*	49	95	46	*I C*	176		22	*C W N*	572	188	42	*I C*	455
	30	*C L J*	48		22	*C W N*	662		19	*Cr L J*	649	189	45	*I C*	875
48	45	*I C*	548	97	43	*I C*	826	143	47	*I C*	907	190	38	*I C*	437
49 (1)47		*I C*	800		19	*Cr L J*	234	144	48	*I C*	448		21	*C W N*	840
49 (2)44		*I C*	516	98 (1)45		*I C*	13	145 (1)46		*I C*	879		18	*Cr L J*	325
	28	*C L J*	222	98 (2)44		*I C*	5		28	*C L J*	24	191	45	*Cal*	502
	23	*C W N*	930		27	*C L J*	517	145 (2)45		*I C*	732		46	*I C*	687
50	47	*I C*	818	102	43	*I C*	991	146	45	*I C*	872	192	45	*I C*	735
	19	*Cr L J*	961		22	*C W N*	689	147	44	*I C*	143	193	44	*I C*	398
51	51	*I C*	98	105	43	*I C*	497		22	*C W N*	702	194	44	*I C*	734
	29	*C L J*	245	106 (1)43		*I C*	820	148	46	*I C*	783	196	39	*I C*	805
53	45	*I C*	725		19	*Cr L J*	228		22	*C W N*	760		21	*C W N*	516
55	52	*I C*	985	106 (2)43		*I C*	822	150 (1)43		*I C*	440		18	*Cr L J*	465
	29	*C L J*	419		19	*Cr L J*	230		19	*Cr L J*	152				

A.I.R		Other Journals	
198	45	*I C*	879
	22	*C W N*	990
201	41	*I C*	129
	26	*C L J*	610
	22	*C W N*	455
	18	*Cr L J*	753
202	46	*I C*	254
203	37	*I C*	993
204	(1)43	*I C*	17
204	(2)46	*I C*	859
205	45	*I C*	929
206	38	*I C*	578
207	(1)46	*I C*	269
207	(2)46	*I C*	975
208	38	*I C*	997
SB	18	*Cr L J*	437
212	46	*I C*	970
213	45	*I C*	913
214	38	*I C*	960
	18	*Cr L J*	400
215	46	*I C*	136
216	45	*I C*	917
217	46	*I C*	689
	22	*C W N*	742
	19	*Cr L J*	769
218	41	*I C*	767
	22	*C W N*	999
220	(1)38	*I C*	534
220	(2)38	*I C*	701
221	45	*I C*	933
	22	*C W N*	902
222	42	*I C*	633
223	42	*I C*	548
225	41	*I C*	57
227	38	*I C*	536
	21	*C W N*	423
228	46	*I C*	852
229	46	*I C*	168
	27	*C L J*	489
230	46	*I C*	741
	45	*Cal*	496
232	46	*I C*	78
	22	*C W N*	790
233	(1)46	*I C*	100
	28	*C L J*	220
233	(2)38	*I C*	422
	18	*Cr L J*	310
234	41	*I C*	245
236	46	*I C*	243
237	47	*I C*	64
	27	*C L J*	311
	22	*C W N*	596
	19	*Cr L J*	868
238	(1)46	*I C*	412
	22	*C W N*	552
	19	*Cr L J*	732
238	(2)46	*I C*	528
	45	*Cal*	816
	28	*C L J*	261
	22	*C W N*	744
	19	*Cr L J*	752
239	46	*I C*	184
240	42	*I C*	532
242	41	*I C*	240
243	46	*I C*	158
	22	*C W N*	597
	19	*Cr L J*	702
244	46	*I C*	587
245	37	*I C*	916
	21	*C W N*	835
246	41	*I C*	396
247	46	*I C*	195
	22	*C W N*	933
248	46	*I C*	228
249	45	*I C*	305
	45	*Cal*	481
	22	*C W N*	416
250	43	*I C*	18
251	46	*I C*	328
252	(1)48	*I C*	433
252	(2)48	*I C*	752
253	46	*I C*	104
	22	*C W N*	807
255	45	*I C*	477
	22	*C W N*	463
	43	*I C*	59
	22	*C W N*	856
	43	*I C*	996
	22	*C W N*	131
	42	*I C*	63
	44	*Cal*	741
	26	*C L J*	605
	47	*I C*	371
	28	*C L J*	492
	47	*I C*	365
	45	*I C*	228
	45	*Cal*	934
	27	*C L J*	374
	46	*I C*	298
	22	*C W N*	376
	19	*Cr L J*	714
	43	*I C*	452
	27	*C L J*	100
	44	*I C*	18
	44	*I C*	473
	42	*I C*	604
	26	*C L J*	39
	21	*C W N*	1059
	18	*Cr L J*	988
	47	*I C*	638
	28	*C L J*	201
	44	*I C*	480
	48	*I C*	300
	28	*C L J*	266
289	(1)48	*I C*	965
289	(2)45	*I C*	258
	45	*Cal*	825
	27	*C L J*	377
	22	*C W N*	646
	19	*Cr L J*	498
292	42	*I C*	500
293	47	*I C*	831
294	43	*I C*	893
	27	*C L J*	403
	22	*C W N*	104
301	45	*I C*	730
	27	*C L J*	400
303	47	*I C*	62
304	(1)47	*I C*	332
304	(2)44	*I C*	328
	19	*Cr L J*	312
305	47	*I C*	92
	19	*Cr L J*	896
306	42	*I C*	521
307	45	*I C*	738
	27	*C L J*	78
312	43	*I C*	779
	22	*C W N*	474
314	43	*I C*	241
	21	*C W N*	1152
	19	*Cr L J*	81
318	44	*I C*	279
318	22	*C W N*	362
322	(1)47	*I C*	840
322	(2)45	*I C*	690
	22	*C W N*	571
323	43	*I C*	251
	19	*Cr L J*	91
324	43	*I C*	981
326	45	*I C*	289
	45	*Cal*	475
	28	*C L J*	148
	22	*C W N*	422
328	44	*I C*	497
	45	*Cal*	966
	28	*C L J*	285
	22	*C W N*	824
329	44	*I C*	21
330	42	*I C*	649
	22	*C W N*	671
332	45	*I C*	712
	22	*C W N*	766
333	44	*I C*	526
	22	*C W N*	487
334	39	*I C*	647
335	39	*I C*	640
	21	*C W N*	544
336	43	*I C*	169
	27	*C L J*	339
337	43	*I C*	11
	44	*Cal*	917
341	44	*I C*	1
344	45	*I C*	616
345	44	*I C*	996
346	45	*I C*	686
	19	*Cr L J*	638
348	44	*I C*	562
	27	*C L J*	210
349	39	*I C*	387
	21	*C W N*	425
350	45	*I C*	7
351	43	*I C*	348
	44	*Cal*	1016
353	43	*I C*	511
	27	*C L J*	205
	22	*C W N*	547
355	39	*I C*	795
356	38	*I C*	643
357	39	*I C*	1
358	44	*I C*	13
	22	*C W N*	491
	27	*C L J*	388
360	43	*I C*	781
	22	*C W N*	263
	27	*C L J*	257
363	48	*I C*	561
SB	28	*C L J*	306
391	(1)39	*I C*	861
391	(2)39	*I C*	137
392	39	*I C*	487
	18	*Cr L J*	519
393	45	*I C*	705
	27	*C L J*	441
394	41	*I C*	726
395	44	*I C*	538
	27	*C L J*	274
397	43	*I C*	742
	27	*C L J*	385
398	44	*I C*	504
	27	*C L J*	137
399	39	*I C*	767
400	43	*I C*	715
402	39	*I C*	460
404	44	*I C*	159
	27	*C L J*	535
405	39	*I C*	497
406	43	*I C*	614
	22	*C W N*	199
	19	*Cr L J*	198
	27	*C L J*	434
	45	*Cal*	727
407	41	*I C*	687
409	45	*I C*	965
	27	*C L J*	459
410	43	*I C*	467
411	45	*I C*	986
	27	*C L J*	453
	22	*C W N*	641
414	41	*I C*	690
415	44	*I C*	763
	27	*C L J*	418
	22	*C W N*	627
419	43	*I C*	740
	27	*C L J*	289
421	42	*I C*	506
422	41	*I C*	863
	22	*C W N*	666
424	37	*I C*	779
425	(1)39	*I C*	240
425	(2)38	*I C*	187
426	44	*I C*	543
	27	*C L J*	284
429	41	*I C*	733
430	37	*I C*	790
431	42	*I C*	192
432	41	*I C*	759
	45	*Cal*	515
	27	*C L J*	560
	22	*C W N*	997
433	44	*I C*	465
434	41	*I C*	501
435	22	*C W N*	693
	43	*I C*	758
	27	*C L J*	115
	45	*Cal*	926
436	42	*I C*	758
	18	*Cr L J*	1014
437	41	*I C*	431
440	41	*I C*	399
443	41	*I C*	728
445	(1)42	*I C*	390
445	(2)39	*I C*	637
446	42	*I C*	30
	22	*C W N*	347
	27	*C L J*	607
	45	*Cal*	691
448	45	*I C*	667
	22	*C W N*	483
450	40	*I C*	623
452	39	*I C*	881
	22	*C W N*	124
453	41	*I C*	302
	21	*C W N*	864
456	42	*I C*	243
457	43	*I C*	775
	27	*C L J*	451
458	41	*I C*	936
459	(1)41	*I C*	875
459	(2)43	*I C*	22
460	40	*I C*	616
461	44	*I C*	26
463	38	*I C*	103
464	40	*I C*	614

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
466	41	*I C*	711	517 (1)19		*Cr L J*	220	609	40	*I C*	783	687 (1)28		*C L J*	262
467	44	*I C*	233	517 (2)40		*I C*	513		21	*C W N*	906		19	*Cr L J*	933
	22	*C W N*	204		21	*C W N*	809	615	41	*I C*	878	687 (2)40		*I C*	498
	45	*Cal*	138	520	41	*I C*	800		22	*C W N*	210	688	41	*I C*	503
	28	*C L J*	498	521	41	*I C*	525		27	*C L J*	497		21	*C W N*	1043
471 (1)41		*I C*	657		25	*C L J*	626		45	*Cal*	434		45	*Cal*	538
	21	*C W N*	756		21	*C W N*	1132	618 (1)18		*I C*	971	695	41	*I C*	751
	18	*Cr L J*	833	523	41	*I C*	19	618 (2)42		*I C*	484		28	*C L J*	155
471 (2)38		*I C*	25	524	42	*I C*	624		21	*C W N*	1076		45	*Cal*	638
472 (1)42		*I C*	723	525	43	*I C*	47		26	*C L J*	187	696	41	*I C*	815
	18	*Cr L J*	995	526 (1)44		*I C*	91		45	*Cal*	60		23	*C L J*	264
472 (2)40		*I C*	845		22	*C W N*	156	626	40	*I C*	996	697	40	*I C*	450
	25	*C L J*	553	526 (2)44		*I C*	870		26	*C L J*	328	698	42	*I C*	546
	21	*C W N*	920		22	*C W N*	372		22	*C W N*	86	699	40	*I C*	419
473	41	*I C*	897	528	41	*I C*	627		45	*Cal*	151		21	*C W N*	978
474	38	*I C*	63	529	43	*I C*	770	629	40	*I C*	464	700	38	*I C*	787
475	43	*I C*	212		27	*C L J*	104	631 (1)47		*I C*	777		25	*C L J*	551
	27	*C L J*	431	530	43	*I C*	772	631 (2)40		*I C*	816	701 (1)40		*I C*	463
476 (1)41		*I C*	744	532	42	*I C*	884		21	*C W N*	1147	701 (2)41		*I C*	817
476 (2)41		*I C*	393	534	40	*I C*	77	632	46	*I C*	781		18	*Cr L J*	849
477	43	*I C*	812	535	43	*I C*	221	633	40	*I C*	397	705	41	*I C*	73
	27	*C L J*	141	536	41	*I C*	757	634	47	*I C*	847		45	*Cal*	530
479 (1)42		*I C*	619		27	*C L J*	133	635	40	*I C*	1005	707	39	*I C*	705
	27	*C L J*	477	538	43	*I C*	26		21	*C W N*	868		25	*C L J*	238
479 (2)41		*I C*	691	539 (1)42		*I C*	616		26	*C L J*	115		21	*C W N*	482
480	40	*I C*	157	539 (2)38		*I C*	844	636	41	*I C*	242		44	*Cal*	978
482	41	*I C*	685		21	*C W N*	751		21	*C W N*	628	713	44	*I C*	930
483 (1)42		*I C*	260	540	44	*I C*	915	638	40	*I C*	894		26	*C L J*	345
483 (2)43		*I C*	726		22	*C W N*	709	639	41	*I C*	530		19	*Cr L J*	402
	27	*C L J*	474	544	41	*I C*	456		21	*C W N*	903	740	39	*I C*	522
485	41	*I C*	998	545	40	*I C*	605		28	*C L J*	18	742	37	*I C*	997
	26	*C L J*	208	546	39	*I C*	177	642	40	*I C*	113	743	41	*I C*	610
	22	*C W N*	69		21	*C W N*	979	643	46	*I C*	876		45	*Cal*	697
	18	*Cr L J*	886	551	40	*I C*	839	644	40	*I C*	646		26	*C L J*	319
486	41	*I C*	775		26	*C L J*	317		21	*C W N*	895		22	*C W N*	197
487	42	*I C*	543	552 (1)40		*I C*	659	645	40	*I C*	322	744	41	*I C*	679
488	43	*I C*	464	552 (2)42		*I C*	614		26	*C L J*	29	746	41	*I C*	732
	22	*C W N*	919	553	43	*I C*	461		21	*C W N*	1009	747	41	*I C*	964
489 (1)39		*I C*	562	554	40	*I C*	609		18	*Cr L J*	674		45	*Cal*	685
489 (2)41		*I C*	584	556	38	*I C*	94	650 (1)46		*I C*	606		27	*C L J*	494
490	43	*I C*	450		27	*C L J*	281		19	*Cr L J*	766	749	38	*I C*	476
491	41	*I C*	859	557	40	*I C*	865	650 (2)41		*I C*	447	750 (1)39		*I C*	273
492 (1)42		*I C*	550		22	*C W N*	226		21	*C W N*	777	750 (2)41		*I C*	694
492 (2)41		*I C*	769	578	40	*I C*	355		44	*Cal*	1091		27	*C L J*	480
493	43	*I C*	801	580	44	*I C*	567	658	42	*I C*	285	752	45	*I C*	113
494 (1)42		*I C*	977		27	*C L J*	201		21	*C W N*	992		26	*C L J*	401
	21	*C W N*	1111	582	41	*I C*	37	659	40	*I C*	662		19	*Cr L J*	449
	19	*Cr L J*	17		21	*C W N*	774	660	42	*I C*	280	782	37	*I C*	904
494 (2)43		*I C*	737		27	*C L J*	129	661	40	*I C*	682		22	*C W N*	568
495 (1)43		*I C*	24	584	40	*I C*	271	662 (1)47		*I C*	340	784	38	*I C*	469
495 (2)40		*I C*	725		25	*C L J*	635	662 (2)40		*I C*	718		25	*C L J*	467
	21	*C W N*	758		21	*C W N*	1001		22	*C W N*	479	785	40	*I C*	706
	18	*Cr L J*	25	586	41	*I C*	12		18	*Cr L J*	718		21	*C W N*	872
497	40	*I C*	74	588	39	*I C*	977	663	40	*I C*	728		18	*Cr L J*	706
	21	*C W N*	595		21	*C W N*	694		18	*Cr L J*	728	786	38	*I C*	882
499	41	*I C*	370		18	*Cr L J*	609	665 (1)47		*I C*	19		25	*C L J*	286
501	44	*I C*	216	590	40	*I C*	215	665 (2)42		*I C*	534	791	40	*I C*	735
504	40	*I C*	494	595	41	*I C*	425	667	40	*I C*	100		21	*C W N*	755
505	41	*I C*	924		22	*C W N*	63	668	40	*I C*	732		18	*Cr L J*	735
507 (1)43		*I C*	29	597	45	*I C*	65		18	*Cr L J*	732	792	39	*I C*	490
507 (2)40		*I C*	736		22	*C W N*	449	669	40	*I C*	544		25	*C L J*	255
	21	*C W N*	1135	598	40	*I C*	999		25	*C L J*	480		21	*C W N*	640
	27	*C L J*	89		21	*C W N*	826	672	40	*I C*	648		44	*Cal*	1002
	45	*Cal*	301		26	*C L J*	44	673	41	*I C*	458		18	*Cr L J*	522
	18	*Cr L J*	786	601 (1)46		*I C*	564	681	42	*I C*	623	794 (1)41		*I C*	84
508	42	*I C*	615	601 (2)45		*I C*	317		21	*C W N*	1052	794 (2)38		*I C*	49
509	41	*I C*	259		27	*C L J*	523	688	40	*I C*	504		21	*C W N*	636
510 (1)42		*I C*	1	602	41	*I C*	269	684	40	*I C*	460	795	40	*I C*	577
510 (2)40		*I C*	576		27	*C L J*	110	685 (1)47		*I C*	780	796 (1)41		*I C*	411
511	41	*I C*	200	605 (1)40		*I C*	596	685 (2)40		*I C*	462	796 (2)40		*I C*	626
512	44	*I C*	80	605 (2)41		*I C*	348	686	40	*I C*	467		21	*C W N*	815
	22	*C W N*	289		21	*C W N*	1055	687 (1)47		*I C*	657	797 (1)41		*I C*	406
517 (1)43		*I C*	796	608	41	*I C*	65		22	*C W N*	936				

AIR		Other Journals	
797	(2)39	*I C*	720
799	38	*I C*	56
	22	*C W N*	275
801	40	*I C*	135
	21	*C W N*	599
802	41	*I C*	421
803	41	*I C*	472
	26	*C L J*	88
804	41	*I C*	736
	26	*C L J*	263
806	38	*I C*	523
807	41	*I C*	804
	27	*C L J*	107
808	38	*I C*	520
809	41	*I C*	747
	28	*C L J*	197
810	41	*I C*	837
	27	*C L J*	605
811	41	*I C*	307
	45	*Cal*	486
	27	*C L J*	85
	22	*C W N*	96
	18	*Cr L J*	787
812	40	*I C*	234
	28	*C L J*	163
813	40	*I C*	173
814	41	*I C*	872
	26	*C L J*	258
816	41	*I C*	673
	45	*Cal*	774
	28	*C L J*	152
	22	*C W N*	188
817	41	*I C*	77
818	(1)38	*I C*	69
818	(2)41	*I C*	639
819	39	*I C*	865
821	41	*I C*	682
822	40	*I C*	740
	45	*Cal*	82
	26	*C L J*	342
	22	*C W N*	328
	18	*Cr L J*	740
823	41	*I C*	227
824	41	*I C*	387
	22	*C W N*	310
826	40	*I C*	731
	26	*C L J*	141
	21	*C W N*	1062
	18	*Cr L J*	731
827	40	*I C*	490
	22	*C W N*	477
828	41	*I C*	779
	21	*C W N*	1149
829	(1)37	*I C*	983
829	(2)41	*I C*	684
830	40	*I C*	383
	45	*Cal*	28
	26	*C L J*	62
	21	*C W N*	670
839	37	*I C*	971
	44	*Cal*	829
841	38	*I C*	609
842	41	*I C*	698
843	(1)46	*I C*	862
FB	22	*C W N*	967
843	(2)45	*I C*	25
	27	*C L J*	293
844	27	*I C*	640
	27	*C L J*	583
846	31	*I C*	859
	22	*C W N*	143
847	(1)45	*I C*	892
847	(2)44	*I C*	497
848	40	*I C*	442
	22	*C W N*	304
849	29	*I C*	461
	27	*C L J*	579
	19	*C W N*	1129
850	39	*I C*	465
	44	*Cal*	816
	25	*C L J*	193
	21	*C W N*	269
	18	*Cr L J*	497
858	41	*I C*	944
	45	*Cal*	111
	27	*C L J*	158
	21	*C W N*	794
865	40	*I C*	422
	25	*C L J*	396
	22	*C W N*	301
866	44	*I C*	141
	22	*C W N*	158
868	41	*I C*	810
	26	*C L J*	123
869	41	*I C*	203
	27	*C L J*	590
870	41	*I C*	615
875	43	*I C*	341
876	35	*I C*	49
	25	*C L J*	391
	22	*C W N*	350
878	46	*I C*	681
	22	*C W N*	640
879	34	*I C*	592
	21	*C W N*	188
	27	*C L J*	326
883	(1)41	*I C*	956
	27	*C L J*	592
	21	*C W N*	1087
883	(2)38	*I C*	835
887	41	*I C*	649
	27	*C L J*	382
	22	*C W N*	163
	18	*Cr L J*	825
888	35	*I C*	651
	27	*C L J*	540
889	42	*I C*	378
	27	*C L J*	611
891	35	*I C*	638
	44	*Cal*	567
	22	*C W N*	190
892	(1)45	*I C*	160
	27	*C L J*	314
	19	*Cr L J*	496
892	(2)43	*I C*	263
	21	*C W N*	1125
895	41	*I C*	693
	45	*Cal*	634
	26	*C L J*	265
	22	*C W N*	115
896	41	*I C*	919
	27	*C L J*	294
897	42	*I C*	431
	45	*Cal*	920
	26	*C L J*	333
	22	*C W N*	367
899	42	*I C*	590
	27	*C L J*	486
	22	*C W N*	66
901	42	*I C*	768
	22	*C W N*	342
	18	*Cr L J*	1024
904	45	*I C*	937
	28	*C L J*	219
905	41	*I C*	894
	45	*Cal*	765
	27	*C L J*	491
906	37	*I C*	956
	44	*Cal*	214
	27	*C L J*	198
	21	*C W N*	206
907	43	*I C*	815
908	44	*I C*	911
909	44	*I C*	564
910	41	*I C*	311
	26	*C L J*	138
	21	*C W N*	948
	18	*Cr L J*	791
911	36	*I C*	457
	24	*C L J*	533
	22	*C W N*	160
913	41	*I C*	853
	26	*C L J*	130
	22	*C W N*	390
917	44	*I C*	254
	28	*C L J*	91
	22	*C W N*	179
923	41	*I C*	850
	22	*C W N*	522
925	42	*I C*	711
	45	*Cal*	519
	26	*C L J*	325
	22	*C W N*	446
927	44	*I C*	177
	45	*Cal*	336
	27	*C L J*	316
	22	*C W N*	165
	19	*Cr L J*	273
929	36	*I C*	398
	26	*C L J*	118
	22	*C W N*	192
932	44	*I C*	331
	45	*Cal*	585
	27	*C L J*	463
933	37	*I C*	277
	44	*Cal*	425
	27	*C L J*	212
	21	*C W N*	177
941	36	*I C*	792
	27	*C L J*	483
	22	*C W N*	279
942	44	*I C*	49
943	(1)44	*I C*	518
943	(2)41	*I C*	658
	26	*C L J*	210
	22	*C W N*	117
	18	*Cr L J*	834
946	41	*I C*	276
	27	*C L J*	594
	21	*C W N*	1109
947	33	*I C*	891
	22	*C W N*	297
950	33	*I C*	957
	45	*Cal*	756
	23	*C L J*	485
	21	*C W N*	155
952	41	*I C*	561
	45	*Cal*	259
	21	*C W N*	959
960	37	*I C*	817
	22	*C W N*	318
961	36	*I C*	884
	44	*Cal*	555
	24	*C L J*	363
961	22	*C W N*	89
965	42	*I C*	881
	26	*C L J*	322
	22	*C W N*	323
966	42	*I C*	601
	45	*Cal*	430
	26	*C L J*	37
	22	*C W N*	72
	18	*Cr L J*	985
967	37	*I C*	469
	28	*C L J*	209
	21	*C W N*	125
	18	*Cr L J*	117
968	44	*I C*	922
969	41	*I C*	952
	45	*Cal*	469
	27	*C L J*	277
	22	*C W N*	312
971	41	*I C*	116
	25	*C L J*	619
	21	*C W N*	996
	45	*Cal*	159
975	44	*I C*	77
	22	*C W N*	128
976	44	*I C*	604
	22	*C W N*	1027
977	42	*I C*	472
	45	*Cal*	630
978	44	*I C*	533
	22	*C W N*	278
979	41	*I C*	959
	45	*Cal*	285
	25	*C L J*	613
	21	*C W N*	972
982	35	*I C*	177
	22	*C W N*	325
983	42	*I C*	709
	26	*C L J*	339
	22	*C W N*	319
984	45	*I C*	416
985	46	*I C*	558
986	46	*I C*	116
	22	*C W N*	594
987	46	*I C*	226
988	45	*I C*	838
	45	*Cal*	169
	26	*C L J*	459
	21	*C W N*	1161
	19	*Cr L J*	530
1023	46	*I C*	555
1024	43	*I C*	184
	27	*C L J*	125
	22	*C W N*	419
1026	35	*I C*	415
	27	*C L J*	525
	21	*C W N*	246
1027	46	*I C*	656
1027	33	*I C*	994
	22	*C W N*	130
1028	41	*I C*	47
1034	42	*I C*	574
	21	*C W N*	1134
1035	42	*I C*	933
	21	*C W N*	1129
1036	42	*I C*	259
1037	41	*I C*	929
	27	*C L J*	96
	21	*C W N*	784
1039	35	*I C*	95
	44	*Cal*	448
	22	*C W N*	374

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

THE
ALL INDIA REPORTER
1918
CALCUTTA HIGH COURT

A. I. R. 1918 Calcutta 1

MOOKERJEE AND WALMSLEY, JJ.

Secretary of State—Appellant.

v.

Digambar Nanda—Respondent.

Appeal No. 252 of 1913, Decided on 22nd August 1917, against original decree of Sub-Judge, Midnapore, D/- 26th March 1913.

(a) Bengal Tenancy Act (1885), S. 104-H —Settlement held to be of raiyati holding and not of tenure.

A tenure holder may settle a raiyat on the land of his tenancy, and a raiyat also may, in his turn, sublet the land of his holding to an under-raiyat. The mere fact that a tenant has sublet his land does not by itself establish conclusively that his status is that of a tenure holder and not that of a raiyat. The test to be applied to determine the status of a tenant is the intention of the contracting parties. [P 2 C 1]

The amalnamah was expressly granted for the purpose of reclamation and cultivation by the grantee, and the regular lease which followed did not indicate any intention to alter the nature of the tenancy. Under the lease the grantee was authorized to cultivate the land, either by himself or by making settlement with tenants.

Held: that the settlement was of a raiyati holding and not of a tenure. [P 2 C 1]

(b) Landlord and Tenant — Origin of tenancy unknown — Terms ambiguous— Subsequent conduct may be considered.

Where the origin of the tenancy is unknown the mode of user of the land may furnish a valuable clue to determine the original purpose of the tenancy and where the terms of the grant are ambiguous, evidence of conduct subsequent of the parties may also be admissible. [P 2 C 2]

(c) Precedents—Rights of parties dependent on facts—Precedents should not be cited as authorities.

Practice of citing judicial precedents not as authorities for principles enunciated therein, but as guides in the determination of the rights of parties which are dependent on the facts of individual cases and the contractual obligations enforceable between them deprecated. [P 8 C 1]

(d) Bengal Tenancy Act (1885), S. 104-H— Duty of Court laid down.

In a suit under S. 104-H it is not sufficient for the Court to hold that the entry in the Settlement Rent Roll as to the status or the rent is erroneous. The Court must affirmatively determine the exact conditions and incidents of the tenancy as also the rent to be settled on such basis. [P 3 C 2]

Ram Charan Mitra—for Appellant.

B. Chakravarti, Shib Chandra Palit, Kshirod Narain Bhuia and *Dhirendra Krishna Roy*—for Respondent.

Judgment.—This is an appeal by the Secretary of State for India in Council in a suit instituted by the respondent under S. 104-H Ben. Ten. Act, for declaration that he is an occupancy raiyat in respect of the subject-matter of the litigation and for incidental reliefs. The Subordinate Judge has decreed the suit and has held that the plaintiff is not a tenure-holder but an occupancy raiyat and that the existing rent which the plaintiff was liable to pay before the last survey and settlement proceedings was fair and equitable. The substantial question in controversy, consequently, is whether the plaintiff is an occupancy raiyat as he alleges or whether he is a tenure-holder as recorded by the revenue authorities. The root of the title of the plaintiff is an amalnamah granted on 19th June 1868 to his father by Lal Chand Bhuia, the then settlement holder under the Government. This document recites that the mouzahs mentioned were settled with the grantee for bringing them under cultivation, and it specifically directs the grantee to extirpate wild beasts and, by clearing out jungles and raising embankments at his own expense, to carry on cultivation and tillage and enjoy the

crops thereof. The express purpose of the grant consequently was reclamation and cultivation of the leasehold lands by the grantee. No rent was settled at the time, but the amalnamah recites that a pattah would be granted at the proper rent in the following year. On 14th June 1869, the grantor executed a pattah in favour of the grantee.

This instrument recites that, on the strength of the amalnamah, Bhoia Nath Nanda had taken possession of land exceeding two thousand bighas in area and that he had at his own expense commenced to reclaim jungles, to raise embankments and to cultivate the lands. The settlement was made for a term of 19 years for carrying on cultivation at a progressive rate of rent. The document further authorized the grantee to continue to enjoy the profits of the land by bringing them under cultivation either by himself or by making settlement with tenants, and a covenant was inserted to the effect that if the grantee did not cultivate lands fit for cultivation within the term of the lease, he would be liable to compensation for loss that might be sustained by the grantor. In our opinion, this document leaves no room for doubt that the settlement was of a raiyati holding and not of a tenure. The amalnamah was expressly granted for the purpose of reclamation and cultivation by the grantee, and the regular lease which followed did not indicate any intention to alter the nature of the tenancy. Stress has been laid however on the circumstance that under the lease the grantee was authorized to cultivate the land, either by himself or by making settlement with tenants. This clause obviously does not show conclusively that the tenant was a tenure-holder and not a raiyat. A tenure-holder may settle a raiyat on the land of his tenancy, and, a raiyat also may, in his turn, sublet the land of his holding to an under-raiyat. Consequently, the mere fact that a tenant has sublet his land does not by itself establish conclusively that his status is that of a tenure-holder and not that of a raiyat. The test to be applied to determine the status of a tenant is the intention of the contracting parties. S. 5, sub-S. (1), Ben. Ten. Act defines a "tenure-holder" to mean primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it. Sub-S. (2) of the section defines a "raiyat" to mean primarily a person who has acquired such a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants or with the aid of other persons. Sub-S (3) further provides that a person shall not be deemed to be a raiyat unless he holds lands either immediately under a proprietor or immediately under a tenure-holder. These difinitions show that there may be a tenure-holder directly under a proprietor as there may be a raiyat directly under a proprietor. The test to be applied in each case is furnished by S. 5, sub-S. (4), namely, the purpose for which the right of tenancy was originally acquired. Sub-S. (5) formulates a rebuttable presumption, namely, that where the area held by the tenant exceeds one hundred standard bighas, the tenant shall be presumed to be a tenure-holder untill the contrary is shown. There is no room however for the application of this statutory presumption when the terms of the original grant are known, as in the case before us. To ascertain the status of the plaintiff, we must consequently determine the purpose for which the tenancy was originally created; Did the grantor intend to carve out the interest of a middle manor did he intend to settle the land with a person who would bring the lands under cultivation? The mere fact that the plaintiff has sublet the land is not decisive, because a tenure-holder, though a middleman who collects rent, may yet cultivate a portion of the land himself, just as much as a raiyat, though himself a cultivator, may settle a portion of the land with under-raiyats.

In cases where the origin of the tenancy is unknown, the mode of user of the land may furnish a valuable clue to determine the original purpose of the tenancy, and where the terms of the grant are ambiguous, evidence of conduct subsequent of the parties may also be admissible: *Promotho* v *Nilmani* (1), *Promoda Nath* v. *Asiruddin* (2) and *Bamapada Roy* v. *Midnapore Zamindari Co.* (3). The case before us however is free from the

(1) [1911]14 C. L. J. 38=15 C. W. N. 902.
(2) [1911] 15 C. W. N. 896.
(3) [1912] 16 C. L. J. 322.

difficulty which arises when the terms of the original grant are either unknown or ambiguous. Here the amalnamah which sanctioned the entry of the grantee on the land demised and the lease which followed, make it plain beyond controversy that the purpose of the settlement was reclamation and cultivation by the grantor himself. The interest created was consequently that of a raiyat and not that of a tenure-holder. In this view, it is needless to consider the conduct of the parties. But we may observe that the judgment of the Subordinate Judge shows and his view is amply sustained by the materials on the record—that the settlement authorities have, from time to time, regarded the plaintiff and his predecessor, not as tenure-holders, but as raiyats entitled to a right of occupancy. Stress was laid by the appellant on the decisions in *Secy. of State* v. *Jadav Chandra Misra* (4) and *Secy. of State* v. *Gobind Prashad Barik* (5). No useful purpose would however be served by an analysis of decisions given on entirely different sets of circumstances, and we may usefully recall the emphatic protest of Lord Haldane L. C. in the case of *Kreglinger* v. *New Patagonia Meat Co.*, (6) against the abuse of judicial precedents, where they are cited, not as authorities for principles enunciated therein, but as guides in the determination of the rights of parties which are dependent on the facts of individual cases and the contractual obligations enforceable between them. We must accordingly confirm the finding of the Subordinate Judge that the plaintiff is a raiyat and not a tenure-holder.

The next question which requires examination is: Is the plaintiff an occupancy or non-occupancy raiyat, and what is the fair rent assessable on the lands in suit according to his status? In the Court below, it appears to have been assumed that if the plaintiff was not a tenure-holder as found by the Revenue Authorities, he must be an occupancy raiyat. This however does not necessarily follow. Indeed, it has been argued before us that after the creation of the holding, the plaintiff was, for a period an ijardar, and that this circumstance interrupted the growth and perfection of the right of occupancy. This is an aspect of the matter which has not been fully investigated. Besides this, the question of the fair rent payable by the plaintiff must depend upon his precise status, and till that has been determined with accuracy, it is impossible to ascertain the amount of rent to be settled. In a suit under S. 104-H it is not sufficient for the Court to hold that the entry in the Settlement Rent Roll as to the status or the rent is erroneous. The Court must affirmatively determine the exact conditions and incidents of the tenancy as also the rent to be settled on such basis; this is obvious, as under sub-S. (7) the rent settled by the Court is deemed to have been duly settled in place of the rent entered in the Settlement Rent Roll.

It is consequently impossible to affirm the decree of the Subordinate Judge, although we hold that his view that the plaintiff is not a tenure-holder is correct. The result is that this appeal must be allowed and the decree of the Court below set aside. The decree of this Court will declare that the status of the plaintiff is that of a raiyat and the case will be remitted to the Subordinate Judge to determine whether the plaintiff is an occupancy raiyat or non-occupancy raiyat and then to ascertain the fair rent payable by him. The plaintiff will have half his costs both here and in the Court below. The costs after remand will abide the result.

V.B./R.K. *Appeal allowed.*

(4) [1916] 21 C. W. N. 452.
(5) [1916] 21 C. W. N. 505.
(6) [1914] A. C. 25.

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TEUNON AND CUMING, JJ.

Azem Ali—Petitioner.

v.

Emperor—Opposite Party.

Misc. Criminal Revn. No. 77 of 1918, Decided on 23rd August 1918.

Criminal P. C. (1898), S. 190 (1) (c)—Magistrate taking cognizance of offence can hold inquiry preliminary to commitment.

The fact that a Magistrate took cognizance of an offence under S. 190 (1) (c) is no bar to his holding an inquiring preliminary to commitment. [P 3 C 2; P 4 C 1]

A. K. Fazlal Huq and *Muhammad Abdul Hai*—for Petitioner.

Judgment.—This Rule is based upon an application for transfer. Even if it had to be held that the Magistrate took cognizance under the provisions of S. 190 (1) (c), Criminal P. C., still that is no bar to the Magistrate holding an enquiry

preliminary to commitment. We have read the Magistrate's explanation and we can find no reason to think that the petitioner will not be accorded a full and fair hearing before that officer. This Rule is discharged.

V.B./R.K. *Rule discharged.*

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CHITTY AND SMITHER, JJ.

Gahar Mahammed Sarkar and *others* —Accused—Petitioners.

v.

Pitambar Das—Complainant— Opposite Party.

Criminal Revn. No. 75 of 1918, Decided on 8th February 1918, against order of Deputy Magistrate, Dinajpur, D/. 31st October 1917.

Penal Code (1860), S. 186—Restitution of conjugal rights--Warrant issued to seize wife and deliver her to husband— Warrant is illegal and obstruction to it is not offence under S. 186—Husband and wife.

In execution of a decree for restitution of conjugal rights a warrant was issued directing the executing peon to seize the wife and deliver her bodily over to her husband, failing which to bring her under arrest before the executing Court:

Held: that the warrant was illegal, so that resistance to its execution was not an offence under S. 186. [P 5 C 1]

Girija Prasonna Sanyal—for Petitioners.

Facts.—The complaint is that on the morning of 21st August, Pitamber Das, a peon of the civil Court went to execute a warrant of arrest in the house of the accused Gaher Muhammad and the accused persons obstructed him in the discharge of his public functions. Halimuldin instituted a civil suit against his wife Masiran Bibi for the restitution of conjugal rights and got a decree. An appeal was preferred by the defendants against the order of the Munsif, and it was dismissed with costs. Masiran Bibi was detained by the accused Gaher Muhammad in his house as he wanted to marry her with his son Abdul Aziz. The peon went to Gaher Muhammad's house on the morning of 21st August accompanied by Nasir Sheik, Halimuddin and Ajibulla. They found Masiran Bibi sweeping the inner yard of Gahar Muhammad's house, Halimuddin identified his wife, whereupon the peon asked him to seize her. Gaher Muhammad wanted to see the letter of authority and the peon showed him the warrant of arrest (Ex. 1), Halimuddln and Nasir were beaten by Gaher Muhammad and others. Nasir Sheik instituted a case under S. 323, I. P. C., against Gaher Muhammad and others, and it has been disposed of by me to day. The peon gave "dohai" of Government, but to no effect. The accused Gaher Muhammad ordered to snatch away Masiran Bibi. Abdul Aziz, Esar and others then dragged her away. The peon then wrote a report (Ex. 2) in the outer yard of Gaher Muhammad's house. The first Munsif granted sanction to the peon to file a case under S. 186, I. P. C. (Ex. 3), on 22nd August.

It appears from the deposition of P. Ws. No. 1 and 2, that the peon asked Halimuddin to seize Masiran Bibi. The prosecution witnesses have satisfactorily proved that the peon showed the warrant to the accused Gaher Muhammad and that Masiran Bibi was dragged away by Abdul Aziz, and others under the order of Gahar Muhammad Sarkar. The defence story is that Nasir Sheik, Halimuddin and others numbering about 30 or 40 men trespassed into the house of Gaher Muhammad, at about 4 a. m. of 21st August. There was no peon with them and that nobody gave "dohai" of Government. Rai Mahamed, the father of Halimuddin, asked Gaher Muhammad to produce Masiran Bibi. An altercation ensued and Gaher Muhammad was wounded on his head by Rai Muhammad. The defence story does not seem to me to be a probable one. I cannot believe that D. Ws. 1 and 2 were sitting wide awake at that hour of the night and saw 30 or 40 men passing by their houses. Apparently the defence attempted to change the time of occurrence for their own advantage. I have seen the General Diary Book of the Chirirbandar Police Station for 21st August. One of the sons of the accused Gaher Muhammad lodged an information of mar pit at the Thana. He stated then that there was a Hindu peon with the party. The prosecution ought to have examined the Police Officer and got the entry in the diary marked as an exhibit.

The warrant was a legal one as Masiran Bibi had an opportunity of obeying the decree and wilfully failed to obey it (vide R. 32, O. 21, Civil P. C.). Masiran Bibi had appealed against the order of the Munsif, and consequently she had full knowledge of the decree. The

appeal was dismissed by the Officiating Additional Sub-Judge on 31st July. The warrant was issued on 20th August. It is clear therefore that she had nearly three weeks' time to obey the decree. Pitamber Das, peon, was obstructed in the discharge of his public duties by the aforesaid accused persons and he was authorized by law to execute the warrant. I therefore find the accused Gaber Muhammad Sarkar, Abdul Aziz and Esar Muhammad guilty under S. 186, I. P. C., and sentence each of them to pay a fine of Rs. 10 (ten only), in default to undergo rigorous imprisonment for a fortnight. They are further directed to pay Rupee 1-8-0 to the complainant as the cost of court-fee.

Judgment.—In this case we think that the warrant the execution of which is said to have been resisted, was illegal. The petitioners should not therefore have been convicted under S. 186, I. P. C. We set aside the conviction and sentence and direct that the fines, if paid be refunded.

V.B./R K. *Rule made absolute.*

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* A. I. R. 1918 Calcutta 5
Special Bench

SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Gholam Mowlah—Defendant—Appellant.

v.

Ali Hafiz and *others* — Plaintiffs — Respondents.

Appeal No. 60 of 1915, Decided on 15th December 1915, from original decision of Greaves, J., D/- 26th March 1915.

*** Civil P. C. (1908), S. 92, O 1, Rr. 3and 10 (2)—Suit to eject third persons from trust properties cannot be brought under S. 92 — Transferees of trust properties cannot be made parties under O. 1, Rr. 3 and 10 to suit under S. 92.**

A claim for the recovery of possession of trust property from a trespasser or from a transferee from a trustee is not within the scope of S. 92 and a Court trying a suit under that section is not competent to bring before it under R. 3 or R. 10 (2), O. 1, any person who is in possession of trust property either as a trespasser or as a transferee. [P 7 C 1, 2]

S. R. Das and *A. Rasul*—for Appellant.

Asghar and *P. N. Chatterjee*—for Respondents.

Sanderson, C. J.—In this case the action was brought by four plaintiffs whose names appear upon the record: the second and third are two sons of Abdur Rahman, who is defendant 1 and the first and the fourth are relations of Abdur Rahman, and defendant 2 was a man called Gholam Mowalah, who was a purchaser of certain property from defendant 1. The purchase was effected by a deed which is dated the 12th June 1910; I need not read the deed in detail because it has been fully commented upon by Mr. Asghar, the learned counsel for the plaintiffs, this morning: It refers to certain property in Calcutta on a part of which stands a mosque; and Abdur Rahman, the vendor, in the conveyance refers to the fact that this property was his hereditary property, that his father and he himself have, generation after generation, in succession without anybody's objection all along for more than 12 years, been enjoying and possessing the proprietary rights thereof one after another and that no one else has any sort of right or claim thereto. Then he refers to the fact that he has got into necessitous circumstances and must sell. He says:

" consequently, there is no other means left but to sell my aforesaid Calcutta properties, subject to the duties and responsibilities of the said mosque, and I cannot sell the same to any other purchaser than a religious Mussalman of the Sunni sect. You (i. e, defendant 2) are a religious Mussalman of the Sunni sect, and believing all my aforesaid statements you became desirous of purchasing the aforesaid property as proposed by me, and having fixed the value thereof at Rs. 3,000 I received from you yesterday,"

and so on, and he sells the property subject to all the aforesaid conditions, and says:

" you being malik in all my aforesaid rights and titles, shall continue all along to enjoy and possess the same, and shall exercise all sorts of proprietary rights. You shall maintain the mosque according to the custom prevailing and look after the same and shall perform all the acts and observe the festivals that are necessary for the Mussalmans of the Sunni sect in connexion therewith,"

and he refers to the different prayers, and then to the properties and says

" all these belong to me personally; no one else has any sort of right or claim thereto; you believing all these statements of mine and other statements mentioned above relating to my title agreed to and purchased. . . should anyone else purchase the aforesaid property from you, he shall also have to carry out the aforesaid conditions in respect of the mosque and you shall not be entitled to sell the aforesaid property to anyone else who is not a Mussalman of the Sunni sect,"

Now it is said that this was a trust property held by defendant 1 Abdur Rahman as trustee, and that he had no right to sell the property in the way he did. The action was brought by the plaintiffs against these two defendants. Defendant 1 did not appear; two of the plaintiffs, as I have said, are his sons; the other two plaintiffs are his relations. It was apparently proved in evidence that they had very little connexion with this mosque, that they did not live in Calcutta; one of them did not live there for 15 years: and, without saying more, I agree with what the learned counsel for defendant 2 argued yesterday that there is ground for saying that their claim ought to be looked upon with great care. I do not want to say more than that, because I have not heard what Mr. Asghar might have said with regard to that matter in full detail, but there are certain facts, which, if I had been a Judge in the first instance, would have led me to investigate the bona fides of this claim with great care. Now defendant 2, it has been found by the learned Judge, was a bona fide purchaser. He made certain inquiries which were detailed to us yesterday by Mr. Das and I am not going to repeat them. The learned Judge said that if the defendant had made certain further inquiries he would, in all probability, have found that this was trust property, and the learned Judge has therefore come to the conclusion that defendant 2 had what is called in law constructive notice; meaning thereby that if he had made these further inquiries to which the learned Judge refers, which, in his opinion, were reasonable enquiries, he would have found that there was a trust, and inasmuch as he did not make those reasonable inquiries, he must be taken to have been affected with notice. This is what was meant by the words "constructive notice." Therefore that is the position of the parties. Then the claim is made and it is admittedly under S. 92, Civil P. C. Now, the nature of the claim was this: As far as defendant 1 Abdur Rahman was concerned, it is alleged that he had committed a breach of the trust by selling the property to defendant 2. It is asked that he should be removed from the position of trustee and that a new trustee should be appointed in his place. I think there were other prayers, but those were the main prayers as far as defendant 1 was concerned. As regards defendant 2, the essence of the claim against him was that he was a trespasser and that the property of which he was in possession under this purchase should be handed over to the new trustee who was to be appointed by the Court. It was in essence, as regards defendant 2, an action in ejectment of defendant 2 from that property. It has been admitted by Mr. Asghar, the learned counsel for the respondents, in the stress of argument that such a claim cannot be made in a suit which is instituted under S. 92, Civil P. C., and therefore as far as the claim for that relief is concerned, he cannot substantiate the part of the decree which carries out that claim. But he says that defendant 2 is really in the position of a trustee, and because he is in the position of a trustee, the plaintiffs were entitled to have him kept before the Court as a party to the proceeding, in order that he may hear the decree which the learned Judge would make against defendant 1 and in such a way that defendant 2 might be bound by that decree. His argument is, first of all, that this is a trust for two reasons: first, defendant 2 had a constructive notice of the trust.

The learned Judge has found that he had constructive notice of this particular trust, and for the purpose of my judgment I will assume that this is a correct finding. Then he goes on to say that in addition to that defendant 2 performed the duties, which the trustee of that trust would have to perform, and consequently he was a trustee de facto.

Now, I do not agree with the argument upon that point, because it is clear that any duties which he may have performed in connexion with the mosque must be attributed to the covenant which he had made in the deed of conveyance of 12th June 1910. It is perfectly true that it is found that he had a constructive notice of the trust—and it is so found because he did not make certain enquiries—but it is also true, as the learned Judge has found as a fact, that he was a bona fide purchaser and he did not in fact know that such a trust existed. Therefore when we find in the deed that he personally undertook a covenant to the vendor that he would perform certain duties, because, as the vendor says:

"I have been looking after and keeping supervision over the same (mosque) and doing all other acts in connexion therewith at my own expense . . . . and I cannot sell the property to anybody else than a person who is a religious Mussalman of the Sunni sect, ... and I would not sell it to you unless you undertook to perform the same kind of duties as I have been performing"

meaning thereby, not as a trustee, but, as he says, "out of my own pocket and out of my own money."—it is clear to me that such duties as may have been performed by defendant 2 must be attributed to that personal covenant which he made in that deed, and not to the position of a trustee of this particular trust. Therefore, I do not think that he must be taken as acting as a trustee de facto. The argument which was put forward by Mr. Asghar on this point therefore fails. Then his argument is that if he does not succeed there, he is entitled to bring to his aid O. 1, R. 3, Civil P. C., which runs as follows:

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise;"

and the learned counsel says that under that rule, he is entitled to keep defendant 2 before the Court, in order, as I have said before, that he might hear the declaration which would be made by the Court against defendant 1. I think the answer to that argument is the one which was given by Mr. Das yesterday, and it is this: inasmuch as the essence of the relief which was claimed by the plaintiff against defendant 2 was ejectment, or, to be strictly accurate, recovery of possession of property, and inasmuch as it is admitted that this claim could not be brought under S. 92, I fail to understand how O. 1, R. 3, can be applied in aid, because it is only applicable for the purpose of preventing multiplicity of suits: and one way of testing it is this—the concluding words point to it—they are:

"Where if separate suits were brought against such persons, any common question of law or fact would arise."

Once it is decided that the claim against defendant 2 could not be instituted under S. 92, it is clear to my mind that it is outside the power of the Judge to make use of O. 1, R. 3, for joining defendant 2 as a party to the proceedings under that section. For these reasons, I think that this decree, so far as it affects defendant 2, must be set aside and the appeal, so far as that defendant is concerned, must be allowed with costs both of the Court of first instance and of this appeal. Against defendant 1 the decree will stand and will be available to the plaintiffs for what it is worth.

Woodroffe, J.—In my opinion the case is covered by the decisions in *Budree Das Mukim* v. *Chooni Lal Johurry* (1) and *Budh Singh Dudhuria* v. *Niradharan Roy* (2). It has doubtless been held in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3) that where there is a claim for administration of a trust which falls within the section, a claim to eject an alienee may be joined with it. But, in my opinion, that claim does not come within the scope of the section and it is open to the charge of misjoinder. That decision has been dissented from in the cases to which I have referred. The decision in *Sajedar Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3), not being a decision under the present Code, is not a decision which is binding upon us. I therefore agree that the appeal should be decreed.

Mookerjee, J.—I agree that this appeal must be allowed and the decree discharged in so far as it affects the appellant. The suit was, in essence, of a composite nature. As against defendant 1, the alleged trustee, it was framed as one under S. 92, Civil P. C., and appropriate reliefs were claimed against him. As against defendant 2, the transferee from defendant 1, the suit was in substance one for ejectment. In my judgment in the case of *Budh Singh Dudhuria* v. *Niradbaran Roy* (2) I held—on grounds which were fully stated then and need not be repeated now—that suits for recovery of possession of trust properties from third parties, for instance, from trespassers and from transferees from the trustees, were not within the scope of S. 539, Civil P. C. of 1882, which has been subsequently replaced by S. 92 of the Code of 1908. If I may say so without impropriety, I have heard nothing urged in the course of the elaborate and careful argument addressed to us on behalf of the respondents which has in any way shaken my opinion. That view is in con-

(1) [1906] 33 Cal. 789.
(2) [1905] 2 C. L. J. 431.
(3) [1897] 24 Cal. 418.

formity with a long line of decisions in all the Indian High Courts. Amongst the cases in this Court reference may be made to *Mohiuddin* v. *Sayiduddin* (4), *Budree Das Mukim* v. *Choomi Lal Johurry* (1), *Ayatunnessa Bibi* v. *Kulper Khalifa* (5). Amongst the cases in the Bombay High Court may be mentioned those of *Lakhmandas* v. *Ganpatrav* (6), *Vishvanath* v. *Rambhat* (7), *Kazi Hassan* v. *Sagun Balkrishna* (8), *Ghelabhai* v. *Uderam* (9), *Malhar Bhagvant Kulkarni* v. *Narsingh Krishna Majli* (10) and *Collector of Poona* v. *Bai Chanchalbai* (11). In the Allahabad High Court there is a distinct preponderance of judicial opinion in support of the same view, as is indicated by the decisions in *Muhammad Abdullah Khan* v. *Kallu* (12), *Ghazoffear Husain Khan* v. *Yawar Husain* (13), *Jamaluddin* v. *Mujtaba Husain* (14) and *Dasondhay* v. *Mohammad Abu Nasar* (15).

In the High Court of Madras the same view has been taken since 1880, as is clear from the decisions in *Strinivasa Ayyangar* v. *Srinivasa Swami* (16), *Neti Rama Jogiah* v. *Venkatacharulu* (17), *Chettikulam Prasanna Venkatachala Reddiar* v. *Collector of Trichinopoly* (18), *Asam Raghavulu Setty* v. *Pellati Sitamma* (19) and *Rangayya Naidu* v. *Chainnasamy Iyar* (20). The cases in this Court, which support the contention of the respondents, are, so far as I have been able to investigate, only two, namely, *Lutifunnissa Bibi* v. *Nazirun Bibi* (21) and *Sajedar Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3); from these I respectfully dissent; they do not, in my opinion, give a correct exposition of the true intention of the legislature in framing S. 539 of the Code of 1882 and S. 92 of the Code of 1908. I do not feel pressed by the argument based on O. 1, R. 3, and R. 10, sub-R. 2, mentioned in the judgment of Seshagiri Aivar, J., in *Asam Raghavalu Setty* v. *Pellati Sitamma* (19), as they are of no real assistance to the respondents. Once it is held, as I think it must be held, that a suit for ejectment of a trespasser or of a transferee from a trustee is not within the scope of S. 92, it follows as a necessary corollary that the Court is not competent to bring before the forum any such person under either of the two rules mentioned. I am also unable to accept the contention of the respondents that the appellant was in the position of a constructive trustee. No doubt, he undertook to maintain the worship in the mosque: but this was not in furtherance of the trust which the plaintiffs seek to enforce against defendant 1; it was rather, as the Chief Justice has pointed out, in pursuance of the covenant contained in the conveyance from defendant 1 to defendant 2. In my opinion the decree as against defendant 2 cannot possibly be supported and must accordingly be discharged.

V.B./R.K. *Appeal allowed.*

(4) [1893] 20 Cal. 810.
(5) A. I. R. 1914 Cal. 356=41 Cal. 749=22 I. C. 677.
(6) [1884] 8 Bom. 365.
(7) [1891] 15 Bom. 148.
(8) [1900] 24 Bom. 170.
(9) [1912] 36 Bom. 29=12 I. C. 577.
(10) [1913] 37 Bom. 95=17 I. C. 665.
(11) [1911] 35 Bom. 470=12 I. C. 30.
(12) [1899] 21 All 187.
(13) [1906] 28 All. 112.
(14) [1903] 25 All. 631.
(15) [1911] 33 All. 660=11 I. C. 36.
(16) [1893] 16 Mad. 31.
(17) [1903] 26 Mad. 450.
(18) A. I. R. 1914 Mad. 708=24 I. C. 369.
(19) A. I. R. 1915 Mad. 517=25 I. C. 794.
(20) [1915] 28 I. C. 898.
(21) [1887] 14 Cal. 33.

*A. I. R. 1918 Calcutta 8

TEUNON AND CUMING, JJ.

Rajani Manna Bagdi and *others*—Appellants.

v.

Satish Chandra Roy and *others*—Respondents.

Appeal No. 2415 of 1915, Decided on 2nd August 1918, against appellate decree of Addl. Sub-Judge, Nadia, D/- 26th June 1915.

***Landlord and Tenant—Suspension—Dispossession of tenant from portion of holding—Entire rent is suspended—Landlord is not entitled to apportionment of rent.**

Where a landlord dispossesses a tenant from a portion of the holding, the entire rent is suspended and the landlord is not entitled to any apportionment of rent on the lands still remaining in the possession of the tenant unless he has replaced the tenant in possession or has taken some effective step to that end. [P 9 C 2]

Khetra Mohan Ghose—for Appellants.

Biraj Mohan Mojumdar—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs-landlords for apportionment of rent. It appears that under these plaintiffs the defendants took settlement of some 24 1/4 bighas of land as cultivating raiyats. The lease

then executed was one for 9 years from 1286 to 1294. But though the lease expired in 1294, the tenancy of the defendants has since continued. In the year 1906 the landlords brought a suit against the defendants for arrears of rent for the period 1309 to 1312. In that suit the tenant defendants contended that inasmuch as their landlords had wrongfully dispossessed them of a substantial portion of their holding namely plots Nos. 4 and 5 meaguring 5 1/4 bighas, the landlords were not entitled to any portion of the rent until such time as he replaced the tenants in possession of the two plots referred to. In that suit it was decided that the plaintiff-landlords had, in the year 1309, in collusion with a subsequent lessee of the name of Samiraddi, wrongfully dispossessed the defendants from plots Nos. 4 and 5. It was also decided that the story of exchange and of subsequent arrangement set up by the plaintiffs was false and that as a matter of fact the defendants up to the time of the suit had continued to be, and at the time of the suit were, tenants under the landlords in respect of lands measuring 24 1/4 bighas bearing a rental of Rs. 49. These points were directly and substantially in issue in the rent suit and the decision thereupon arrived at therefore operates as res judicata in the present suit which is, as we have said, one for apportionment of rent on the portion of the holding still remaining in the tenant defendants' possession.

In the Court of first instance the plaintiffs' suit was dismissed. In the Court of first appeal the Subordinate Judge held that though the defendants had after the expiration of their written lease in 1294 continued to hold over, yet the element of consent, which was necessary to constitute a legal holding over, was wanting. In that view he held that the plaintiffs were entitled to an apportionment of rent. We are unable to understand how he arrived at the conclusion that the element of consent was wanting. That there was a legal holding over and that the tenancy subsisted was a question decided in the rent suit brought in 1906, and, moreover, that rent suit, and the present suit also proceeded on this basis that the rent had been paid and accepted up to, at least, the year 1307. No more cogent evidence of consent can be given than that implied in the acceptance of rent. It follows that on the principles laid down in a long series of cases of this Court of which the decisions reported as *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1), *Rasseswari Chowdhurani* v. *Sourendra Mohun* (2), *Chandra Kanta Dass* v. *Ramanath Barman* (3), *Sarip Jan Bibi* v. *Aftab-ud-din* (4), *Purna Chandra* v. *Rasik Chandra* (5) and *Ashutosh Dhar* v. *Joy Lal Sardar* (6) are instances, it must be held that the plaintiffs, not having replaced their tenants in possession of the plots in question and not having taken any effective step to that end, are not entitled to any apportionment of rent on the lands still remaining in the tenants' possession. In support of the Subordinate Judge's decision reference has been made to certain observations to be found in the decision reported as *Rasseswari Chowdhurani* v. *Sourendra Mohun* (3), wherein it is suggested that it is open to argument that where the dispossession is not by the landlord but by the lessee of the landlord, the landlord may still be entitled to apportionment. But this is not applicable in the present case, for here the finding is that the landlords themselves dispossessed the tenant defendants. For these reasons this appeal is decreed, the decree of the Subordinte Judge is set aside and that of the Court of first instance restored with costs in all Courts.

V.B./R.K. *Appeal allowed.*

(1) [1897] 24 Cal. 296.
(2) [1910] 5 I. C. 105.
(3) [1910] 6 I. C. 478.
(4) [1910] 8 I. C. 30.
(5) [1911] 9 I. C. 568.
(6) [1913] 18 I. C. 621.

A. I. R. 1918 Calcutta 9

RICHARDSON AND WALMSLEY, JJ.

Jashoda Dasee and *another*—Plaintiff—Petitioner.

v.

Upendra Nath Hazra—Opposite Party.

Rule Nisi No. 891 of 1917, Decided on 11th February 1918, against order of Sub-Judge, Howrah, in Title Suit No. 51 of 1914.

Partition—Appeal from preliminary decree—Proceedings on preliminary decree stayed so far as joint business was concerned—Final decree partitioning all other properties—Appeal dismissed— Application made under S. 151, Civil P. C., for partition of joint business—Court can make supplementary final decree in regard to joint business.

In an appeal from a preliminary decree in a suit for partition the High Court during the

pendency of the appeal stayed proceedings upon the preliminary decree in so far as it related to a joint business. In the meanwhile the trial Court on the report of the Commissioner made a final decree partitioning all other properties involved in the suit. Subsequently upon the dismissal of the appeal by the High Court an application purporting to be under S. 151, Civil P. C., made by the plaintiff to the trial Court for the partition of the joint business, was refused with the remark that the only course to the plaintiff was an application for review under O. 47, Civil P. C.:

Held: that the trial Court had refused to exercise a jurisdiction which was vested in it inasmuch as it was quite competent to deal with as much of the suit as had not already been dealt with in the final decree and to make a supplementary final decree in regard to the joint business. [P 10 C 2]

Manmatha Nath Ganguly—for Petitioner.

Dwarka Nath Mitter and *Debendra Nath Mandal*—for Opposite Party.

Richardson, J.—This rule was issued at the instance of the plaintiff in a suit for partition. The properties to which the suit related consisted of moveable and immovable properties and a partnership business or joint karbar. A preliminary decree for partition was made by the Subordinate Judge in the trial Court on 30th November 1914. From that decree the defendant, the opposite party before us filed an appeal to the High Court. During the pendency of the appeal the High Court made an order staying proceedings upon the preliminary decree in so far as it related to the joint karbar, but no further. The trial Court thereupon appointed a commissioner to effect a partition of the properties other than the karbar. The Commissioner's report was duly submitted and on 14th April 1915 the matter came before the learned Subordinate Judge and he delivered judgment. The judgment states that there was no objection by any of the parties to the Commissioner's report and goes on to direct that the proceedings of the Commissioner should be confirmed and the suit decreed accordingly. The language of the decree follows that of the judgment. The question which arises is whether that decree was a decree finally disposing of the whole suit. Obviously it was nothing of the kind. The decree disposes of that part of the suit which had been referred to the Commissioner and with reference to which the Commissioner had submitted his report. When the Subordinate Judge spoke of the suit being disposed of he clearly meant that the suit was disposed of in regard to that part of it with which the Commissioner had dealt. At that time the stay order made by this Court was in force and the Subordinate Judge had no power then to deal with the suit in so far as it related to the karbar.

The appeal to the High Court from the preliminary decree was dismissed on 22nd June 1916. The plaintiff then applied to the trial Court over which another Subordinate Judge was now presiding for partition of the joint karbar. The application purports to have been made under S. 151, Civil P. C., apparently on the footing that the decree of 14th April 1915 required some amendment. In my opinion in the circumstances it was quite unnecessary to amend that decree. All that the plaintiff had to do was to apply to the Court to go on with the suit and make a supplementary final decree in regard to the karbar. The learned Subordinate Judge however seems to have been puzzled by the form of the application and on 8th August 1917, he made the order with reference to which this Rule has been issued. By that order he declined to accede to the application and suggested that the only course open to the plaintiff was to apply for a review of the decree under O. 47. That amounted, as it seems to me to a refusal to exercise a jurisdiction vested in him. It was quite competent to him to deal with so much of the suit as had not already been dealt with. In this connection reference may be made to the case of *Muhummad Abdul Majid* v. *Muhammad Abdul Aziz* (1). It is conceled that if the suit can proceed without any amendment of the previous decree no question of limitation arises. The result is that the Subordinate Judge's order of 8th August 1917 should be discharged and the case remanded in order that the Subordinate Judge may proceed with the remainder of the suit and dispose of it in accordance with law. The Rule is made absolute in these terms. The petitioner is entitled to his costs of the Rule, which we assess at three gold mohurs. Let the record be sent down at once.

Walmsley, J.—I agree.

V.B./R.K. *Rule made absolute.*

(1) [1897] 19 All. 155=24 I. A. 22 (P. C.).

A. I. R. 1918 Calcutta 11 (1)

CHITTY AND TEUNON, JJ.

Sakhi Lal Chowdhury and *others*—Appellants.

v.

Wajid Ali and *others*—Respondents.

Appeals Nos. 76 and 78 of 1910, Decided on 13th May 1913, against decree of Special Land Acquisition Judge, 24 Parganas, D/- 11th October 1909.

Hindu Law—Joint family—Members dealing with their shares separately in family property—Family became separate.

Three brothers, who formed members of a joint Hindu family governed by the Mitakshara School of Hindu law, separately dealt with their shares in the joint family property with the concurrence of each other:

Held: that the joint family became separate and each of the three brothers was entitled to dispose of his share separately. [P 11 C 2]

Manmotha Nath Mukherjee—for Appellants.

Baranashibashi Mukerjee — for Respondents.

Judgment.—These appeals arise out of an apportionment case in land acquisition proceedings and relate to the 1/12th share of Heera Lal Chowdhury in the property acquired. The appellants are Sakhi Lal Chowdhury and others, claimants 1, 2 and 3, the brothers and nephew of Heera Lal. They are supporting their own case and that of the mortgagees from Sakhi Lal, who do not appear in these appeals. The respondent Munshi Wajid Ali, claimant 4, claims the share of Heera Lal by a purchase, dated 28th August 1900 (Ex. A). The only question is, whether Heera Lal had power to sell his share in 1900, the brothers having before that time formed members of a joint Hindu family governed by the Mitakshara School of Hindu law. On 28th July 1889, Sakhi Lal Chowdhury, acting as karta, had mortgaged the whole property for Rs. 8,000 The sale by Heera Lal, as we have said, was in 1900, following very closely after the mortgage and further charge executed by him in favour of his vendee. Sakhi Lal again purported to mortgage the property on 28th January 1904 for Rs. 17,000 and by this mortgage the first mortgage was paid off. Though he described himself as the karta of the joint family in the second mortgage, he was joined in that mortgage by his brother Ram Lal and no mention was made of Heera Lal. The sons of Shyam Lal were mentioned but they were not parties to the deed. On the facts stated by the learned Land Acquisition Judge, which are now in dispute, there can be no doubt that, between the mortgage of 1889 and the sale by Heera Lal in 1900, the joint family had become separate. We find that on 11th February 1899, Sakhi Lal himself made a will which was registered, in which he purported to leave his one-third share in the property to his widow.

Then we have Heera Lal's dealings with his one-third share and we also have the fact that, on 12th September 1900, Sakhi Lal took a bainapatra from Heera Lal's share in the property for Rs. 6,000. There is the further fact on the evidence that Sakhi Lal brought a suit against Heera Lal by which he agreed to purchase Heera Lal's and attached his property in that suit. All these circumstances show clearly that the family was no longer joint at the date of Heera Lal's sale. It was suggested that Heera Lal's 1/12th share in the whole of the property might be subject to the mortgage of 28th July 1889. But this cannot be so inasmuch as that mortgage had been paid off in 1904 by the second mortgage, which Sakhi Lal executed in favour of the previous mortgagee and another person. He had no power at that time to bind Heera Lal's share and it cannot therefore be said that Heera Lal's share was any longer subject to the first mortgage. These two appeals must accordingly be dismissed with costs. We assess the hearing fee at two gold mohur, and one gold mohur reapectively.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 11 (2)

RICHARDSON AND BEACHCROFT, JJ.

Secretary of State — Defendant—Appellant.

v.

Kamal Krishna Pal—Plaintiff—Respondent.

Appeal No. 2680 of 1914, Decided on 17th January 1918, against appellate decree of Sub-Judge, Chittagong, D/- 23rd May 1914.

(a) Landlord and Tenant—Rent—Liability for.

A holder of a temporary tenure under a kabuliyat which provides that diluvion or no diluvion the tenant would remain liable for the full rent payable is not entitled to claim reduction of rent on the ground of diluvion. [P 12 C 2]

(b) Bengal Tenancy Act (1885), S. 52—S. 52 applies both to tenure-holders and to raiyats—Tenure holder however can contract

himself out of his right to apply for reduction of rent.

Apart from any question of contract S. 52 is applicable both to tenure holders and to raiyats. But a tenure-holder is at liberty to contract himself out of his right to apply for a reduction of rent under S. 52. In the case of a holder of a temporary-tenure S. 52 must be read subject to the terms of the contract between him and his landlord. [P 12 C 1, 2]

Ram Charan Mitra and *Sris Chandra Chaudhuri*—for Appellant.

Khitis Chandra Sen—for Respondent.

Judgment.—This appeal is preferred by the Secretary of State from the judgment and decree of the Subordinate Judge of Chittagong, dated 23rd May 1914, confirming the decree of the Munsif of Chittagong, dated 8th April 1913. The Secretary of State is the defendant in the suit. The plaintiff is the holder of a temporary tenure within a Noabad estate belonging to the Government. The plaintiff purchased the tenure at a sale for arrears of revenue. The tenure was created in the year 1896 and it was held under a kabuliyat of that year. One of the terms of the contract is that diluvion or no diluvion the liability of the tenant to the full rent payable should remain. The suit was brought by the plaintiff on the ground that more than one-half of the land of the tenure had been diluviated and that he was entitled to abatement under S. 52, Ben. Ten. Act. The Courts below have decided in his favour and made a decree allowing him a proportionate deduction of the rent. For the Secretary of State it is argued that the question whether the rent is liable to abatement on the ground of diluvion does not depend on S. 52 alone but depends also on the terms of the contract between the parties. S. 52 begins no doubt with the words "every tenant" and apart from any question of contract, is applicable both to tenure-holders and to raiyats. On the other hand the general principle is that an individual may renounce an advantage conferred upon him by a legislative enactment, in the phrase sometimes used, he may contract himself out of the Act. Under the provisions of sub-S. (3), Cl. (f), S. 178, a raiyat is expressly prohibited from contracting himself out of his right to apply for reduction of rent under S. 52.

There is no corresponding provision however in the case of a tenure-holder. It would seem therefore that the tenure-holder is at liberty to contract himself out of his right to apply for a reduction of his rent on the ground of diluvion. For the plaintiff-respondent it is argued that inasmuch as S. 52 expressly applies to every tenant it must be taken that Ss. 52 and 179 of the Act cover the whole field, so that S. 52 would apply to the case of every tenant under a lease which is not a permanent lease within the meaning of S. 179. This argument appears to me unsound. No doubt there is S. 179, which expressly provides that nothing in the Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mokarari lease on any terms agreed on between him and his tenant. But obviously that section has no application to the case of the holder of a temporary tenure or the lessee under a lease for a term of years, such as the lease in the present case. Such a lease is not within the section and in order to find out how the Act deals with such a lease we must look elsewhere than in S. 179. In my opinion reading Ss. 52 and 178 together the plaintiff in this case must be taken to be bound by the terms of his contract. The opening words of Cl. (5), S. 178 are:

"Nothing in any contract made between a landlord and a tenant after the passing of this Act shall."

Then follow a number of Clauses, (a) to (h), in which different classes of tenants are referred to. Cl. (a) refers to raiyats generally Cl. (b) is limited to the case of occupancy raiyats and so on. Cl. (g) refers to landlords and tenants and Cl. (h) is also applicable to landlords and tenants. It seems to follow that if the legislature had intended to prevent the holder of a temporary tenure from parting with his right to apply for reduction of rent under S. 52 express provision would have been made to that effect. That has not been done. In my opinion, in the case of the holder of a temporary tenure S. 52 must be read subject to the terms of the contract between him and his landlord. His freedom of contract is bound by some but not by all the restrictions imposed by S. 178, in cases within S. 179 none of the restrictions are applicable. The view of the learned Subordinate Judge that the plaintiff, as purchaser of this tenure at a sale for arrears of revenue is not bound by the terms of the kabuliyat creating the tenure

is not supported at the Bar and cannot be accepted. The result is that in my opinion the conclusion arrived at by the Court below is erroneous and this appeal must be allowed and the suit dismissed with costs throughout.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal allowed.*

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Special Bench

SANDERSON, C. J. AND WOODROFFE AND MOOKERJEE, JJ.

Shib Chandra Kar—Appellant.

v.

A. C. Dulcken and *others*—Respondents.

Appeal No. 63 of 1915, Decided on 21st December 1915, from original decision of Chaudhury, J.

(a) Civil P. C. (1908), O. 41, R. 22—Cross-objection by one respondent against another is covered by R. 22—Matter sought to be raised having no connexion with question raised in appeal—Cross-objection should not be allowed.

Order 41, R. 22 is wide enough to cover a cross-objection by one respondent against another. But a cross-objection by a respondent as against his co-respondent should not be allowed under this rule where the matters sought to be raised by the cross-objection have no relation to or connexion with the question raised by the appeal.

[P 13 C 2; P 14 C 2]

(b) Evidence Act S. 115—Hindu female in possession of limited estate mortgaging property by deed reciting legal necessity—Sons joined in mortgage—They cannot deny existence of legal necessity and say that mortgage or consequent sale is not binding on them—Hindu Law, Alienation.

A Hindu female in possession of property inherited from her deceased father or mother mortgaged it by a deed which recited legal necessity. Some of her sons joined in the mortgage:

Held: that the sons who joined in the mortgage were estopped from denying that there was legal necessity for the mortgage and that the mortgage and the execution sale consequent thereon were binding on the property in their hands after the death of their mother.

[P 16 C 1]

(c) Civil P. C. (1908), O. 41, R. 33—R. 33 should not be allowed to be invoked to enable litigant to defeat provisions of other statutes.

Per *Sanderson, C. J.*—O. 41, R. 33, Civil P. C., gives important and useful powers to a Court of appeal, which a Court of appeal would not hesitate to make use of on a proper occasion.

[P 14 C 1]

Per *Mookerjee, J.*—O. 41, R. 33, Civil P. C., must be cautiously applied, for instance, applied generally in cases where but for recourse to it the ends of justice would be defeated. Thus the rule should not be allowed to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes such as the Limitation Act or the Court-fees Act. [P 14 C 2]

(d) Practice—New plea—Question of law raised for first time depending upon construction of document or upon facts admitted or proved—Plea should be entertained.

When a question of law is raised for the first time in a Court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. [P 17 C 2; P 18 C 1]

H. D. Bose and *A Rasul*—for Appellant.

N. Sircar, R. D. Bose, S. R. Das and *P. K. Sen*—for Respondents.

Preliminary Judgment.

Sanderson, C. J.—In my judgment the preliminary objection which was taken by Mr. Sircar must prevail. The appeal in this case was by Shib Chandra Kar and was against the decree made by Chauduri, J., in so far as it related to Mr. Dulcken's claim. It proceeded upon the basis that the plaintiffs were entitled to a half share in certain property, and there was no appeal as to the decision which allocated the half share to the plaintiffs and the dispute between Shib Chandra Kar and Dulcken was solely in relation to the other half. Then the widow of Satish Chandra Sur who did not appear at the trial, but who has been, as I understand, since added as a party to this appeal filed a cross-objection, alleging that the learned Judge was wrong in holding that the plaintiffs were entitled to a half share of the property, and that the learned Judge should have held that Satish Chandra and the other heirs of Shib Chandra Neogi were entitled to the whole property. The widow did not enter a separate appeal, but has raised this point, as I have said, by way of cross objection. The question is whether such cross-objection should be allowed. Now, O. 41, R. 22, which was read yesterday, which I need not read again, in its terms is certainly wide enough to cover such a cross-objection as was made in this case. But it has been held that cross objections under this rule ought not to be allowed in every case: and I refer to the decision in *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (1) and read part of the head-note which refers to this matter and which is as follows:

"No exhaustive rule on the subject can be formulated, and the true test is, whether for the ends of justice it is necessary that upon the appeal of one of the parties the matter should be

(1) [1912] 15 C. L. J. 61=13 I. C. 653.

re-opened only so far as he is concerned or the whole case should be reviewed and some of the respondents allowed the opportunity to urge a cross-objection against their co-respondents. One test of a negative character is sometimes useful: if the party against whom a cross-objection is sought to be urged by his fellow-respondents, is not a necessary party to the appeal, the cross-objection can hardly be allowed to be urged."

and the judgment of my brother Mookerjee is to be found at p. 62 (of 15 *C. L. J.*) I read from a passage at the bottom of p. 63, (of 15 *C. L. J.*) which seems to me to be applicable to this case:

"The principle is that, as a general rule, the right of any respondent to urge a cross-objection should be limited to his urging it only against the appellant; and it is only by way of exception to this general rule, that one respondent may urge a cross-objection as against another respondent; the exception, it is said, holds good in those cases where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents."

And then later on he refers to the negative test which I have already read, and goes on to say:

"The test to be applied is, whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re open matters so far as he is concerned without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they be directed, not against the appellant, but against a co-respondent."

Now, in my judgment the matters which I have referred to and which are sought to be raised by the cross-objection had no relation to or connexion with the question which was raised by the appeal, and cannot be said to be within the test which is laid down by this judgment, namely,

"so connected that one of the parties ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interest of justice, to another to protect himself by urging his objections, even though they be directed, not against the appellant, but against a co-respondent."

I do not think this case comes within that test. What I have only to add is this: our attention was drawn to O. 41, R. 33. This rule, as I understand, has been passed since this decision. It gives undoubtedly important and useful powers to the Court of Appeal, which speaking for myself, I should think the Court of Appeal would not hesitate to make use of on a proper occasion; but as regards this case it is sufficient for me to say that in my judgment it is not a proper case in which the Court of appeal ought to exercise the powers which are given to it by that rule. For these reasons I think the preliminary objection which was raised by Mr. Sircar must prevail.

Woodroffe, J.—I agree.

Mookerjee, J.—I agree that the cross-objection taken by the defendant-respondent against the plaintiff-respondent should not be entertained. The property it has been held, belonged, in equal halves, to two brothers Shib Chandra Neogi and Chunilal Neogi. According to the facts found by Chaudhuri, J., the share of the latter has devolved upon the plaintiff, while the share of the former has vested in the two defendants, Kar and Dulcken. Kar has preferred this appeal and has raised the question, whether the share of Shib Chandra was not vested in him alone to the exclusion of Dulcken. The plaintiff has been joined as a respondent to this appeal, as a partition is sought of the entire joint property. Thereupon, another defendant, who unsuccessfully resisted the claim of the plaintiff to the half share of Chunilal, has sought to re-open that question by way of cross-objection. Clearly, the cross objection should not be entertained under O. 41, R. 22, of the Code the question raised thereby is entirely distinct from and in no way related to the question in controversy in this appeal. The grounds for this conclusion need not be elaborated here and will be found formulated in my judgment in the case of *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (1). Our attention however, has been invited to O. 41, R. 33 of the Code, which it has been argued, invests the Court of Appeal with wide discretionary powers, comprehensive enough to cover the present case. This contention, in my opinion, should not prevail.

The scope of this rule has been the subject of judicial determination in the case of *Ganga Dhar Muradi* v. *Banabashi Padihari* (2), *Ananga Mohan* v. *Bejoy Chanda* (3), *Abjul Majhi* v. *Intu Bepari* (4), *Akimannessa Bibi* v. *Bipin-Behari Mitter* (5), *Mathura Mohan Shaha* v. *Ramkumar Shaha* (6), and *Rangamlal* v. *Jhandu* (7). These decisions show that O. 41, R. 33, must be cautiously applied, for instance, applied generally

(2) A. I. R. 1914 Cal. 722=24 I. C. 208.
(3) [1916] 32 I. C. 491.
(4) [1916] 32 I. C. 494.
(5) [1916] 23 I. C. 499.
(6) [1916] 43 Cal. 790=35 I. C. 305.
(7) [1912] 34 All. 32=11 I. C. 640.

in cases where but for recourse to it, the ends of justice would be defeated. Thus the rule should not be allowed to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes, such as the Lim. Act and the Court Fees Act. Here, a recourse to the other provisions of the Code would have been sufficient for the purposes of the respondent; she has failed to do so, and cannot now be permitted to fall back upon O. 41, R. 33. The cross-objection must consequently be dismissed with ccsts.

Sanderson, C.J.—This case has taken rather a curious course, and it is about to be decided by the Court upon a point which as far as I understand, was not taken in the Court of first instance, and was not mentioned in the grounds of appeal, but was one which occurred to the members of the Court and which was put yesterday to Mr. Das and I may say for myself the case was argued exceedingly well on both sides and when Mr. Das was faced with this point he met it with the candour which always characterizes his conduct in Court and inspite of his ingenuity he had to admit practically that there was no answer to it. When I come to deal with the question about costs, I shall have to say something of the course the case has taken. Before I deal with that, I propose to state shortly the facts of the case and then give my judgment.

The appeal is by Shib Chandra Kar, who appeals as I have already said in dealing with the other part of the case against the decision in favour of another defendant whose name is Dulcken. The learned Judge has decided that Shib Chandra Neogi and Chunilal Neogi formed a joint Hindu family and had a joint business carried on at premises No. 36 'Foriapooker Street, that that property was purchased in the name of the wife of Shib Chandra Neogi, and that the plaintiffs who claim through Chunilal were entitled to half that property. The dispute between the defendant Shib Chandra Kar and Dulcken has been confined entirely to the other half, namely what I may call the half to which the heirs of Shib Chandra Neogi were entitled. Now Shib Chandra Neogi had a daughter whose name was Giribala who had six sons, Satish Chunder Sur, Suresh Chunder Sur, Sirish Chunder Sur, Sarat Chunder Sur, Subodh Chunder Sur and Susil Chunder Sur. There were considerble dealings with the property in question into which I do not intend to go—the material dealings were three mortgages: the first dated 13th February 1901 in which Giribala was the mortgagor and her eldest three sons, Satish, Suresh and Sirish joined ; the mortgage was to a man called Tincowrie Haedar, and the property was mortgaged for Rs. 4 000. On 22nd January 1902 there was another mortgage of the same property by Giribala and the same three sons to Shib Chandra Kar, the defendant for Rs, 4,500. On 12th January 1903, there was a further mortgage to one Nilkanta Pal and in this mortgage Giribala joined on behalf of herself and and also on behalf of her two infant sons Subodh and Susil, and to this mortgage her first, third and fourth sons, Satish, Suresh and Sarat were parties, the second son Sarish having died in the meantime ; that was a mortgage for Rs. 3,000. On 25th February 1904, Tincowry Haldar obtained a decree in Suit No. 278 of 1903 the defendants to that suit were Giribala, Satish and Suresh and the subsequent encumbrancers Shib Chandra Kar and Nilkanta Pal. On 27th April 1904, there was an agreement between Giribala and all her sons except Sirish who was dead at that time, by which the parties agreed to sell the property in Foriapooker Street and another property to Dulcken subject to mortgages—the mortgages being specifically mentioned—and subject to the decree in Suit No. 278 of 1903. On 17th December 1905. Giribala died. On the 2nd of March 1906, Nilkanta Pal assigned his mortgaged debts and his benefit under the decree to the defendant Shib Chandro Kar. On 28th March 1906, there was a substitution order on the register of the suit by which Sarat and one or two of his brothers were added as parties. On 24th July 1906 there was a conveyance to Hutchison by Satish Sarat and Suresh the three sons, and Harish their father and it is the basis of the title of Dulcken. By that these three sons purported to convey their 3/5th share of the property in that conveyance there was no mention or recital of the mortgage. On 31st of July 1908 there was an order amending the decree and substituting the names of the sons for that of the mother

Giribala and on 3rd of May 1909 the decree was made absolute for sale.

On 16th of April 1910, Hutchison conveyed the property, or rather I think I shall be more accurate in saying the 3/5th share of half the property to Dulcken for for Rs. 500. On 2nd of August 1910 Tincowero Haldar assigned his decree to the defendant Shib Chandra Kar and all rights under it for Rs. 3,100. On 23rd of August 1910 Shib Chandra Kar was made plaintiff in Suit No. 278 of 1903. In December there was a sale by the Registrar, and at this sale Shib Chandra Kar purchased all the properties, and paid a sum of Rs. 17,600. On 7th March 1911, the sale certificate was handed to Shib Chandra Kar. There is one other fact which I need now mention, and that is that on 24th of March 1911 the infant sons, the fifth and sixth sons of Giribala in consideration of a sum of money, Rs. 500, released all interests in the property to the defendant Shib Chandra Kar.

Now, the question arises upon those facts whether the defendant Dulcken is entitled to 3/5th share of this property in Foriapooker Street or to any part of that 3/5th share. The learned Judge has held that he was. In my judgment the appellant is entitled to succeed upon this ground—and I may mention here, as I have already mentioned, that I do not differ from the learned Judge's judgment because this point was never raised before the learned Judge, and he never had an opportunity of considering it—I think that by joining in the mortgage of 1903, Sarat and the other two sons, who were the parties conveying to Hutchison in 1906, represented that the property was being mortgaged by their mother for what has been called legal necessity. Upon those mortgages decrees have been made. But I am prepared to hold and do hold that apart from those decrees those sons who joined in those mortgages would not be allowed to go back upon those re-presentations when they are dealing with a party such as Shib Chandra Kar, who has changed his position relying upon the representation of fact, Shib Chandra Kar having parted with no less than Rs. 17,600. In the course of the argument, I referred to the well-known case of *Pickard* v. *Sears* (8), and also the case of *Carr* v. *London and N. W. Ry. Co.* (9) and I read to Mr. Das passage a which I read again. (see Leak on Contract, 6th Edn., p. 4)

"where one by his words or conduct wilfully causes another to believe in the existance of a certain state of things"—

I pause here for a moment and point out that in the present case the three sons by their conduct and statement wilfully caused another to believe in the existence of a state of things to this effect that Giribala was mortgaging the property for a legal necessity and was entitled to convey the whole of the property—

"and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

Therefore, in my judgment, the three sons would be estopped from denying, as far as Shib Chandra Kar was concerned, that the state of things which they had represented existed. Then Mr. Das drew my attention to S. 115, Evidence Act, and also to the illustration which is given in the section, although it was directly contrary to his client's case but naturally it was his duty and he did perfectly right in drawing our attention to it where the illustration given is:

"*A* intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it. The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

For these reasons I am of opinion that Dulcken, who claims in this case through the three sons whose names I have mentioned, obtained no better interest in this particular property than the sons themselves had and therefore this appeal must be allowed. Now, as regards the costs—I speak entirely for myself for the present moment but I think my learned brothers will agree with me—this case had a most unfortunate course. In the Court below the question of legal necessity was only raised, if I may call it, at the last minute, and an adjournment was taken in order that the appellant might prove, if he could, the case of legal necessity on the part of Giribala and her three sons who joined with her. Then the learned Judge on the facts and on the evidence which was given at the late stage of the case decided against the case of legal necessity. That being so the appellant comes to this Court and he first

(8) [1837] 6 A. & E. 469.

(9) [1875] 10 C. P. 307.

of all argued that the learned Judge was wrong in holding that no case of legal necessity was proved and then went on further to argue that even if he could not substantiate that case, he was entitled to succeed on the ground that under the circumstances of this case there was a presumption by reason of the mortgages by the three sons who were of age at the time the mortgages were given that there was a legal necessity and that inasmuch as the other side did not rebut that presumption, the appellant is entitled to succeed. Even that case as far as I can understand was not urged in the Court below and the ground upon which we have decided the case was not mentioned in the notice of appeal and that is the only ground upon which this appeal has been allowed. I purposely abstain from expressing any opinion as to whether the learned Judge was right in holding that there was no such legal necessity: speaking for myself, I should have very great hesitation in interfering with his judgment on that point. I also refrain from expressing any opinion as to whether there was the presumption. If I were to do that, I should have to consider very closely indeed, whether the other side ought not to have an opportunity of displacing that presumption. Fortunately we have not to do that; for I think the appellant is entitled to succeed upon the ground I have mentioned. Having regard to these circumstances, I think the appellant ought not to have any costs against Dulcken either in this Court or in the Court of first instance and that each party should bear his own costs in this Court and in the Court of first instance.

Woodroffe, J.—I agree both as to the order passed on the appeal and as to costs.

Mookerjee, J.— This is an appeal by defendant 1 in a suit for partition of joint property which belonged originally to two brothers Shib Chandra Neogi and Chunilal Neogi though it had been acquired and continued to stand in the name of Ramanimoni Dasi, the wife of the elder brother. The question of the devolution of the share of the younger brother is not in controversy in this appeal and we are concerned only with the share of the elder brother. The rival claimants in respect of this share are the appellant Shib Chandra Kar and the respondent Arthur Clayton Dulcken; the former sets up a title by purchase at a sale held in execution of a decree on three mortgages granted on 13th February 1901, 22nd January 1902, and 12th January 1903 by Giribala, the daughter of Shib Chandra Neogi and Ramanimoni Dasi; the latter claims as assignee from three of the sons of Giribala who had joined with their mother in the execution of one or more of the mortgages already mentioned. Choudhuri, J., has decided in favour of Dulcken on the ground that the mortgages granted by Giribala and the sale consequent thereon did not bind the inheritance in the hands of her sons. On the present appeal the argument was at first directed to controvert this proposition and reliance was placed upon the decision of the Full Bench in *Debi Prosad Chowdhury* v. *Golap Bhagat* (10) as to the precise effect of a transfer by a limited owner with the concurrence of some of the reversionary heirs.

If the decision of the appeal had depended on the determination of this question it would have been necessary for the Court to consider whether upon the pleadings the appellant should have been allowed to raise this point in the Court of first instance and whether upon failure of the case made in the trial Court he should be allowed to rely here upon a radically different aspect of the matter. As the argument proceeded however it transpired that the determination of the rights of the parties really depended upon a question of law neither raised nor investigated in the Court of first instance, namely, were the vendors of the respondent Dulcken estopped to deny the validity of the mortgages (to which they were parties) and the operative character of the consequential execution sale. This question must be entertained and decided by this Court as its solution does not require the investigation of new facts. In this connection, we may usefully recall to mind the observations of Lord Watson in *Connecticut Fire Insurance Company* v. *Kavanagh* (11):

"When a question of law is raised for the first time in a Court of last resort, upon the con-

(10) [1913] 40 Cal. 721=19 I. C. 273 (F. B.).
(11) [1892] A. C. 473.

struction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea."

We must now examine the true legal position of the three sons of Giribala who joined with her in the mortgage transactions; and, upon her death, transferred the property on 24th July 1906 to Hutchison, from whom Dulcken purchased on 16th April 1910. The record shows that the first two sons not only joined their mother in the execution of the first two mortgages but were also parties to the mortgage suit, which, on 25th February 1904, resulted in the usual decree for sale, subsequently made absolute on 3rd May 1909. The other son, though one of the executants of the mortgage of 12th January 1903, was not made a party to the mortgage suit in the first instance; but on the death of his mother on 17th December 1905, he was brought on the record as one of her representatives in interest. I use this inaccurate expression, as it occurs in the decree; but what happened in essence was that the sons of Giribala were, upon her death, brought on the record of the mortgage suit to represent that interest in the hypothecated property which was sought to be bound by the decree made therein: *Premmoyi Choudhrani* v. *Preonath Dhur* (12). There is no controversy that on the dates when the mortgages were executed, the entire interest in the property was vested in Giribala and Giribala alone, subject, no doubt, to the qualification that as she was a limited owner, she could bind the inheritance by a transfer, only if it was made under circumstances recognized as necessary or proper under the Hindu law. Now, each of these mortgages recited her title as derived from her mother by right of inheritance and narrated the circumstances which constrained her to create the incumbrances. Here we may observe parenthetically that whether the property belonged really to her father or to her mother, she would equally take as the heiress; in either contingency, she would be a limited owner, and, upon her death, the property would pass to her sons, who were the reversionary heirs, as much of the estate of her father as of the stridhan property of her mother.

It was thus wholly immaterial, for purposes of devolution, whether the property belonged really to her father or to her mother. The mortgages no doubt proceeded on the assumption that the property belonged to her mother and that the money raised was required for such legitimate purposes as justified an absolute alienation of the inheritance by a limited owner, but how could this prejudice the position of the mortgagee? How could the mortgagors be allowed to rely upon some title other than that alleged in their deed? *Brijraj Nopani* v. *Pura Sundary Dassee* (13). The question thus inevitably arises, whether her sons who joined with her in these mortgages are concluded by their solemn declarations, or whether they are free to resile from the position they deliberately took up and to rely upon a title derived, not from their maternal grandmother, but from their maternal grandfather, and thus impeach, possibly defeat, the interest of the mortgagee; this, be it noted, is not a question as to their competency to bind their expectant interest as reversioners by actual alienation before the succession had opened out: *Sham Sundar Lal* v. *Achhan Kunwar* (14). In my opinion, S. 115, Evidence Act, furnishes an answer emphatically in the negative. This conclusion is supported by the decisions of the Judicial Committee in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (15) and *Chandra Kunwar* v. *Chaudhri Narpat Singh* (16). In the former case, Lord Shand said:

"What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rests is that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it".

In the latter case, Lord Atkinson said:

"In *Heane* v. *Rogers* (17), Bayley, J., in delivering the judgment of the Court, lays it down that there is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think he is at liberty to prove that such admissions were

(12) [1896] 23 Cal. 636.

(13) A. I. R. 1914 P. C. 92=42 Cal. 56=24 I. C. 296=41 I. A. 189 (P.C.).
(14) [1899] 21 All. 71=25 I. A. 183 (P. C.).
(15) [1893] 20 Cal. 296=19 I. A. 203 (P. C.).
(16) [1907] 29 All. 184=34 I. A. 27 (P. C.).
(17) [1829] 9 B. & C. 577.

mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case, the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound. In *Newton* v. *Liddiard* (18), Lord Denman approved and adopted this statement of the law; and *Morgan, Ex parte Simpson, In re* (19) and *Trinidad Asphalte Co.* v. *Coryat* (20) in effect illustrate the same principle".

Reference may also be made to other decisions which illustrate this principle: *Cairncross* v. *Lorimer* (21), *Pickard* v. *Sears* (8) and *Freeman* v. *Cooke* (22), *Cornish* v. *Abington* (23), *Corr* v. *London and N. W. Ry. Co.* (9), *Seton* v. *Lafone* (24) and *Bepin Behari Mitter* v. *Tinkowri Pathak* (25). The doctrine was recognised as early as 1812, when the Sudder Court held in *Mohun Lal Khan* v. *Ranee Siroomunnee* (26) that a reversioner who has voluntarily signed the deed of the widow cannot legally claim in opposition thereto, *Sia Dasi* v. *Gur Sahai* (27) and *Ramadhin* v. *Mathura Singh* (28); Mr. Das, who argued the case for the respondent with great ability indeed, admitted with his usual candour, that the sons who had actually joined in the mortgages granted by their mother could not be heard to maintain to the detriment of the mortgagee or of the purchaser at the mortgage sale; *Sarat Chunder Dey* v. *Gopal Chunder Laha* (15), that the recitals therein were untrue, but he contended that the position of the transferee from them was different in view of S. 43, T. P. Act, which defines the effect of a transfer by an unauthorized person who subsequently acquires an interest in the property transferred.

In my opinion that section is of no real assistance to the respondent, even on the assumption that he is a purchaser for value without notice. The sons are concluded by the recitals in the mortgage instruments to which they were parties; those recitals establish indisputably that the appellant has obtained an absolute title to the property, a title not defeasible at the instance of the sons; consequently, no title did or could pass to the purchaser from the sons. The two sons who were parties to the mortgage suit and are bound by the decree made therein, are obviously in a position of still greater embarrassment than their brother who was not initially made a party to that suit. There is further no room for doubt that what was mortgaged was the entire interest in the property, which was precisely what was intended to be bound by the decree and to be sold thereunder. This follows irresistibly from the fact that the execution sale actually took place after the death of Giribala, for if the decree had been intended to bind merely the limited interest of Giribala, a sale would have been impossible after her death. There is thus no escape from the conclusion that the Court intended to sell the entire interest, and in the events which have happened, that interest has vested in the appellant. The appeal must consequently be allowed, and the decision of Chaudhuri, J., reversed in so far as it affects the appellant.

V.B./R K. *Appeal allowed.*

(18) [1848] 12 Q. B. 925.
(19) [187] 2 Ch. D. 72.
(20) [1896] A. C. 587.
(21) [1860] 3 Macq. H. L. 829.
(22) [1848] 2 Ex. 654.
(23) [1859] 4 H & N. 549.
(24) [1887] 19 Q. B D. 68.
(25) [1911] 9 I C. 374.
(26) 2 Mac. Sel. Rep. 40.
(27) [1881] 3 All. 362.
(28) [1888] 10 All. 407.

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RICHARDSON AND BEACHCROFT, JJ.

Sashishekhareswar Ray Bahadur — Defendant—Appellant.

v.

Hemangini Debi and *others* — Plaintiffs and Defendants—Respondents.

Appeal No. 144 of 1915, Decided on 22nd January 1918 against the appellate decree of Sub-Judge, Rajshahi, D/- 4th January 1915.

Cosharer—Exclusive possession by one—Suit for possession by other cosharer is maintainable.

A cosharer in joint lands can maintain a suit in ejectment against his other cosharer, claiming joint possession with him where the latter is not only in exclusive possession of the lands but asserts in his written statement exclusive possession in denial of the title of the plaintiff.

[P 20 C 1]

Dwarka Nath Chackerbutty and *Gunada Charan Sen*—for Appellant.

Sarat Chandra Roy Choudhury and *Priya Shankar Mazumdar* — for Respondents.

Judgment.—The plaintiff and the principal defendant 1 are cosharers in certain lands. The lands are described in two schedules attached to the plaint.

D. N. Das
Advocate High Court

The land entered in Schedule (ka) is described as appertaining to the demarcated land of Touzi No. 1576 and the land in Schedule (kha) is described as appertaining to Touzi No. 218. In the former estate the share of the plaintiffs is 15 annas 8 gandas 1 kara 1 kranti and in the latter the share of the plaintiffs is one-sixth. In Estate No. 1576 the remaining share belongs to defendant 1 and in Estate No. 218 defendant 1 has a two-third share. Plaintiffs sued to recover joint possession with the defendant 1 of the lands of these two schedules on the footing that they had been ousted therefrom by defendant 1. There is adundant authority on the principle governing cases of this kind between co sharers. The difficulty arises in the application of the principle to the facts of particular cases. In the present case it is clear that the plaintiffs by their plaint complained of ouster by defendant 1.

The plaintiffs say that the defendant 1 has no right to hold exclusive possession of the said lands owned and held by the plaintiffs jointly and as appertaining to these demarcated shares by ousting the plaintiffs therefrom. It seems to me again that by his written statement defendant 1 in effect admitted that his possession of the land in dispute had been possession in exclusion of the plaintiffs and in denial of the plaintiff's title. By his written statement he claimed the major portion of the land as appertaining to another Touzi No. 208 of which he was the sole owner. In that state of the pleadings, in my opinion, it was open to the plaintiff to sue the defendant 1 in ejectment. It has been suggested that the learned Judge has not found that defendant 1 excluded the plaintiff from those lands and denied their title. An examination of the judgment however will show that the learned Subordinate Judge intended to find an ouster of the plaintiffs by defendant 1. He was referred to reported cases on the subject and he distinguished those cases from the case he had before him on the ground that in those cases there was no question of ouster or exclusive possession on the part of the defendant and he came to the conclusion that there was absolutely no analogy between those cases and the present. In my opinion, the ouster necessary to support such a suit as this has been sufficiently pleaded and found. The appeal should accordingly be dismissed with costs.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 20

FLETCHER AND SHAMSUL HUDA, JJ.

Edon Mollah and *others*—Defendants—Appellants.

v.

Badan—Plaintiff—Respondent.

Appeal No. 3001 of 1914, Decided on 30th January 1918, from appellate decree of Addl. Dist. Judge, Faridpore, D/- 7th August 1914.

Landlord and Tenant—Agreement to grant lease—Lessee admitted as tenant—Subsequent lease to third person is not valid.

Defendant was tenant of certain land which the landlord agreed to re-let to him on his paying a certain sum of money in cash. Defendant paid the amount and continued in possession of the land agreed to be let to him. The landlord subsequently granted a lease of the same land to the plaintiff:

Held, (1) that the landlord was entitled to grant a lease to the plaintiff inasmuch as he had already, by reason of the agreement with the defendant followed by the acceptance of the money constituted the latter as a tenant on the land; (2) that plaintiff, when he came to deal with the landlord, must be deemed to have had constructive notice of the rights of the defendant who was actually in possession and cultivating the land. [P 21 C 1]

Prokash Chandra Mazumdar—for Appellant.

Fletcher, J.—This is an appeal by the defendant against the judgment of the learned Additional District Judge of Faridpore, dated 7th August 1914, affirming the decisions of the Munsif of the second Court at Bhanga. The suit was one for ejectment brought by a lessee claiming under the same landlord as the defendant. The question therefore is who has got a prior title. The obvious facts are these: The defendant originally had a lease of this land. There is no doubt about that. A litigation took place between him and the landlord. The case went up to the High Court and Rs. 500 was decreed against the defendant and another person named Kadir. According to the findings terms of settlement were determined and these terms of settlement, it was found by both the lower Courts, were these: that if the defendant Edon paid to the landlord Rs. 150 in cash out of the decretal amount, the landlord would relet two of the plots (that is, the land in contest in the present suit to Edon. It was

also found that the defendant complied with those terms, namely, that Edon paid Rs. 150 to the landlord in September 1907. Therefore the defendant Edon became entitled to a lease of the two plots in suit. He was already in possession of those two plots. Therefore having complied with the terms and having got a verbal agreement and possession of the land, the defendant was in possession of the property as a lessee. It is quite true that he foolishly executed a kabuliyat which he said was in accordance with the terms which had been approved of by his landlord. That has been found against him by both the lower Courts. It was a foolish thing to do: but it cannot affect Edon's right to continue in possession of the land after he has paid the Rs. 150 to his landlord for that right. That was in September 1907. The plaintiff claims under a lease dated 10th Agrahan 1315, that is, in the year 1908. It is quite clear that the landlord was not entitled to grant that lease in 1908 to the plaintiff. He had already, by reason of the agreement followed by the acceptance of Rs. 150 constituted the defendant Edon as a tenant on the land. Moreover the learned Judge of the lower appellate Court considers that it is unlikely that the plaintiff is blameless in the transaction, by which I suppose he means that the plaintiff had notice of the actual agreement that had taken place between the landlord and the defendant Edon. In any case, the defendant Edon being in actual possession of the land and enjoyment thereof the plaintiff, when he came to deal with the landlord, had constructive notice of the rights of Edon who was actually in possession and cultivating the land. In that view of the case the plaintiff by his kabuliyat got nothing from the landlord. The present appeal is therefore allowed and the plaintiff's suit dismissed with costs both here and in the Courts below.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 21

MOOKERJEE AND RICHARDSON, JJ.

Askar Mian and *others*—Appellants.

v.

Sahedali Bara Bhuyian and *others*—Respondents.

Second Appeal No. 907 of 1911, Decided on 27th July 1915.

Assam Land and Revenue Regulation (1886), Ss. 39, 154 (1), 35 and 36—Application for registration of name by purchaser of land dismissed—Suit for declaration and possession in civil Court, is maintainable—Renewal of settlement by vendor after sale does not create right in him.

Section 154, sub-section (1) of the Assam Land and Revenue Regulation, must be read along with, and is controlled by, the concluding clause of S. 39 of the same Act. [P 22 C 2]

Where the plaintiffs purchased lands from the defendants and applied for the registration of their names under the Assam Land and Revenue Regulation, 1886, but their application was refused by reason of the opposition of the defendants, who repudiated the sale:

Held: that the civil Court was competent not only to declare the title of the plaintiffs, but also to place them in possession of the disputed property by ejectment of the defendants. [P 22 C 1]

Held further,: that the mere fact that the defendants obtained a renewal of the settlement from the Revenue Authorities after the sale, did not create in them a right which they did not possess. [P 22 C 2]

Manmatha Nath Mookerjee and *Salendra Nath Mukherjee*—for Appellants.

Gobinda Chunder Dey Roy and *Hemendra Kumar Das*—for Respondents.

Ram Charan Mitra—for the Government.

Judgment—This appeal is directed against a decree in favour of the plaintiffs-respondents for recovery of possession of land upon declaration of title. The Courts below have concurrently found that on the 3rd September 1896, the lands were purchased by the plaintiff from the defendants. Notwithstanding this sale, the defendants got themselves registered under the provisions of the Assam Land and Revenue Regulation and kept the plaintiffs out of possession; the latter have consequently been driven to seek the assistance of the Court.

The defendants originally held under a settlement which was in operation from 1st April 1883 to 31st March 1893. In 1894, there was a survey for the purposes of a fresh settlement, but the term of the previous settlement was extended for two years and the new settlement did not take effect before 1st April 1900. At the time when the new settlement was made, the defendants were able to obtain settlement from the Revenue Authorities, notwithstanding that they had parted with their rights, by reason of two circumstances; namely, first, that the settlement was based on the survey of 1894 when they were landholders lawfully in possession; and secondly, that after the transfer to the plaintiffs, the

defendants were to sub-lease from them and were in actual occupation when the settlement was made in 1900. Subsequently, the plaintiffs applied to the Revenue Authorities to register their names; but their application was refused in 1907 by reason of the opposition offered by the defendants, who repudiated the sale. Consequently on 1st September 1903, the plaintiffs instituted this suit for recovery of possession upon declaration of title. The Subordinate Judge has found upon the question of title in favour of the plaintiffs and no attempt has been made in this Court to assail the accuracy of his conclusion. But it has been argued that the civil Court is not competent to make a decree for possession, and in support of this view, reliance has been placed upon the cases of *Madhub Nath Surma* v. *Mayarani Medhi* (1) and *Patan Maria* v. *Bhabiram Dutt Barna* (2). On the other hand, reference has been made by the plaintiffs-respondents to the decision in *Hedlot Khasia* v. *Karan Khasiani* (3) in support of the view that a decree for possession may be made by the civil Court in favour of the successful plaintiffs.

As the question raised is not free from difficulty and as its determination may affect the revenue administration of the Province of Assam, we thought it proper to invite the assistance of the Government Pleader who has now ascertained the views of the Revenue Authorities on the subject and has communicated them to us. After a careful consideration of the arguments addressed to us on both sides, we have arrived at the conclusion that it is competent to the civil Court, not only to declare the title of the plaintiffs, but also to place them in possession of the disputed property by ejectment of the defendants. Ss. 8 and 9 of the Assam Land and Revenue Regulation, 1886, define the status of a landholder, as a person who has a permanent heritable and transferable right of use and occupancy of his land. Consequently, when the defendants, who were themselves landholders, transferred the property to the plaintiffs, the latter acquired the status of a landholder. The plaintiffs were however at the time when they applied for registration of their names, out of possession, and their application was properly rejected by the Revenue Authorities. But this did not affect their title as landholders. This is plain from S. 39 of the Regulation, which is in these terms:

"Subject to the provisions of S. 151, the order of a Settlement Officer as to the person to whom a settlement should be offered, the amount of revenue to be assessed and the nature and term of the settlement to be offered, shall be final, and a settlement concluded with that person shall be binding on all persons from time to time interested in the estate, but execept as provided by Ss. 35 and 36, no person shall, merely on the ground that that a settlement has been made with him or with some person through whom he claims, be deemed to have acquired any right to or over any estate, as against any other person claiming rights to or over that estate."

Sections 35 and 36 have no application to the case before us, as they refer to cases of refusal of settlement by the Revenue Authorities. It is consequently plain that the mere fact that the defendants have obtained a renewal of the settlement from the Revenue Authorities, does not create in them a right which they do not possess. We are not unmindful that these sections must be read along with S. 154 on which much reliance has been placed by the defendants-appellants. Sub-S. (1) of S. 154, no doubt, provides that except when otherwise expressly provided in the Regulation or in rules issued under the Regulation, no civil Court shall exercise jurisdiction in the matter of questions as to the validity or effect of any settlement or as to whether the conditions of any settlement are still in force; but this provision must be read along with, and is obviously controlled by, the concluding clause of S. 39. It is further clear that the plaintiffs do not raise any question as to the validity or effect of the settlement, nor do they seek to alter the conditions of the settlement by the Revenue Authorities. Their object is to subsititute themselves in place of the defendants; in other words, to acquire the property as settled by the Revenue Authorities with the defendants. Consequently, it cannot be maintained that the object of this suit is to raise a question which falls within Cl. (a) sub-S. 1, S. 154.

Equally unfounded is the contention that the claim for recovery of possession is barred under Cl. (m) sub-S. (1)

(1) [1890] 17 Cal. 819.
(2) [1897] 24 Cal. 239.
(3) [1912] 13 I. C. 377.

S. 154, which merely provides that no civil Court shall exercise jurisdiction in any matter respecting which an order expressly declared by the Regulation to be final subject to the provisions of S. 151, has been passed. The view we take, is strengthened by an examination of Cl. (a), S. 62, which lays down that nothing contained in Ch. 4 and nothing done in accordance therewith shall be deemed to preclude any person from bringing a suit in the civil Court for posseasion of, or for declaration of his right to any immovable property to which he may deem himself entitled. The suit now before us is clearly of this description. The application of the plaintiffs for registration was rightly refused by the Revenue Authorities; they were at the time out of possession, which as is clear from S. 53, is an essential requisite for an order of registration. The only remedy of the plaintiffs was to institute a suit in the civil Court, as they have done, for declaration of their right and for recovery of possession. The appellants have contended however that the plaintiffs should obtain a mere declaration in this suit, and should then apply to the Revenue Authorities to register their names and to place them in possession.

But apart from the fact that the Revenue Authorities cannot register the name of a person who is out of possession we must bear in mind what was properly emphasised by the Government Pleader, namely, that they have no power, in fact, they have no machinery, to give possession, except in the circumstances mentioned in Ss. 12, 54 and 116, which do not cover the case before us. Consequently, if we were to accede to the contention of the appellants and to give the plaintiffs a mere declaration, the declaratory decree would be infructuous; in fact in this very case, the Board of Revenue, in dealing with the application of the plaintiffs for registration of their names, said in 1907 that they must obtain possesssion from the civil Court before their names could be registered. We hold accordingly, upon a review of the statutory provisions on the subject, that the civil Court is competent to make not only a decree for declaration of title but also for recovery of possession. This as we have been informed by the Government Pleader, is precisely the view of the Revenue Authorities. We have been pressed, however with the decisions of *Madhdb Nath Sarma* v. *Mayarani Medhi* (1) and *Patan Maria* v. *Bhabiram Dutt Barna* (2), which to some extent support the contention of the appellants. But we observe that in those cases, the provisions of S. 62 were not brought to the notice of the Court; and we also notice that in the later case of *Hedlot Khasia* v. *Karan Khasiani* (3) a decree for possession on declaration of title was made, notwithstanding the earlier decisions. We follow accordingly the decision of *Hedlot Khasia* v. *Karan Khasiani* (3) and hold that the decree for possession made by the Subordinate Judge must be maintained. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 23

MOOKERJEE AND BEACHCROFT, JJ.

Danesh Molla and *others*—Appellants.

v.

Dhananjoy Biswas—Respondent.

Letters Patent Appeal No. 99 of 1914, Decided on 16th March 1916, from judgment of Chatterjee, J., D/- 17-7-1914.

Civil P. C. (1908), S. 11, O. 23, R. 1—Suit for recovery of possession of land—Relinquishment of portion of claim without leave of Court—Subsequent suit for recovery of relinquished portion is barred by res judicata and also under O. 23, R. 1.

In a suit for recovery of possesion of land, the plaintiff included within the boundaries described in the plaint two parcels *A* and *B*, and put forward his claim for ejectment in respect of both on the allegation that the defendants had dispossessed him therefrom, but before the Commissioner at the local inquiry, and at the trial the plaintiff relinquished his claim without leave of the Court in respect of the paracel *B*, with the result that the suit was dismissed with regard to that parcel:

Held : that a subsequent suit for recovery of possession of parcel *B* against the same defendants was res judicata and was also barred under O. 23, R. 1, as the dispossession which was the cause of action in both the suits was in reality the same, although the plaintiff falsely alleged, in his plaint in the subsequent suit, dispossession at a later date. [P 26 C 1]

Jyotish Chandra Sircar—for Appellants.

Mohini Mohan Chakrabarty—for Respondents.

The judgment from which Letters Patent appeal was preferred was delivered by

Chatterjee, J. — Two points have been argued in this appeal. The first is that the subject matter of this suit was

the subject-matter of a previous suit between the same parties and that the decision in the previous suit which dismissed the claim of the plaintiffs in respect of the lands claimed in this suit is a bar to the maintenance of the present suit by the rule of res judicata, and the second is that the plaintiffs came to Court on an allegation, that while in possession, they had been dispossessed and that it was therefore the duty of the plaintiffs to prove that they were in possession within 12 years of the institution of the suit. In this case however the learned Judge has, it is contended, applied Art. 144 and tried the question whether the defendants have proved adverse possession for more than 12 years. I think that both these contentions must fail. The previous suit as instituted, no doubt, included the lands in dispute in the present case. The eastern boundary in the previous suit was given as the river Madhumati and the disputed land in this case lies between what was shown as the disputed land in that case and the river Madhumati. It was therefore within the land claimed in the plaint in that suit. At the time of the local investigation held in that case however the plaintiffs showed only the land to the west of the disputed land in this case as the land that they had claimed in that suit and the learned Munsif in the previous case said:

" I should mention here that at the time of the local investigation by the civil Court Commissioner, the plaintiff disclaimed his right to a portion of land on the bank of the Madhumati which is covered by the boundaries given in the plaint. The piece of land which has been shown in yellow colour in the Commissioner's map and which the plaintiff has pointed out to him as belonging to him (plaintiff) is now treated and described as the disputed land. "

It seems therefore that although the disputed land in this case was included within the boundariss of the plaint land in that case, the westsrn portion of the same only which was shown to the Commissioner as the disputed land was treated as the disputed land. It cannot therefore be said that any dispute as to this piece of land to the east of the land marked yellow in the previous suit was the subject of investigation and decision in that case. There is no doubt that the decree made by the Munsif dismissed the claim of the plaintiffs in that case to the lands to the east of the yellow portion, but nevertheless, what was the subject of investigation and decision in that case was the yellow portion and nothing else. It would have been better if the plaintiffs in that case had made an amendment in their plaint ; and that might have prevented a good deal of dispute in the present case. But that was not done, nevertheless that only will be considered as the subject of dispute which was treated as such in that case and the decision of that case must be confined to that land only. It has further been found by the learned Judge in this case that, at the time of the institution of the previous suit, the land which is now in suit was not in existence as culturable land It was then covered by the river and therefore the plaintiffs had at the time of the institution of that suit rightly described the yellow portion of the disputed land in that case as being bounded by the Madhumati on the east. In this view of the case I am unable to accede to the learned argument of the appellant's vakil that the decree in the previous suit simply by reason of its dismissing the claim of the plaintiffs in respect of lands which answer to the boundaries of the paesent suit should be considered as a final decision in respect of these lands. With regard to the question of limitation it is true that the plaintiffs' suit was brought on the allegation of possession and dispossession. But it is found in this case that :

" the land on the east side i. e., the present disputed land, was not fit for cultivation and so was not in the possession of any one. "

that is about the time of the dispossession alleged in the previous case and then again the learned Judge says :

"I do not think that they could dispossess the plaintiffs from this land before Agrahayan 1306 in the time of dispossession regarding the land in previous suit which is within 12 years. "

Although the judgment is not as clear as it could be expected, I think that this means that the plaintiffs must be taken to have been in possession in or about the year 1306 when these lands became culturable and if that be so, the plaintiffs have proved their possession within 12 years. Notwithstanding therefore the finding of the learned Judge that there was no satisfactory evidence that the defendants or their lessor or vendor had possession of the land in suit for more than 12 years, I think that there is sufficient in the judgment from which it can be made out that the learned Judge found that the plaintiffs were in possession

within 12 years. In this view of the case I think that the plea of limitation also fails.

In view of the fact however that the plaintiffs failed to take sufficient measures for ensuring certainty in the previous case by making an amendment in their plaint in respect of the land which appeared after the institution of their suit, each party should bear his own costs in this Court.

Judgment.—This is an appeal under Cl. 15 of the Letters Patent from a judgment of Chatterjee, J., in a suit for recovery of possession of land. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge reversed that decision and on appeal to this Court the decree of the Subordinate Judge has been confirmed. The defendants contend that the suit should have been treated as barred under S. 11 and O. 23, R. 1, Civil P. C., 1908. To determine the validity of this objection, we must bear in mind the facts of a previous litigation between the parties. On 3rd January 1902, the present plaintiffs instituted a suit against the defendants for recovery of possession of what we may briefly describe as two parcels of land A and B. The plaintiffs then alleged that they had been dispossessed by the defendants on 1st January 1900.. A Commissioner was appointed to survey the disputed lands. The plaintiffs confined their claim to plot A alone before the Commissioner and from the report of the Commissioner it appears that whereas the plaintiffs pointed out parcel A as the disputed land, the defendants pointed out parcels A and B as the disputed lands. The Commissioner further found that the defendants were at the time in possession of both parcels of land. In the judgment of the trial Court in that suit we find a statement to the effect that at the time of the local investigation by the civil Court Commissioner, the plaintiffs disclaimed their right to

"a portion of the land on the bank of the Madhumati, which is covered by the boundaries given in the plaint"

that is what we have called B. The Court came to the conclusion that the suit should be decreed in part that is with regard to plot A alone, and then proceeded to state explicitly that the claim so far as it relates to the remaining portion of the land included in the boundaries of the plaint, that is what we have called B, be dismissed The defendants appealed and in the judgment of the Subordinate Judge we find the statement repeated that at the time of the local inquiry by the Commissioner the plaintiffs gave up their claim in respect of what we have called plot B and confined their claim to the portion coloured yellow in the map that is what we have called A. The Subordinate Judge reversed the decree of the Court of first instance and dismissed the suit in its entirety. The plaintiffs preferred a second appeal to this Court, and the result was that the decision of the Subordinate Judge was reversed and that of the Court of first instance restored on 5th Juue 1906. On 30th March 1911, the plaintiffs commenced the present litigation in respect of plot B. Objection was forthwith taken that there was a two fold bar to the suit, namely, bar of res judicata and bar from withdrawal or abandonment of claim without leave of the Court. In our opinion there is no answer to the objection. S. 373 of the Code of 1882, which was in force when the previous suit was decided and has since been reproduced as O. 23, R. 1 of the Code of 1908, provides as follows:

"If the plaintiff withdraws from the suit or abandons part of his claim without such permission, he shall be liable for such costs as the Court may award and shall be precluded from bringing a fresh suit for the same matter or in respect of the same part."

Here the plaintiff undoubtedly abondoned a part of his claim. We are not concerned with the reasons which induced him to adopt this course, nor does a statement of such reasons appear in the proceedings of that suit. But we do know this that although the parcels A and B were included within the boundaries described in the plaint and although the claim for ejectment was put forward in respect of both the plots on the allegation that the defendants had dispossessed the plaintiffs therefrom before the Commissioner and at the trial they relinquished their claim in respect of one of these parcels, with the result that the suit was dismissed with regard to that parcel. In such circumstances, we cannot appreciate how the plaintiffs can possibly escape from the bar provided by para. 2, S. 373. Reliance however has been placed upon the decision of this Court in the case of *Kamini Kant Roy*

v. *Ram Nath Chuckerbutty* (1). That case is clearly distinguishable. There *A* instituted a suit to establish his right to sell a certain property in satisfaction of a decree against *B*. He withdrew the suit without leave obtained to bring a fresh suit. *A* subsequently instituted another suit to establish his right to sell the same property in execution of another decree against *B*. The Court held that the second suit was not barred by the provisions of S. 373, as it could not be deemed a fresh suit in respect of the matter covered by the previous suit. Here however the position is entirely different. We observe that a comprehensive view has been taken of the scope of S. 373 by the Madras High Court in the cases of *Achuta Menon* v. *Achutan Nayar* (2), *Machana Ujhala* v. *Gorugantulu* (3) and *Sennava Reddiar* v. *Venkatachala Reddiar* (4), where in the determination of the question whether the matters in controversy in two suits were or were not identical, reference was made not merely to the right claimed by the plaintiff but also to the right set up by the defendant.

These cases however must be deemed materially qualified, if not actually overruled by the Full Bench decision in *Pandillapalli Singa Reddi* v. *Yeddula Subba Reddi* (5), which accords with the decision in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee* (6), and it is not necessary for our present purpose to attribute to S. 373 such a wide scope for even upon a more limited view, the suit is barred by S. 373. We must also hold that the suit is barred under the provisions of S. 11 of the Code of 1908. The plaintiffs put forward a claim to the land now in dispute in the earlier litigation; that claim was dismissed. It is obviously impossible for them to maintain another suit to enforce the identical claim: the dispossession, which is the cause of action in this suit, is in reality the dispossession urged in the previous litigation, although the plaintiffs in view of the possibility of objections under S. 11 and O. 23, R. 1, falsely alleged in the plaint dispossession at a later date. The result is that this appeal is allowed the decrees of this Court as also of the Court of Appeal below set aside and that of the Court of first instance restored. The suit will stand dismissed with costs in all the Courts.

V.B./R.K. *Appeal allowed.*

(1) [1894] 21 Cal. 265.
(2) [1898] 21 Mad. 35.
(3) [1910] 8 I. C. 1066.
(4) [1915] 28 I. C. 91.
(5) [1916] 39 Mad. 987=35 I. C. 185.
(6) [1900] 4 C. W. N. 110.

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MOOKERJEE AND CARNDUFF, JJ.

Ram Prasad Narayan —Plaintiff—Appellant.

v.

Daud Durzi—Defendant—Respondent.

Appeal No 2367 of 1909, Decided on 5th July 1911, from appellate decree against decree of Sub-Judge, Mozufferpur, D/- 11th June 1909.

Bengal Tenancy Act (1885), S. 104 (2)—Order under S. 104 (2) is reviewable on ground of error by Settlement Authorities.

Proceedings before the Revenue Authorities under sub-S. (2), S. 104, as it stood before its amendment, were in the nature of a suit and an order made therein was in the nature of a decree. Consequently, such order is reviewable on the ground of error by the Settlement Authorities.

[P 27 C 2]

Babus Umakali Mukerjee and *Akshoy Kumar Banerjee*—for Appellant.

Sailendra Nath Palit—for Respondent.

Judgment.—This is an appeal on behalf of the plaintiff in a suit for rent. The plaintiff claimed to realise rent at the annual rate of Rs. 26-8-9. The defendant resisted the claim on the ground that rent was payable by him only at the rate of Rs. 22-13-3. Each side produced a settlement Khatian in support of his claim which bore the same date, namely, 9th June 1897. The Court was therefore called upon to inquire under what circumstances the two khatians, apparently contradictory, had been made. It transpired that under sub-S. (2), S. 104, as it stood before its amendment in 1898, the Record of Rights was finally published on 9th January 1897, and that so far as the present tenant was concerned, the rent was stated to have been settled at Rs. 22-13-3. Immediately after the final publication, an application appears to have been made on behalf of the landlord to the Assistant Settlement Officer to correct the entry. The Assistant Settlement Officer suggested a reference to the Settlement Officer and consequently on 23rd July 1897 an application was made for alteration of the record to the latter officer. The Settlement Officer called for a report, as a result of which the record was amended, so that the rent

payable by the defendant was entered as Rs. 26-8-0 instead of Rs. 22-13-3. The proceedings before the Revenue Authorities further make it clear that the tenant appeared and agreed to this alteration. The plaintiff now seeks to recover rent at the altered rate. The defendant contends that the alteration in the Record of Rights was ultra vires because the Settlement Authorities had no jurisdiction to revise the order previously made. The Court of first instance gave effect to the contention of the landlord and made a decree in this favour. Upon appeal the Subordinate Judge has reversed that decision.

On behalf of the landlord, appellant, it has been argued that the Revenue Authorities had inherent jurisdiction to recall the erroneous order previously made and to modify the entry in the Record of Rights as published. On behalf of the respondent, this contention has been sought to be negatived by a reference to the case of *Shamthu Chandra* v. *Purna Chandra* (1). It has further been argued that the decisions of this Court in the cases of *Brahmanunda Mahapatra* v. *Arjun Raut* (2) and *Durga Churn Law* v. *Hateen Mandal* (3) indicate that the decision of the Settlement Officer was in the nature of a decree and consequently could be revised only by way of appeal. In our opinion the contention of the appellant is well founded and must prevail. The two cases upon which reliance is placed by the respondent, namely, *Brahmanunda Mahapatra* v. *Arjun Raut* (2) and *Durga Churn Law* v. *Hateen Mandal* (3), show conclusively that a decision under sub-S. (2), S. 104 operates as a decree. It follows consequently that the Settlement Authorities have jurisdiction to review the decree on the ground that it is erroneous. This view is supported by the decision of this Court in the case of *Achha Mian Chowdhry* v. *Durga Churn Law* (4). It becomes unnecessary therefore to consider the wider question whether every Court has inherent power to review an erroneous decision. It may be pointed however that this view does receive support from the observations of their Lordships of the Judicial Committee in *Syud Tuffazool Hossein Khan* v. *Rughoonath Pershad* (5) as also from the decision of this Court in *Haradhun Mookerjee* v. *Chunder Mohun Roy* (6). We are not unmindful however that the contrary view has sometimes been maintained : *Babaji* v. *Babaji* (7) and *Ramsing* v. *Babu Kisansing* (8). The decision of the Court of appeal in *Drew* v. *Lewis or Willis* (9) may also possibly support the view that it is competent to a Court to review its decision only where there is statutory authority in that behalf.

As we have stated however it is not necessary for us to found our decision on that ground. We hold here that the proceeding before the Revenue Authorities was in the nature of a suit, that the order made by the Settlement Officer was in the nature of a decree and that the decree was consequently reviewable on the ground of error by the Settlement Authorities. In this view, it becomes unnecessary for us to consider in detail whether even, if we had been obliged to hold that the Settlement Authorities had no jurisdiction to review their order, it would have been open to the tenant, who had consented to the order, to challenge it on the ground that it was ultra vires. But we may observe that the observations of their Lordships of the Judicial Committee in *Ledgard* v. *Bull* (10) might possibly present an insuperable bar in the way of the respondent. In that case their Lordships held that when the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on merits when those are submitted to him. In the case before us it has been found that the alteration in the record was made by the Settlement Authorities upon the joint application of the landlord and the tenant, and it is clearly not open to the tenant to turn round and contend that the order was made without jurisdiction and is not binding upon him. The result therefore is that the decree made by the Court of appeal below must

(1) [1908] 35 Cal. 176.
(2) [1878] 1 C. L. J. 310.
(3) [1902] 29 Cal. 252.
(4) [1898] 25 Cal. 146.
(5) [1870-72] 14 M. I. A. 40.
(6) Marsh. 205.
(7) [1891] 15 Bom. 650.
(8) [1895] 19 Bom. 116 (F. B.).
(9) [1891] 1 Q. B. 450.
(10) [1885-86] 9 All. 191=13 I. A. 134. (P. C.)

be set aside and that of the Court of first instance restored with costs throught.

V.B. R.K. *Appeal allowed.*

A. I. R. 1913 Calcutta 28

MOOKERJEE AND CARNDUFF, JJ.

Azmat—Plaintiff—Appellant.

v.

Bishun Prakas Narain Singh and *others*—Defendants—Respondents.

Appeal No. 2442 of 1909, Decided on 5th July 1911, against appellate decree of Sub-Judge, Muzafferpur, D/- 18th August 1909.

(a) Landlord and Tenant — Ejectment—Suit for—Suit by landlord to recover possession of land on allegation that they were zerait lands—Tenants in occupation of lands contending that lands were not zerait but part and parcel of raiyati holding—Settlement khatian going against landlord—Length of time during which defendants were in occupation not considered and suit decreed on ground that tenants had failed to establish tenancy—Plaintiff held rebutted evidence as to entries—Court held wrong in not considering length and character of defendants possession.

Plaintiff, the proprietor of an estate within which were situated certain lands in the occupation of the defendants, brought a suit to recover possession thereof, alleging that they formed his zerait lands. The defendants resisted the claim on the ground that the disputed lands were not the zerait lands of the proprietor, but were part and parcel of the raiyati holding for which they paid rent to the landlord. The entries in the settlement khatian, by which the plaintiff was not bound, were against the plaintiff and he failed to prove that the lands were zerait as alleged by him. The lower appellate Court, without considering the question of the length of the time during which the defendants were in occupation, held that, although the plaintiff had failed to establish the specific case alleged by him, he should get a decree for ejectment on the ground that he was entitled to recover possession as the defendants had failed to discharge the burden that lay upon them to establish a tenancy under the plaintiff in respect of the disputed lands. The defendants appealed to the High Court and contended, first, that the lower appellate Court had on an erroneous ground considered the settlement proceedings to be a nullity:

Held: that though the entries in the settlement khatian afforded prima facie evidence in support of the defendants case, the plaintiff had as he was bound to do, rebutted that evidence. [P 29 C 1]

It was next urged that the burden of proof had been erroneously thrown on the defendants:

Held: that the decision of the lower appellate Court could not be supported and the case must be remitted to it for re-decision. [P 29 C 2]

Lastly, it was objected that the question of the defendant's possession ought to have been tried:

Held: that the lower appellate Court was wrong in not considering the length and character of the defendants' possession, for if they had been in possession for over twelve years and had treated the disputed lands as part of their tenancy, the only remedy of the landlord was by a suit for assessment of rent, because the claim for recovery of actual possession had been extinguished by the adverse possession of the defendants. [P 29 C 2]

(b) Landlord and Tenant — Ejectment—Suit for — Dispute as to whether disputed lands are within or without boundaries of tenancy — Burden of proof is on relative situation.

Where the defendants in an action in ejectment are tenants of the plainttff and the only dispute is whether the disputed lands are within or without the boundaries of that tenancy, the burden of proof depends upon the relative situation of the land in controversy and the admitted lands of the tenancy held by the defendant. [P 29 C 2]

Lakshmi Narain Singh—for Appellant.

Akshoy Kumar Banerjee — for Respondents.

Judgment.—This an appeal on behalf of the defendants in an action in ejectment. The case for the plaintiff-respondent is that he is the proprietor of the estate within which the disputed lands, now in occupation of the defendants, are situated, that they form zerait lands and that consequently he is entitled to recover possession thereof from the defendants. The defendants resisted the claim mainly on the ground that these lands were not the zerait lands of the proprietor but were part and parcel of the raiyati holding for which they paid rent to the landlord. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge has made a decree in favour of the plaintiff. He has found that the settlement khatians, the entries wherein are admittedly against the plaintiff, are not binding upon him, but he has held that the plaintiff has failed to prove that the land is zerait as alleged by him. The Subordinate Judge has held however that though the plaintiff has failed to establish the specific case alleged by him, he should get a decree for ejectment on the ground that as proprietor he is entitled to recover possession, unless the defendants establish their alleged tenancy. From this point of view, the Subordinate Judge has examined the evidence on the part of the defendants and come to the conclusion that they have failed to discharge the burden that lay upon them to establish a tenancy right under the plaintiff in respect of the disputed lands.

He had not however considered the question of the length of time during which the defendants have been in occupation, because, in his opinion, possession even for a considerable length of time does not indicate any tenancy right in the land. On the present appeal, the defendants have contended that the judgment of the Subordinate Judge is open to objection on three grounds, namely, first; that he has on an erroneous ground considered the settlement proceedings to be a nullity, secondly; that the burden of proof has been erroneously thrown upon the defendants, and thirdly; that the question of possession ought to have been tried. There is no substance in the first of these contentions but the second and third grounds must prevail. In so far as the first ground is concerned, there can be no room for dispute that the settlement records afford prima facie evidence in support of the case alleged by the defendants. The plaintiff is bound to rebut that evidence: and although the conclusions of the Subordinate Judge upon this part of the case are not very accurately expressed it is plain that he has found in substance that the plaintiff has rebutted that evidence. He has pointed out that there was no trial of the objection taken by the landlord: under a misapprehension the objection was treated by the Revenue Authorities as falling under a clause within which it could not be included; in other words, the Settlement Authorities treated the case as if it raised a question of the nature and amount of rent payable and did not involve any question of the status of the tenants and the true character of the land in dispute. There was therefore in substance no decision of the objections taken by the landlord; and the rejection of his objections by the Revenue Authorities was thus obviously erroneous. Under these circumstances the Subordinate Judge has correctly held that the evidence furnished by the Record of Rights has been amply rebutted.

In so far as the second objection is concerned, it is clear that the judgment of the Subordinate Judge cannot be supported. He has held upon the authority of the decision in *Narsing Narain Singh* v. *Dharam Thakur* (1), that the onus is upon the defendants to establish the tenancy alleged by them. The case relied upon however is clearly distinguishable. In that case the landlord sued to recover possession of land. The defendant contended that he held a tenancy right in the disputed property. The burden therefore was rightly cast upon him to establish the tenancy as alleged by him. In the case before us the defendants are tenants of the plaintiff. The only dispute is whether the lands now in controversy are included within the boundaries of that tenancy or lie outside them. The plaintiff relies upon the decision in *Nanda Lal Goswami* v. *Jajneswar Haldar* (2) in support of the proposition that the onus is upon ths tenants to establish the tenancy, while the defendants rely upon *Rajendro Kumar Bose* v. *Mohim Chandra Ghose* (3) in support of the view that the burden lies upon the plaintiff to show that the lands of which he seeks to recover possession are outside the tenancy held by the defendants. It may seem difficult at first sight to reconcile these two decisions. But the true rule is that laid down by Banerjee, J., in *Sheodeni Rai* v. *Chowdhury Chatoorbuj Roy* (4). where that learned Judge pointed out that the burden of proof in a case of this description must depend upon the relative situation of the land in controversy and the admitted land of the tenancy held by the defendant. The Subordinate Judge has not examined the case from this point of view. The matter therefore must be reconsidered.

In so far as the third ground urged by the appellant is concerned, it is clearly well founded and must prevail. The Subordinate Judge has not considered the length of time during which the defendants have been in occupation of this land. If they have been in possession for over 12 years and have treated this land as part of their tenancy, the only remedy of the landlord is by a suit for assessment of rent, because the claim for recovery of actual possession has been extinguished by the adverse possession of the defendants: *Ishan Chandra Mitter* v. *Raja Ramranjan Chakrabutty* (5). The length and character of the possession of the defendants are from this point of view very important elements for consideration. The result is that this ap-

(1) [1905] 9 C. W. N. 144.

(2) [1902] 6 C. W. N. 105.
(3) [1899] 3 C. W. N. 763.
(4) [1910] 8 I. C. 785.
(5) [1905] 2 C. L. J. 125.

peal must be allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that these two questions may be decided. As the true bearing and importance of these questions do not appear to have been appreciated in either of the Courts below the Subordinate Judge will be at liberty to take additional evidence; such evidence may be taken either by him or under his direction by the Court of first instance. The costs of this appeal will abide the result.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 30

MOOKERJEE AND BEACHCROFT, JJ.

Sukraj Roy—Plaintiff—Appellant.

v.

Lal Bahadur Gope—Defendant—Respondent.

Appeals Nos. 2560 and 2837 of 1919, Decided on 16th July 1912, from appellate decrees of Dist. Judge, Bhagalpur, D/- 10th July 1909.

(a) Bengal Tenancy Act (1885), S. 105—Enhancement of rent claimed on ground of rise of price of staple food crops—Case should be decided under S. 105.

A landlord, who claims enhancement of rent on the ground of rise in the average local price of staple food crops during the currency of the existing rent, should have his case decided by the settlement officer in a proceeding under S. 105, and should not be driven to a separate suit. [P 30 C 1]

(b) Bengal Tenancy Act (1885), S. 52—Increase of rent for additional area can be granted.

A landlord may be entitled to additional rent under S 52, even though he is unable to establish that the previous measurement was accurate and reliable, where it appears that the inaccuracy in the previous measurement was in favour of the landlord and the tenant is found to be in possession of more land than was found in the previous measurement. [P 30 C 2]

Umakali Mukherjee and *Khetra Mohan Sen*—for Appellant.

Judgment.—This is an appeal on behalf of the landlord in a proceeding under S. 105, Ben. Ten. Act, for settlement of fair and equitable rent in respect of the land held by the tenants respondents. The claim was allowed in part by the settlement officer. But upon appeal that decision has been reversed by the Special Judge. The landlord assails the decree of the Special Judge substantially on two grounds, namely, first that in so far as he claims enhancement of rent on the ground mentioned in S. 30, Cl. (b), Ben. Ten. Act, namely rise in the average local price of staple food crops during the currency of the existing rent, he should not have been driven to a separate suit; and secondly that additional rent for excess lands should have been allowed under S. 52, Ben. Ten. Act, notwithstanding the finding that the previous measurement made by the landlord in 1900 was not trustworthy. In our opinion both these contentions must prevail. In respect of the first contention, it is difficult to see upon what ground the landlord has been referred to a fresh litigation. S. 105 entitles the landlord to apply for assessment of a fair and equitable rent in respect of the lands held by the tenants. Sub S. 4, provides that in settling rents under the section the revenue officer shall presume, until the contrary is proved, that the existing rent is fair and equitable and shall have regard to the rules laid down in the Act, for the guidance of the civil Court in increasing or reducing rents, as the case may be. One of the rules laid down in the Bengal Tenancy Act, for enhancement of rent is to be found in S. 31-B read with S. 30, Cl. (b). Consequently this matter must be determined by the Special Judge.

In so far as the second ground is concerned no doubt under S. 52, it is not disputed that the landlord has to establish that there is excess land in respect of which he is entitled to claim additional rent. The landlord must prove that the tenant is, at the time of the claim in occupation of more land than that for which he has hitherto paid rent. He has therefore to establish the quantity of land in the occupation of the tenant at the time of the claim and the quantity in his possession previously. This presumes no doubt that the present as well as the previous measurement is accurate and reliable. It is conceivable however as is illustrated by the present case, that the landlord may be entitled to addditional rent even though he is unable to establish that the previous measurement is accurate and reliable. In the case before us, the measurement of 1900 was made by what is called the Kamarband system. The settlement officer has explained what is meant by the system of measurement. A russi is used for measurement and is 20 cottahs in length. Each cottah is equal to $5\frac{1}{2}$ cubits but one cottah at each end of the

russi is twisted round a man's waist, and measurement is made only by 18 cottahs, which actually makes 1 bigha equal to 16 cottahs 4 dhurs. This obviously is beneficial to the landlord. He measures with a russi which is ostensibly 20 cubits in length; but the one actually employed is only 18 cottahs in length. Under this system it would not be difficult to convert the area as determined into the area according to the standard method of measurement. But the Special Judge has pointed out that an inaccuracy is introduced by the reason of the practice followed in carrying out the measurement, which is thus described by him:

"In writing down the measurements the number of the lugga reached is written; that is what is two luggas on the ground is written three, what is three is written four and so on. Lengths and breadths measured on this system are multiplied together in calculating areas and the result obtained reduced to bighas and cottas by the ordinary calculation, namely 20 dhurs is taken as equivalent to one cottah and 20 cottahs as equivalent to one bigha."

It is obvious that this practice introduces an indeterminate error. The extent of the error depends not upon the area of the plot mentioned, but upon the lengths of its sides. Let us take a concrete instance. If a field really measured 3 by 4, according to this system, it is taken to be 4 by 5; that is, what is 12 becomes according to this system 20. On the other hand a field which is 19 by 20, becomes 20 by 21; while another field 38 by 10 that is of equal area, becomes 39 by 11; in other words 380 becomes 420 in the one case, but 429 in the other. It is thus obvious that the extent of the error is not proportionate to the size of the field, and that even in the case of several fields of equal area, the extent of the error may widely differ; for instance the error in the case of a field 60 by 7 is very different from the error in the case of a field 21 by 20, although the areas of the two fields are identical. Consequently if merely the area of the field as determined according to this inaccurate method is known, we have not sufficient data to determine the correct area. The error it will be observed is for the benefit of the landlord. Prima facie therefore the landlord is not entitled to rely upon this measurement to show that the tenant is in occupation of more lands than that for which he has been paying rent. But the learned vakil for the landlord appellant has pointed out that he is entitled to excess rent in respect of the difference between the area as indicated in the measurement of 1900 and the area as accurately determined on the present measurement. This is obviously sound.

The error in 1900, as we have already explained, has been for the benefit of the landlord. Consequently if we take the difference between the two figures just mentioned, the advantage will be on the side of the tenant, as he will be assessed with additional rent, on the principle mentioned in sub-S. 5, S. 52, only in respect of the excess quantity so determined. Let us take a concrete illustration again: the tenant who really held 12 bighas (4 by 3) in 1900, was shown in the measurement papers as in possession of 20 bighas (5 by 4); if he is now in occupation of 25 bighas, he will be liable for additional rent in respect of 5 bighas; he cannot very well altogether escape payment of additional rent, merely because the measurement of 1900 was inaccurate in favour of the landlord. Consequently the claim under S. 52, Ben. Ten. Act, ought not to have been entirely negatived. The result is that this appeal is allowed, the decree of the Special Judge set aside and the case remanded to him in order that these two points may be reconsidered. There will be no order as to the costs of this appeal. It is conceded that this judgment will govern the other appeal, Second Appeal No. 2837 of 1909, in which a similar order will be drawn up.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 31

RICHARDSON AND BEACHCROFT, JJ.

Sonaulla Sarkar—Defendant—Appellant.

v.

Tula Bibi—Plaintiff—Respondent.

Appeal No. 115 of 1916, Decided on 5th February 1918, from appellate decree of Sub Judge, Rajshahi D/- 28th February 1916.

(a) Mahomedan Law—Mother appointed certificated guardian — Marriage of minor effected by uncle cannot be questioned — Specific Relief Act (1877), S. 42.

Under the Mahomedan law the mother even when appointed certificated guardian of the person and property of her minor daughter has no legal character within the meaning of S. 42, Specific Relief Act, entitling her to a declaration

that the marriage of her daughter with a certain person effected by her uncle is not valid [P 32 C 1]

(b) Specific Relief Act (1877), Ss. 42 and 43—Suit for declaration that marriage of Mahomedan minor girl is invalid is not maintainable.

It would not be a proper exercise of judicial discretion to make any declaration under S. 42 in a suit by the guardian of a Mahomedan minor girl for a declaration that her marriage with a certain person is invalid when the minor is not a party to the suit inasmuch as under S. 43 of the Act, the decree would not be binding upon the minor. [P 32 C 2]

Dhirendra Nath Bagchi for *Brojendra Nath Chatterjee*—for Appellant.

Krishna Kamal Maitra—for Respondent.

Richardson, J.—The plaintiff in this suit is the mother and certificated guardian of a minor Mahomedan girl. Defendant 1, the appellant before us is the uncle of the girl. He is said to be the step-brother of defendant 2, who is the father of the minor defendant 3 Baharulla Mundal. The suit was brought for a declaration that a ceremony purporting to be a ceremony of marriage between the plaintiff's daughter and defendant 3 was not duly performed and was invalid. The Courts below have concurred in making the declaration sought and this appeal is preferred by defendant 1. The question whether the rites required by the Mahomedan law were duly performed turns on matters of fact and if the decrees of the Courts below were not otherwise open to objection their finding on that question would be binding on us. On behalf of defendant 1 however it has been contended throughout that the suit is not maintainable by the plaintiff on the ground that she has no right or authority to intervene in matters relating to the marriage of her daughter. It is said that when as here the uncle is the nearest male agnate he is the guardian for marriage of his minor niece and is in a position to compel her marriage to a bridegroom of his own selection subject to the girl's right on attaining puberty to refuse her consent to the marriage and to take proper steps to have it cancelled. In the Courts below it seems to have been held (without reference to the rights of the uncle) that the mother as the appointed guardian of the person and property of her minor daughter has a legal character within the meaning of S. 42, Specific Relief Act, entitling her to the declaration which she seeks. The daughter's marriage or alleged marriage is apparently regarded as an invasion of the mother's rights as guardian which it is said are "affected." This view of the case cannot be supported. Clearly the legal character or status involved is the status of the two persons said to have been married and the true objection to the suit is that the plaintiff's daughter is no party to it. She is it would seem treated as a chattel while her elders are disputing about her disposal in marriage either because there are money considerations involved or because they are quarrelling about other matters. As the suit is framed in any view of the rights of the uncle it would not be a proper exercise of judicial discretion to make any declaration under S. 42, Specific Relief Act, inasmuch as under S. 43 the decree would not be binding on the daughter.

It is unnecessary therefore to determine the relative rights of the mother and uncle in the present connexion or to deal with the further question whether under any or under what circumstances it would be open to a mother either as the natural guardian or as the appointed guardian of her daughter with a view to the protection of her daughter's interests to bring all necessary parties before the Court and to seek a judicial pronouncement as to the validity of a form of marriage to which that daughter had been subjected. If our decision in the present case should leave the mother in any doubt as to her duty it will be open to her by application to ask for the advice of the District Judge. The appeal succeeds on the ground indicated. The judgments and decrees of the Courts below are set aside and the suit dismissed. In the circumstances we make no order as to costs.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 32

MOOKERJEE AND HOLMWOOD, JJ.

Khedon Lal and *others*—Plaintiffs—Appellants.

v.

Rajendra Narain Singh—Defendant—Respondent.

Appeal No. 1186 of 1908, Decided on 5th August 1912, against Appellate decree of Dist. Judge, Bhagalpur, D/- 23rd March 1908.

Limitation Act (1908), Art. 142—Suit for declaration of title and possession—Allegation of possession and dispossession—Burden is on plaintiff—Nature of proof of possession depends on nature of case.

Where in a suit for declaration of title to land and for recovery of its possession, the plaintiff alleges his prior possession and subsequent dispossession by the defendant, the burden is primarily upon the plaintiff to show possession and dispossession within 12 years of the institution of the suit, but the nature of the proof of possession must depend upon the nature of the case. If the land was wholly or partially subject to inundation, the plaintiff must be deemed to have been in possession of the submerged land duriug the period it was covered by water, no matter who was in possession at the date of the submergence. [P 33 C 2]

Rash Behary Ghose, Umakali Mukerjee and *Gurudas Singh*—for Appellants.

Dwarka Nath Chuckerbutty and *Biraj Mohan Majumdar*—for Respondent.

Judgment,—This is an appeal on behelf of the plaintiffs in a suit for declaration of title to immovable property and for recovery of possession thereof with mesne profits. The property in dispute covers an area of 247 bighas, claimed by the plaintiffs as part of their Mouza Judia, and by the defendants as part of their village Koriaputti. The Subordinate Judge found upon the question of title that approximately one half of the disputed area fell within the estate of the plaintiffs. With reference to the question of limitation, he found that as the land was subject to inundation by the water of the river Kosi from time to time, the burden was upon the defendants to establish that the title of the plaintiffs had been extinguished by adverse possession on their part. Upon the evidence, he held that the defendants had failed to establish such adverse possession for the statutory period; and in this view, decreed the suit in part. Both the parties were dissatisfied with this decision and appealed to the District Judge. Upon the appeal of the defendants the District Judge held that the burden was upon tha plaintiffs to establish that they were in possession and were subsequently dispossessed, as alleged by them, within 12 years before the commencement of the suit. He found that the plaintiffs had failed to discharge the burden that lay upon them and in this view dismissed the suit. On the present appeal by the plaintiffs, it has been contended that the decision of the District Judge upon the question of limitation cannot be supported. In our opinion there is no answer to this argument.

We shall for the purposes of this appeal assume that the plaintiffs are proprietors of the disputed land as alleged by them. It may be conceded that when they alleged their prior possession and subsequent dispossession by the defendants, the burden is primarily upon them to establish, as laid down by their Lordships of the Judicial Committee in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1), that they were in possession within the statutory period. But in the determination of this question of possession, the nature of the land must be first considered. If, as the Subordinate Judge found, the land was wholly or partially subject to inundation by the water of the river Kosi, the plaintiffs must be deemed to have been in possession of the submerged portion during the period that such tract was covered by water, no matter who was in possession at the date of the submergence: *Secy. of State* v. *Krishnamoni Gupta* (2). In our opinion, the judgments of both the Courts below are open to criticism on the ground that neither of the learned Judges ascertained the precise tract of land to which the principle of submergence applies; nor did they find, at what period, the water receded and the land re-appeared before the suit. It is conceivable that part of the land was reclaimed more than 12 years before the commencement of the suit; in respect of such portion, the plaintiffs may be rightly called upon to prove their possession within 12 years. But in respect of some portion, at any rate, of the disputed land, it is clear from the evidence of the defendants themselves that the area has been waste or submerged or unfit for cultivation in quite recent periods. In respect of such land the principle laid down by their Lordships of the Judicial Committee in the cases of *Rajkumar Roy* v. *Gobind Chunder Roy* (3) and *Radha Gobind Roy* v. *Inglis* (4) clearly applies. As was pointed out by Wilson, J. in the cases of *Mono Mohun Ghose* v. *Mothura Mohun Roy* (5) and *Mahomed Ali Khan* v. *Khaja Abdul Gunny*, (6) although, as

(1) [1889] 16 Cal. 473=16 I. A. 23. (P. C.).
(2) [1902] 29 Cal. 518=29 I. A. 104.
(3) [1892] 19 Cal. 660=19 I. A. 140 (P. C.).
(4) [1881] 7 C. L. R. 364 (P. C.).
(5) [1881] 7 Cal. 225.
(6) [1883] 9 Cal. 744.

a general rule, where the plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within 12 years, the nature of the proof of possession must depend upon the nature of the case. The District Judge in the Court below appears to have lost sight of this aspect of the case and has held, erroneously as we think, that the burden lies upon the plaintiffs to establish their possession unless they can prove that the whole of the land was entirely waste. He does not appear to have realised that the question of possession requires examination from different standpoints in view of the present or past condition of different portions of the disputed land.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him for reconsideration. We notice from the judgment of the District Judge that he was not satisfied with the manner in which the property had been surveyed in the Court of first instance. We further observe that the original survey maps were not produced. The District Judge will therefore consider whether it would not be desirable to have the lands accurately surveyed by a professional surveyor with reference to the original survey maps, and give direction accordingly. It is obviously desirable in a case of this description that the question of title should be satisfactorily decided in the first instance before the question of limitation is considered. The costs of this appeal will abide the result.

V.B./R.K. *Appeal decreed.*

A. I. R. 1918 Calcutta 34

MOOKERJEE AND BEACHCROFT, JJ.

Banwarilal Singh—Plaintiff—Appellant.

v.

Dwarkanath Missir and *others*—Defendants—Respondents.

Appeal No. 2318 of 1909, Decided on 13th August 1912, from appellate decree of Dist. Judge, Manbhum, D/- 20th August 1909.

(a) Landlord and Tenant — Permanent Tenancy— Presumption — Tenancy of unknown origin held to be permanent from its inception—Inference to be drawn was one of law from facts.

In an action in ejectment defendant 1, who claimed the property as purchaser of the right title and interest of the other defendants who had been in possession of the disputed property by right of inheritance from their father produced a certified copy of a dar-mokarari, purporting to have been executed in 1830 and containing a recital of the existence of the tenancy and a certified copy of a mortgage bond of 1861, in which the factum of the permanent character of the tenancy was acknowledged by the grantor of the mortgage and also other proofs showing that the tenancy which had descended from father to son for three genarations was effectively transferred from time to time and was held at a uniform rate for at least eighty years before the institution of the suit:

Held: (1) that from these circumstances the Court could legitimately infer that the tenancy which was of unknown origin was in its inception of a permanent character, (2) that the inference to be drawn was one of law from facts found or admitted. 13 *I. C.* 606, *Rel on.*

[P 38 C 1]

(b) Evidence Act (1872), S. 90—Original not in existence—Presumption under S. 90 can be raised from certified copy.

Where a dar-mokarrari lease granted in 1830 was not in existence and there was no proof of its execution and a certified copy of the document obtained in 1861, and since then produced in Court on several occasions was received at the trial in evidence;

Held: that the certified copy was admissible in evidence though there was no proof of the execution of the original document which had been lost. 34 *Cal.* 1059 (*P. C.*), *Foll.*

[P 37 C 1]

(c) Practice—Admissibility—Omission to object does not make inadmissible document admissible.

The omission to take objection to the admission of a document which is absolutely inadmissible does not make it admissible in law.

[P 37 C 2]

(d) Bengal Tenancy Act (1885), S. 18-A—Landlord not party to document—Document can be used to show assertion by tenant of character of tenancy.

Section 18-A, Ben. Ten. Act does not prevent the use of a document, to which the landlord is not a party to show that there was an assertion by the tenant at the time that the tenancy was of a particular description. [P 36 C 2]

(e) Evidence Act (1872), S. 18—Admission by guardian of person as to property is not binding on minor.

Admissions made by the guardian of the person of an infant as to the property rights of the latter are not binding on the infant, but such admissions may be receivable in evidence for other purposes. [P 37 C 1]

(f) Evidence Act (1872), S. 18—Admission by Court of Wards is not admissible on infant proprietor.

An admission by the Court of Wards made at the time when the estate was in charge of the Court cannot bind or prejudice the infant proprietor. [P 37 C 2]

Rash Behary Ghose, *Bepin Bahari Ghose*, *Lalit Mohan Ghose* and *Karunamoy Ghose*—for Appellant.

Umakali Mukerjee, *Biraj Mohan Majumdar* and *Indu Bhusan Roy*—for Respondents.

Judgment.—This is an appeal on behalf of the plaintiff in an action in ejectment. Defendant 1 claims as purchaser of the right, title and interest of the other defendants, who were in possession of the disputed property by right of inheritance from their father. The original grant was in favour of the grandfather of these defendants and the question in controversy between the parties is whether the tenancy was permanent and transferable. The District Judge, in concurrence with the Court of first instance, has found upon this question against the plaintiff. This decision has been challenged in this Court on the ground that it is based on evidence not admissible in law.

The first document to which exception has been taken is a dar-mukarari lease granted on 20th February 1850 by Kanchan Singh, the first tenant. The original of this document is not in existence and a copy has been produced which was taken in 1861 and since then has been produced in Court on several occasions. It has been contended that as there is no proof of execution of the original the copy cannot be received in evidence under S. 90, Evidence Act. In support of this proposition reliance has been placed principally upon the terms of S. 90 and it has been argued with considerable force that by no stretch of language can it be said that in the case before us the presumption mentioned in S. 90 is applicable to the copy produced. S. 90 provides that where any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested that it was duly executed or attested by the persons by whom it purports to be executed and attested. It has been argued that this section contemplates the production of the original document, and that only upon such production can the Court presume that the signature and every other part of the document which purports to be in the handwriting of any particular person was in that person's handwriting. This view it has not been disputed, may lead to hardship where the original of an ancient document has been lost (though a certified copy is in existence) and no witness is available who can speak to its actual execution by way of analogy it has been mentioned that a similar hardship arises in cases where an unstamped original has been lost and a certified copy cannot be received in evidence even upon payment of penalty *Marine Investment Co.* v. *Haviside* (1) and *Kopasan* v. *Shamu* (2) which is in conflict with *Haran Chunder* v. *Russick Chunder* (3). We do not think any question of hardship really arises for consideration; what we have to determine is whether the interpretation of S. 90, suggested by the appellant is justified by its language; that we think must be conceded in his favour.

But it is admitted that a different construction was placed upon S. 90 by Wilson J., in the case of *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeteru'no* (4). which was accepted as good law though with some hesitation by Sir Arthur Strachey in the case of *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (5) The observations in *Vasudeo* v. *Bhau* (6) possibly tend in the same direction while the observations in *Appathura Pattar* v. *Gopala Panikkar* (7) support the contrary view. In view of this divergence of judicial opinion it would have been our duty to construe the terms of S. 90, Evidence Act but whatever our opinion might have been if the matter were res integra, we are bound by the decision of their Lordships of the Judicial Committee in the case of *Shahzadi Begam* v. *Secy. of State* (8) which we think concludes the point against the appellant. As it has been contended however that the point which now requires consideration was not decided by their Lordships we must examine the circumstances of that case. In that case reliance was placed upon a deed of exchange, the original of which had been lost. A certified copy, obtained in 1851, was produced at the trial. The genuineness of this certified copy was questioned. The District Judge found that the certified copy was genuine and

(1) [1872] 5 H. L. 624.
(2) [1884] 7 Mad. 440.
(3) [1873] 20 W R 63.
(4) [1880] 5 Cal. 886.
(5) [1900] 22 All. 294.
(6) [1897] 21 Bom.528.
(7) [1902] 25 Mad. 674.
(8) [1907] 34 Cal. 1059=34 I. A. 194 (P. C,).

admitted it in evidence. Upon appeal to this Court the certified copy was pronounced a forgery and the document was consequently rejected. When the matter went before the Judicial Committee reliance was placed on behalf of the appellant upon the certified copy and it was argued that the certified copy was not a forgery because it bore the same stamp and water marks as other contemporary documents admittedly genuine and produced in a previous litigation between the parties. The respondents contended that the certified copy was a forgery and also argued that the certified copy even if genuine was not admissible. On behalf of the appellant in reply reference was made to the decision in *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (4) and it was contended that the certified copy was admissible without proof of execution of the original. Lord Collins in the course of his judgment first observed with regard to the deed of exchange that the certified copy was produced from the custody of Shahzadi Begum and was found to be written on paper bearing the same stamp and water marks as other documents on the record of that litigation he then proceeded to state that their Lordships agreed with the District Judge that it was admissible in evidence and for the reasons given by him adopted his conclusions as to its genuineness.

The learned vakil for the appellant has contended that the only question before the Judicial Committee was whether or not the certified copy was genuine and that their Lordships did not decide whether the certified copy if genuine could be received in evidence because the parties at the original trial had contended that there was a genuine original which had been lost and the only question thus was whether what was produced as a certified copy was genuine or not. In our opinion it is clear from the report of the arguments before the Judicial Committee that the question of the admissibility of the certified copy was expressly raised before their Lordships and was treated by them as really not open to serious argument. But even if it be held that their Lordships assumed the document to be admissible because it was conceded that there was a genuine original the case before us is not distinguishable from the one before the Judicial Committee because the judgment of the District Judge shows that even according to the plaintiff there was a genuine original lease. Reference was made on behalf of the appellant to the decision of the House of Lords in *Padwick* v. *Wittcomb* (9) to show that the certified copy would not be admissible according to the rules of evidence recognized in English law; that decision however is clearly distinguishable and is of no assistance to the appellant. On the other hand the observations in *Bullen* v. *Michel* (10) undoubtedly support the view taken by their Lordships of the Judicial Committee (see also Wigmore on Evidence Vol. 3, S. 2145). It is not necessary however to place reliance upon the rule of English law on the subject; the question before us must be determined with reference to the statutory provisions contained in S. 90, Evidence Act; and in view of the decision of their Lordships of the Judicial Committee in *Shahzadi Begum* v. *Secy. of State* (8), we must hold that the certified copy was properly received in evidence.

A second objection has been taken to the admissibility of this document. Our attention has been invited to S. 18-A, Ben. Ten. Act, which was introduced by S. 8, Act 1 of 1907 (B. C.). That section provides that nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence amount or fixity of rent area, transferability or any incident of any tenure or holding referred to in such instrument. In our opinion this section is of no assistance to the appellant, If it be assumed that the section is applicable it merely lays down that nothing contained in the instrument to which exception is taken can be used as evidence as against the landlord of the permanence of the tenure mentioned in such instrument. This does not prevent the use of the document for an entirely different purpose, namely, to show that there was an assertion by the tenure holder at the time that his tenancy was of a particular description. Ex. O (the dar mukarrari patta) must therefore be treated as admissible in evidence. The second document to which exception has been taken is a usufructuary mortgage-bond executed by

(9) [1853] 4 H. L. C. 425.
(10) [1816] 4 Dow. 297.

Durbari Singh, the son of the original tenant, on 8th March 1861. What has been produced is a certified copy of the document, and it contains an assertion by the executant that the property granted by way of usufructuary mortgage was his maurasi mukarrari property and that it had been possessed by his father who made a dar-mukarrari settlement thereof with the father of the mortgagee referring obviously to the document of 20th February 1830. We are of opinion for the reasons already given, that the certified copy was admissible in evidence. The third document to which exception has been taken is the record of a statement by the mother and step-mother of the predecessor of the plaintiff in 1861. It has been argued that the guardian of the person of the infant was not competent to bind the minor by an admission as to his property rights, and in support of this view, reliance has been placed upon the cases of *Brojendra Coomar Roy* v. *Chairman of the Dacca Municipality* (11), *Suruj Mukhi Konwar* v. *Bhagwati Konwar* (12) and *Ram Autar* v. *Mahamad Mumtaj Ali* (13). In our opinion it cannot be disputed that the guardians of the person of the infant were not competent to bind the ward by an admission of this character. The document however appears to have been used in the Court of first instance, not with a view to bind the plaintiff by the admission of the guardian, but for an entirely different purpose.

The plaintiff himself produced a statement by the mother of the infant to the effect that Durbari Singh, the son of the original tenant, held merely as an ijaradar; it was with a view to contradict this statement that the defendants produced the statement to which exception has been taken. For this limited purpose the document was undoubtedly receivable in evidence; but apparently, it has been used by the District Judge for a wider purpose. To this extent the judgment of the District Judge is open to criticism. The fourth document to which exception is taken is a road cess return. The objection here is really not to the admissibility of the document but rather to its proof. The document bears the seal of the Raja; it is contended that the District Judge should also have compared what purports to be the signature of the Raja on the document with his signature in certain documents which were produced at the trial and were more than 30 years old. In our opinion, the judgment of the District Judge is not open to criticism on this point. The aspect of the matter which has been presented here, was not placed before the District Judge, and the only question argued there was about the admissibility of the document in that objection, there was no substance. The fifth document to which exception is taken is the record of an admission by the Court of Wards, made apparently on behalf of the predecessor of the plaintiff when the estate was in charge of the Court.

It cannot be seriously disputed that the admission by the Court of Wards cannot bind or prejudice the infant proprietor. But the judgment of the District Judge is not open to criticism on this ground, because he does not really base his conclusion upon the admission. We may observe incidentally that some of the objections urged here were not taken, at least in the same form in the Court below, but we have allowed them to be argued fully, partly from the importance of the questions raised, and partly in view of the principle that omission to take objection to the admission of a document which is absolutely inadmissible does not make it admissible in law: *Miller* v. *Babu Madho Das* (14), *Girindra Chandra* v. *Rajendra Nath* (15), *Basava* v. *Kalapa* (16) and *Oomatool Fatima* v. *Ghnnnoo Singh* (17). The position then, is that we have a document of 1830 in which the existence of the tenancy is recited. We have further a document of 1861 in which the factum of tenancy is acknowledged by the grantor of the mortgage. It is true the landlord was not a party to these transactions; but it is not disputed on his behalf that there was a tenancy in favovr of Kanchan Singh and subsequently in favour of his son Durbari Singh. We have thus a tenancy of unknown origin, which has descended from father to son for three generations, has been effectively transferred from time to time and has been

(11) [1873] 20 W. R. 223.
(12) [1882] 10 C. L. R. 377.
(13) [1897] 24 Cal. 853=24 I. A. 107 (P. C.).
(14) [1897] 19 All. 76=23 I. A. 106. (P. C).
(15) [1897] 1 C. W. N. 530.
(16) [1877-78] 2 Bom. 489.
(17) [1873] 19 W. R. 22.

held at a uniform rent for at least 80 years from 1829 up to the date of the present suit. From these circumstances we are of opinion that the Court may legitimately infer that the tenancy in its inception was of a permanent character; *Mohoram Sheik Chaprasi* v. *Telamuddin Khan* (18). In this view it is not material to rely upon the documents to which objection has been successfully taken namely, the admission made by the mother and step-mother of the infant in 1861, the statement in the road cess return, and the settlement in the sale certificate, which after all is merely the allegation of the decree-holder and cannot in any way be direct evidence against the landlord. Even if all these statements be left out of consideration, the circumstances already mentioned, which have been indisputably established, support the conclusion that the tenancy was of a permanent character. It is consequently needless to remand the case for further consideration. The inference to be drawn is one of law from facts found or admitted: *Mohoram Sheik Chaprasi* v. *Telamuddin Khan* (18); the facts established by the evidence legally admissible are sufficient to support the decree of the District Judge. But we desire to add that we do not in any way depart from the principle recognized by Sir Richard Garth, C. J., in *Womes Chunder Chatterjee* v. *Chundee Churn Roy* (19), which we hold does not apply to this case. The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(18) [1912] 13 I. C. 606.
(19) [1881] 7 Cal. 293.

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JENKINS, C. J. AND HOLMWOOD, J.

Udoy Narain Jana—Defendant—Appellant.

v.

The Secretary of State—Plaintiff—Respondent.

Appeal from Appellate Decree No. 44 of 1912, Decided on 30th July 1915, against decree of Sub-Judge, Second Court, Midnapore, D/- 6th November 1911.

Landlord and Tenant—Abwab—Annual payment for upkeep of embankments is not abwab—Long continued payment from time immemorial creates title in favour of recepient.

An annual sum claimed by the Government from Government khas mahal tenants in respect of certain embankments the upkeep of which is necessary for the preservation of the lands of the tenants, is not an abwab. [P 38 C 2]

A long-continued payment beyond the memory of man of an annual sum is in itself a title in favour of the recipient of such sum. [P 38 C 2]

Nilmadhav Bose and *Hari Bhusan Mukherjee*—for Appellant.

Rash Behary Ghose and *Ram Charan Mitra*—for Respondent.

Jenkins, C. J.—This appeal arises out of a claim by the Secretary of State for a small sum of money which is described as peshkash. The principal defence that has been urged before us is that the annual sum claimed is an abwab. The facts negative that suggestion. The claim is by the Secretary of State, not as a landlord, but as representing the Government and claiming payment of that which is payable to the Government in respect of certain embankments the upkeep of which is necessary for the preservation of land, including that to which the present defendant is entitled. The claim does not rest in any sense on the relation of landlord and tenant. Therefore, we may at once negative the plea which suggests that the claim is bad as being an abwab.

Then it is said, what is the basis of this claim? The basis is long continued payment beyond the memory of man, which in itself is a title in favour of the recipient of the annual payment. That in itself is sufficient. There is an authority of the Privy Council in the case of *Sumlhcolall Girdhurlall* v. *Collector of Surat* (1), where that was regarded as a sufficient defence for a claim of annual payment, though that payment had a vicious origin. Here there is no vice in the origin. On the contrary the consideration for the payment is most beneficent work. There is, in my opinion nothing in the answer that is advanced on behalf of the defendant.

The only matter to which exception may be taken in the decree of the lower appellate Court is, that it is expressed in such wide, vague and inconclusive terms that it is perhaps difficult to know precisely what the determination of the Judge was on the various prayers in the plaint. But on behalf of the Secretary of

(1) [1859-61] 8 M. I. A. 1.

State it is stated that all that is desired is a decree for money. There will be eliminated from the decree of the lower appellate Court so much as is not a decree for payment of the sum of money claimed. This will be, not because we determine these declarations are erroneous, but because they should not be embodied in a decree in a suit of this character. The appellant must pay the costs of this appeal.

Holmwood, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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RICHARDSON AND BEACHCROFT, JJ.

Abdur Rahaman and *another*—Appellants.

v.

Amir Sharif and *others*—Respondents.

Appeal No. 337 of 1916, Decided on 4th January 1918, against order of Dist. Judge, Chittagong, D/- 1st September 1916.

*** Civil P. C. (1908), O. 38, Rr. 5, 9 and 11 —Attachment before judgment ceases on dismissal of suit—Court dismissing suit should make order withdrawing attachment — Appeal does not revive order of attachment.**

An attachment before judgment comes to an end when the suit is dismissed.

In order to avoid all possible doubt and difficulty, the Court should when dismissing a suit make an order under O. 28, R 9, withdrawing the attachment before judgment. But even if an order directing withdrawal of attachment is not made, on the dismissal of the suit, the attachment before judgment ceases to exist, and it does not revive when an appeal is lodged. [P 40 C 1]

In a suit brought by the plaintiff the property of the defendant was attached before judgment. The trial Court dismissed the suit without making any order as to the withdrawal of the attachment. On appeal, the suit was decreed. In the interval, the property attached was transferred by a private sale. The decree-holder then applied for the execution of his decree by the sale of the property without applying for its re-attachment:

Held: that as the property had ceased to be under attachment after the dismissal of the suit by the trial Court, the Court had no jurisdiction to direct it to be sold without being first attached. [P 40 C 1, 2]

D L. Kastagir—for Appellants.

Chandra Sekhar Sen — for Respondents.

Richardson, J.—A preliminary point is taken in this appeal that no appeal lies under S. 102, Civil P. C. We are of opinion that this objection is good and that the appeal must be dismissed.

The appellant however succeeded in obtaining a Rule from this Court which raises the same question as is raised in the appeal. The question turns on the provision contained in R. 9, O. 38, Civil P. C. The rule runs as follows :

"Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required together with security for the costs of the attachment or when the suit is dismissed."

It appears that on 19th September 1911, certain property belonging to the defendant in the suit out of which these proceedings arise was attached before judgment. The suit was dismissed by the trial Court on 20th November 1911. On appeal the suit was decreed on 28th January 1913. In the interval the property attached before judgment had been purchased at a private sale by the appellant, or rather the petitioner. In 1915 the decree-holder applied for execution of his decree by the sale of the property, on the footing that the attachment before judgment subsisted and that it was unnecessary for him to apply for re-attachment of the property. It is obvious that he was bound to frame his application for execution in that way because if the attachment before judgment did not subsist, the property having been purchased by the petitioner could not be attached or sold in execution. The point made on behalf of the decree-holder is that when the first Court dismissed the suit it omitted to carry out the direction in R. 9, O. 38 of the Code that the Court should at the same time order the attachment to be withdrawn. If that order had been made, there can be no doubt that the attachment would not have subsisted and would not have been revived by the fact that on appeal the decree of dismissal was set aside and the suit was decided in the plaintiff's favour. As authority for that, if authority is needed, we may refer to the case of *Sesirama Kumari* v. *Meherban Khan* (1) decided by Mookerjee and Coxe, JJ.

The argument is that the Court having omitted to make an order withdrawing the attachment, the attachment continued. This point was decided by the learned the Munsif against the decree-holder and by the learned District Judge in his favour. With great respect to the latter I agree with the learned Munsif. The observations made by Mahmud, J., in the case of

(1) [1910] 9 I. C. 918.

Ram Chand v. *Pitam Mal* (2) are as applicable to the present Code as to the previous Code and in my opinion they correctly state the law. In principle, as pointed out by Mookerjee, J., in the first case cited, the attachment before judgment should come to an end when the suit is dismissed. And I agree with Mahmud J., when he says, speaking of the Code of 1882, that the part of the Rule requiring the Court to remove the attachment was never intended to be more than directory. There is no doubt that in order to avoid all possible doubt and difficulty the Court should, when dismissing a suit, at the same time make the order directing the attachment to be withdrawn. But even if the order is not made, in my opinion, on the dismissal of the suit the attachment before judgment falls to the ground.

Some attempt was made to argue that R. 11, O. 38, has made some change in the law by reason of the word "subsequently" which appears in that rule. The rule is as follows:

"Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property."

But that rule cannot be read in the way in which the learned pleader for the respondent seeks to read it. It applies only where the property is under attachment and a decree is passed subsequently. It is begging the question to say that the property remains under attachment after the suit has been dismissed or that it revives when an appeal is lodged. If the property is not under attachment at the date of the appeal, this rule can have no application even though a decree be subsequently made in favour of the plaintiff. It is obvious that if the suit is dismissed and no appeal is preferred, the attachment, whether an order withdrawing it is made or not, must cease, and I cannot see that the filing of an appeal makes any difference. For the reasons indicated, the judgment of the District Judge is, in my opinion, erroneous and must be set aside. The Rule is accordingly made absolute. It has been suggested that no question of jurisdiction arises which justifies us in interfering with the District Judge's order under S. 115, Civil P. C. But clearly if the property is not under attachment, the District Judge had no jurisdiction to direct it to be sold without being first attached. The question raised is therefore one which falls within the scope of S. 115. The result is that the Rule must be made absolute and the order of the Court below set aside. The petitioner is entitled to his costs which are assessed at one gold mohur.

Beachcroft, J.—I agree.

V.B./R.K. *Rule made absolute.*

(2) [1888] 10 All. 506.

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FLETCHER AND TEUNON, JJ.

Fakir Mullick and *another* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 859 of 1916, Decided on 28th August 1916, against order of Sub-Divl. .Officer, Uluberia, D/- 14th August 1916.

Criminal P. C. (1898), Ss. 133, 139 and 140—Enquiry in proceedings under S. 133—Bona fide claim of right set up—Order under Ss. 139 and 140 held not without jurisdiction — Proper procedure would have been to refer parties to civil Court.

On a complaint being made to a Magistrate that public rights in a channel had been interfered with, the Magistrate took proceedings under S. 133, and coming to the conclusion that the channel in question was in fact a public channel passed orders under Ss. 139 (1) and 140 (1).

Held: that it was not incumbent upon the Magistrate to inquire whether the party complained against had a bona fide claim of right to the channel and to refer the parties to the civil Court if he found that the claim of right set up was bona fide, although in normal cases that course would be a wise and proper course to adopt. [P 41 C 1]

Manmatha Nath Mukherjee and *Asiranjan Chatterjee*—for Petitioners.

Atulya Charan Bose—for the Crown.

Fletcher, J.—This is a Rule calling upon the District Magistrate of Howrah to show cause why the orders under S. 139 (1) and 140 (1), Criminal P. C., complained of in the petition should not be set aside or why such other order should not be passed in the matter as to this Court might seem fit and proper on grounds Nos. 1 and 2 mentioned in the petition. The proceedings with which we are concerned in this case are proceedings taken under S. 133, Criminal P. C. The learned Sub-Divisional Magistrate of Uluberia proceeded to enquire on a complaint that public rights had

been interfered with and he came to the conclusion that the channel was, in fact, a public channel. Mr. Mukherjee, who appears for the petitioners in this case, says that, having regard to the rulings of this Court, the Magistrate ought to have first enquired whether his clients had a bona fide claim of right to the channel; and, if he found that they had, then he should have referred the parties to the civil Court. No doubt, in certain decisions of this Court, the rule is stated to that effect; but those words do not appear in the section and I think that every case must largely turn on the particular circumstances affecting it. No doubt, in normal cases that course is a view and proper course to adopt. It is not convenient that a Court of this nature should adjudicate and settle matters which can properly be referred to the civil Court. But there are other cases —cases of urgency—where that rule, notwithstanding the fact that it may place oue of the parties in a less favourable position, cannot be followed and it seems to me that the present case is one of those cases where the Magistrate has got to choose whether he would proceed with the case and determine it or whether serious injury would be caused to the other party. I think in this case we ought not to interfere with the orders complained of, the Magistrate having determined that the public have a right to the water of the channel, as it would, if the petitioners' argument be assented to, seriously affect a very large portion of land of the persons who appeared before the learned Magistrate.

The other point that has been made is that the learned Sub-Divisional Magistrate was guilty of a serious contempt of Court in ordering the bund to be cut after an order had been made by this Court on 16th August last staying all further proceedings. It is said that the order was communicated to the learned Magistrate by a Mukhtar. Whether the learned Magistrate believed the statements made by the Mukhtar as credible or not we do not know. There is no answer to the affidavit filed by the petitioners and I do not know whether the Magistrate ever knows of it or not. There seems to be no reason, if the petitioners intended to communicate an order of an urgent nature to the Magistrate, why an order in some form or other should not have been taken from this Court to communicate to the Magistrate. Whether any actual rule exists or not as to that I do not know; but I take it that, where the order is of a very urgent nature, there cannot be any difficulty in procuring an order from the Court and sending it down by the party who obtains the order to communicate it to the Magistrate. I do not think we can assume in this case that the learned Magistrate was deliberately acting in defiance of the order of this Court. I think this is a case where we ought not to interfere, hnving regard to the nature of the public right which the learned Magistrate has found to exist. That bcing so, the Rule fails and must be discharged.

Teunon, J.—I agree.

V.B./R.K. *Rule discharged.*

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CHATTERJEA AND SMITHER, JJ.

Sankar Nath Mukherji—Petitioner—Appellant.

v.

Biddutlata Debi — Defendant — Respondent.

Appeal No. 225 of 1916, Decided on 12th July 1918, against original decree of Dist. Judge., Nadia, D/- 10th August 1916.

(a) Probate—*G*, *H*. and *L* obtaining probate and administering estate until appointment of *T* as executor—Death of *T*—Grant of probate 35 years after death of testatrix held not necessary or proper to *S*, who was able to act as executor on attaining majority.

B by her will appointed *G*., *H*., *L*. and *T*. her executors. It was also provided that *S*. would be able to act as executor when he attained majority. *G*., *H*. and *L*. obtained probate in 1882 and went on administering the estate until 1888, when *T*. was appointed executor. *T*. died in 1908. There was a legacy in favour of *S*. who presented an application for probate long after the death of the testatrix:

Heid: that it was not necessary or proper to grant probate 35 years after the death of the testatrix in order that *S*. might get the property bequeathed to him, when the genuineness of the will and the right of the parties under the will had been established by the previous grant of probate. [P 43 C 1]

(b) Executor—Duty of, is to administer estate to enable him to carry out terms of will — Authority to manage ceases after estate becomes property of residuary legatee.

The duty of an executor is to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee

under the will, the executor as such has no authority to manage the estate on his behalf. 31 *Cal.* 89, *Foll.* [P 43 C 1,2]

Ram Chunder Mozumdar, *Romesh Chunder Sen* and *Atindra Nath Mukerjee*—for Appellant.

Baidyanath Dutt and *Bhupendra Kumar Bose*—for Respondent.

Chatterjea, J.—This appeal arises out of an application for probate of the will of one Bhayaharni Debi, dated 2nd Agrahan 1288. By her will she appointed her husband's brother's sons Girindra and Harendra, her daughter Lambodari and her husband Tara Nath, her executors. It was also provided in the will that Sankar Nath (the appellant), who was the son of another brother of Tara Nath, when he attained majority, would be able to act as executor: and that in case Tara Nath was willing and able to act as sole executor, he would be entitled to do so. Bhayaharini died two days after the execution of the will: and as Tara Nath was not willing to apply for probate, Girindra, Harendra and Lambodari applied for, and obtained, probate in January 1882 and went on administering the estate until April 1888 when Tara Nath having applied for probate, he was appointed executor. In the year 1893, Girindra, Harendra and Narendra as also Sankar Nath and his two minor brothers represented by their mother were called upon to state whether they would accept the bequest in their favour, which consisted of certain immoveable property subject to an annnity of Rs. 2,400 a year in favour of Lambodari. Girindra, Harendra and Narendra filed a petition in Court giving up the legacies. In 1894, there was an agreement between Tara Nath and her daughter Lambodari and daughter's son Mohini Mohan under which Lambodari and her son gave up their right to certain properties and also the annuity given to her under the will, and Tara Nath gave certain properties to her absolutely. Tara Nath died in 1908, and in 1910 Girindra and Harendra applied for probate. Notice was served upon Sankar and he stated that he could not apply for probate owing to ill health but that he would do so later on.

It appears that after the death of Bhayaharini, Tara Nath married a second wife and had a son Baroda Bhusan, who died sometime before 1910 leaving a widow Biddutlata, who is the respondent before us. In August 1910 Biddutlata, who was a minor, filed an application through her father for revocation of the probate granted to Girindra and Harendra and the grant was accordingly revoked. Then the present application was made by Sankar on 9th March 1894 for the probate of the will of Bhayaharini. The application has been refused by the Court below and Sankar Nath has appealed to this Court. The testatrix died more than 35 years ago, and presumably the estate has been fully administered. But it was contended on behalf of the applicant in the Court below as well as in this Court that there were certein debts and legacies unpaid, and that it was necessary to grant administration to manage the properties dedicated for deba sheba provided for in the will of Bhayaharini. As regards the debts, it appears that there was a mortgage bond executed by Bhayaharini on 25th Falgun 1283. The mortgagee obtained a decree against Tara Nath apparently as executor. On 1st Ashar 1311 Tara Nath mortgaged certain properties in lieu of the debt due under the mortgage decree obtained by the creditor, asserting his own right to the properties, presumably based upon the ekrar with Lambodari. The properties mortgaged appear to have formed part of the estate left by Bhayaharini, but Tara Nath took over the liability of the debt upon himself and the creditors chose to take the properties to which Tara Nath asserted his own right, as security. In these circumstances, we do not think that a fresh probate should be granted on the fresh ground.

Then as to the legacies under the will, we have seen that Harendra, Girindra and Narendra refused to accept the bequest burdened with the annuity in favour of Lambodari. It is contended on behalf of the appellant that there is no evidence that notice was served upon Sankar. On the other hand, we were referred on behalf of the respondent to a finding of the District Judge in a previous revocation case as showing that Sankar had been served with notice: and it is also contended on her behalf that Sankar having in 1897 stated in his deposition that Tara Nath was in possession and had got his own name registered as proprietor, any claim for the bequest

was barred by limitation. But these questions cannot be gone into by the Probate Court and we do not think that we should consider them. It appears that specific property or rather a share in a certain specific property was bequeathed to Sankar and his brothers, and they can enforce the right against the persons in possession if they have any subsisting right. We do not think it necessary or proper to grant probate 35 years after the death of the testatrix in order that Sankar may get the property bequeathed to him, when the genuineness of the will and the right of the parties under the will have been established by the grant of probate previously made.

The last point relates to deba sheba and the contention is that the sheba is to be carried on by the executors. This contention was raised in another appeal to this Court arisng out of the application made by Biddutlata for revocation of the probate granted to Girindra and Harendra Nath Mookerji. Coxe J, in disposing of that contention observed as follows:

"As regards the idol it is argued that the sheba has to be performed for ever and that consequently the estate cannot have been completely administered. It appears to us that this argument amounts to reductio ad absurdum. The will provides that: 'If any of the aforesaid executors died, his successive male descendants will be able to act as executors.' But it is impossible to hold that the estate can never be completely administered and that the heirs of the executors will be entitled to apply for probate of this will till the end of time. The appellants held the probate of the will for seven years. They had full opportunities for making all necessary arrangements for the sheba of the idol. In *Ranjit Singh* v. *Jagannath Prosad Gupta* (1) the executor had been empowered to appoint a shebait and had failed to exercise that power. But in the present case all that was done was to leave certain property to certain idols, and there is nothing to show that the idols are not in the full enjoyment of the property:" Vide Respondent's Book, p. 51.

We agree with those observations and also with the observations made by Brett, J., as to the position and duties of an executor in *Taran Singh Hazari* v. *Ramratan Tewari* (2):

"The position and duties of an executor in this country are not very well understood, and considerable confusion exists as to duties of the executor, in administering the estate. The duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf. Under the will, the beneficial interest in the property vested in the minor as soon as the testator died, and Gauri Debi was appointed as executrix to manage the property till the minor attained majority. In describing her as executrix for this purpose, there has, in our opinion, been a confusion or misinterpretation of the term 'executrix.' What was intended appears to us to be that she should as executrix administer the estate and see that the terms of the will were carried out, and, this being done, that she should manage the property covered by the will, not as executrix under the will and administratrix of the deceased's estate, but as manager for the minor till he attained majority. The intention clearly was to appoint her to be manager of the minor's estate. We think that in interpreting the will, we must have regard not merely to the words used but to the evident intention of the testator."

We think under the circumstances that it is not necessary to grant probate, for the administration of the estate as the estate really does not require what is technically meant by "administration." If there is any controversy between the parties as to the shebaitship of the disputed property, they must seek for a decision in a title suit framed for the purpose. In this view of the case, it is unnecessary to consider whether the appellant had any locus standi to make the application for probate. The appeal accordingly fails and is dismissed with costs, five gold mohurs.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(1) [1886] 12 Cal. 375.
(2) [1904] 31 Cal. 89.

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FLETCHER AND SHAMSUL HUDA, JJ.

Srish Chandra Ray and *others*—Defendants—Appellants.

v.

Jadunath Kundu and *others*—Plaintiffs—Respondents.

Appeal No. 867 of 1916, Decided on 5th April 1918, from appellate decree of Sub-Judge, First Court, Pabna, D/- 21st February 1916.

Bengal Tenancy Act (8 of 1885), S. 67—Interest on rent accrues from expiration of quarters of agricultural year in which instalments fall due.

Under the Bengal Tenancy Act interest on rent accrues, not from the expiration of the dates on which the instalments are payable according to the kist stipulated in the contract of lease, but from the expiration of the quarters of the agricultural year in which the instalments fall due. [P 44 C 2]

Surendra Chandra Sen—for Appellants.

Mohini Mohan Chakravarty—for Respondents.

Fletcher, J.—This is an appeal by the defendants against the decision of the learned Subordinate Judge of Pabna, dated 21st February 1916, affirming the decision of the Munsif of Serajganj. The plaintiffs brought the suit to recover rent in arrears for the years 1317, 1318 and 1319 B. S. The amount sued for rent and cesses was Rs. 429-0-9. Rupees 104-4-0 was also claimed for damages under the provisions of the Bengal Tenancy Act. The claim with regard to the rent and cesses for the year 1317 has been decreed in favour of the plaintiffs and no question has been raised in this appeal with regard to that. Therefore, the judgment appealed against with regard to the arrears of rent for 1317 must stand. The question arises with reference to the years 1318 and 1319. It is common case between both the parties that the rent in this case is payable by five kists, namely, 10th Assar, 10th Bhadra, 10th Aswin, 25th Agrahayan and 25th Falgun. Now the damages that have been claimed in this case are damages which the plaintiffs are entitled to and they say they are entitled to, under the provisions of S. 68, Ben. Ten. Act which provides that

> "if in any suit brought for the recovery of arrears of rent it appears to the Court that the defendant has without reasonable or probable cause neglected or refused to pay the amount of rent due by him, the Court may award to the plaintiff, in addition to the amount decreed for rent and costs, such damages not exceeding twenty-five percentum on the amount of rent decreed, as it thinks fit."

In this case, it is common fact that the rent was tendered by money order, and the reason which the learned Judge considered made those tenders bad was that the tenders did not include interest as from the dates on which the rent became due, namely, the respective dates fixed for the payment of the rent. On what dates the rent was actually tendered through money order, does not appear from the judgments of the Courts below. But we have been handed a table which is stated to have been made from a perusal of the record. Whether that table is accurate or not we are not in a position to say. This is not a case of any contract in writing proved. The interest that the plaintiffs can claim is under and by virtue of the provisions of S. 67, Ben. Ten. Act, and that section does not provide that arrears of rent shall bear interest from the date on which the rent becomes due, but from the expiration of the quarter of the agricultural year in which the instalment falls due. It depends on what dates the tenders were made by money order. If the tender was made before the date mentioned in S. 67, then no interest was due on the arrears of rent; but if it was made after that date, then interest was due; and whether that was a good tender would depend on a consideration of those facts.

If the tender was made before the time from which by virtue of S. 67 interest commences to run, then it can hardly be said, the tenants having tendered the whole amounts of the kists due, that they under the provisions of S. 68 had without reasonable or probable cause neglected or refused to pay the amounts. I think in this case the learned Judge of the lower appellate Court has not considered the facts relating to the tender with reference to S. 67, Ben. Ten. Act. In that view the case must go back to the learned Judge of the lower appellate Court for him to re-hear the appeal, after taking into consideration what was the date of the tender which was refused by the plaintiffs. This remand only relates to the claim for the years 1318 and 1319; the appeal as regards the claim for 1317 is dismissed. The learned Judge of the lower appellate Court will also find whether on the date of the tender interest, having regard to the provisions of S. 67, Ben. Ten. Act, had commenced to run so that the tender was or was not a good tender by reason of its not having included any interest. The case must therefore go back to have the sppeal, save and except as regards the claim for 1317, re-heard by the learned Judge of the lower appellate Court. Courts will abide the result of the rehearing by the learned Judge of the lower aqpellate Court.

Shamsul Huda, J.—I agree.

V.B./R.K. *Case remanded.*

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A. I. R. 1918 Calcutta 45 (1)

FLETCHER AND WALMSLEY, JJ.

Bibhuti Bhusan Chakravarty and *others*—Petitioners.

v.

Umesh Chandra Mukherjee—Opposite Party.

Civil Rule No. 349 of 1918, Decided on 19th August 1918, against decision of Dist. Judge, Bankura.

Civil P. C. (5 of 1908), S. 115—High Court will not interfere with decision on point of law.

A High Court cannot interfere under the terms of S. 115, with decision at the instance of persons who complain of the decision on a point of law. [P 45 C 2]

Shib Chander Palit and *Jadunath Mondal*—for Petitioners.

Bepin Behari Ghose, II, and *Bejoy Kumar Chatterjee*—for Opposite Party.

Fletcher, J.—This is an application made by the decree-holders who purchased certain property in execution, asking the Court to set aside an order made by the District Judge affirming the decision of the Munsif. The District Judge has found that the applicants obtained by fraudulent suppression of sale notices a property of considerable value for an inadequate price of Rs. 49 only. The decree-holders, being aggrieved by the judgment of the District Judge, have applied to this Court to have the order set aside. The first question that arises is this: Had the opposite party an interest entitling him to come to Court under the provisions of O. 21, R. 90, Civil P. C. The opposite party had a mortgage—a mortgage securing the payment of paddy — and apparently there were endorsements on the deed. The learned Judge held that the opposite party had an interest. It is quite true that the learned Judge departed from the duties of a Judge when he stated that the mortgagors were morally bound to pay off the debt. But notwithstanding that, he in his capacity as a Judge adjudicated on the rights of the parties and held that the opposite party had a subsisting interest on the terms of the mortgage. That is a pure question of law. Whether or not the opposite party has under the terms of the mortgage an interest in the property is a matter on which, as far as I can see, the Judges of this Court are not all agreed as to what is the nature of the mortgage and what is the article of the Limitation Act that applies to the case. But this is a question of law and it is quite clear that the Court will not and cannot interfere under the terms of S. 115, Civil P. C., at the instance of the persons who complain of the learned Judge's decision on a point of law.

The next point that has been seriously pressed by Mr. Palit on behalf of the petitioners is as regards the finding of the learned Judge with reference to the applications to set aside the sale, having regard to the facts of the case, being within the time allowed to make such an application. It is quite true that if one takes that as the first part of the judgment and alone, the finding is not sufficient. Of course, it would have been much better if the finding had been given in clear and conclusive terms in an earlier part of the judgment. But what the learned Judge meant to say is quite clear. If one reads the next part of his judgment which is not dealing with the question of limitation, and takes the findings made therein coupled with the earlier portion of the judgment, it is quite clear that the learned Judge meant to find facts on which he could come to the conclusion that the application to set aside the sale was within time. I think in this case no ground has been shown to us to interfere with the decision of the learned District Judge. The present Rule therefore fails and is discharged with costs, one gold mohur.

Walmsley, J.—I agree.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 45 (2)

MOOKERJEE AND BEACHCROFT, JJ.

Dwarka Nath Das—Petitioner — Appellant.

v.

Kangali Charan Sahu—Opposite Party —Respondent.

Appeal No. 269 of 1912, and Rule No. 3999 of 1912, Decided on 15th May 1913, against order of Sub-Judge, Midnapore, D/- 10th February 1912.

Civil P. C. (1908), S. 47 — Decree for arrears of rent — Court deciding controversy between usufructuary and simple mortgagee as to their rights— Decision of Court is not appealable— Questions do not come under S. 47 nor under Bengal Tenancy Act (1885), S. 171.

Where in execution of a decree against a tenant for arrears of rent the Court decides a controversy between a usufructuary mortgagee and a simple mortgagee as to their respective rights under their mortgages, the decision of the

Court is not appealable, as the questions in controversy are not questions relating to the execution, satisfaction or discharge of the decree and do not raise between the parties to the suit or their representatives-in-interest within the meaning of S. 47 nor are the matters in difference between the mortgagees such as ought to be summarily determined in a proceeding under S. 171. [P 46 C 2]

Biraj Mohan Majumdar and *Hari Bhusan Mookerjee*—for Appellant.

Bejoy Kumar Bhattacharjee for *Khirode Narain Bhuia* — for Respondents.

Judgment.—We are invited in this Rule to set aside an order made by the Court of first instance under sub-S. (1) (c), S. 171, Ben. Ten. Act. The circumstances under which the order has been made are not disputed. The Maharaja of Burdwan obtained a decree for arrears of rent against one of his tenants. In execution of this decree the holding was advertised for sale. It appears that the tenant had executed a simple mortgage of the holding on 27th May 1900 and a usufructuary mortgage on 19th July 1908. On 17th January 1911, the simple mortgagee made an application under sub-S. (3), S. 170, for leave to deposit the judgment-debt on the allegation that he had, in the holding advertised for sale, an interest voidable on the sale. This application was granted without notice to the decree-holder or the judgment-debtor. On 11th April 1911, the simple mortgagee who had made the deposit, applied to the Court to be put in possession of the holding as first mortgagee thereof under S. 171, sub-S (1) (c). Notices were thereupon issued to the persons interested in the holding. On 17th May 1911, the judgment-debtor appeared and objected to the grant of the application.

He stated that the simple mortgage had been satisfied, that the mortgagee had no subsisting interest such as would entitle him to make an application under sub-S. 3, S. 170, and that, in reality, the money deposited by the mortgagee was his own money, which he had entrusted to the mortgagee to be put into Court on his behalf. He added that his usufructuary mortgagee and not he himself was in possession of the holding. On the same day, the usufructuary mortgagee also appeared in Court and resisted the application of the simple mortgagee on the same grounds as urged by the judgment-debtor. The Court thereupon took evidence and came to the conclusion that the usufructuary mortgage had not been acted upon and that the judgment-detor was still in possession. The Court consequently directed the simple mortgagee to be placed in possession. The usufructuary mortgagee appealed to the Subordinate Judge, who held that the appeal was incompetent, because the questions in controversy between the two mortgagees did not fall within the scope of S. 47, Civil P. C., of 1908. The Subordinate Judge however proceeded to express an opinion on the merits of the case, namely, that the usufructuary mortgage was not collusive and that the usufructuary mortgagee was in possession of the holding.

We are now invited by the usufructuary mortgagee to set aside the order of the Court of first instance, on the ground that the Court had no jurisdiction under sub S. (1) (c), S. 171 to make an order for delivery of possession as against a stranger to the proceeding. The order of the Subordinate Judge has also been assailed on the ground that the appeal before him was competent, and, on the facts found, should have been allowed. In so far as the competency of the appeal before the Subordinate Judge is concerned, we are of opinion that the view taken by him is unquestionably sound. The questions in controversy between the mortgagees are not questions relating to the execution satisfaction or discharge of the decree, nor do they arise between the parties to the suit or their representatives-in-interest. Consequently the appeal to the Subordinate Judge was incompetent and the appeal preferred to this Court is equally open to the same objection. In so far as the propriety of the order of the Court of the first instance is concerned, we are of opinion that the case falls within the principle laid down in the case of *Ram Narain Routh* v. *Lal Das Routh* (1). It was pointed out in that case that there is a noticeable difference between the expressions used by the legislature in sub-S. (c), S. 170, Ben. Ten. Act and Cl. (4), S. 13, Regn 8 of 1819, which deals with similar matters. Under the Putni Regulation, the person who makes the deposit to avert the intended sale not only obtains the position of a mortgagee but is

(1) [1907] 6 C. L. J. 595.

also entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter. On the other hand, sub-S. (1) (c), S. 171, Ben. Ten. Act, does not explicitly state that the depositor is entitled to be placed in possession of the holding upon an application made to the Court. It is not necessary for us to determine on the present occasion whether, even as between the depositor and the judgment-debtor, this clause may not be construed as embodying merely a statement of the rights of the parties and not prescribing also the procedure for enforcement of these rights. It is plain that in so far as two strangers to the proceeding are concerned, it could never have been intended that the matters in difference between them should be summarily determined in a proceeding under S. 171.

The result is that the appeal presented to this Court is dismissed, but the Rule is made absolute and the order of the Court below is discharged as against the petitioner, the usufructuary mortgagee. The order of the lower Court, in so far as it makes the petitioner liable for costs, is also discharged. There will be no order for costs either in the appeal or in the Rule.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 47

MOOKERJEE AND BEACHCROFT, JJ.

Najabat Ali—Petitoner.

v.

Bibi Kadiran—Opposite Party.

Civil Rule No. 3423 of 1910, Decided on 10th February 1913, against decision of Dist. Judge, Bhagalpur, D - 28th February 1910.

(a) Civil P C. (1908), S. 115 — Objection abondoned by pleader—Court acts with material irregularity in entertaining such objection raised by successor of pleader.

Where an objection taken by the pleader for the defendant is abandoned, the Court acts with material irregularity in the exercise of its jurisdiction in entertaining such objection raised at a subsequent stage of the proceedings by the successor of the pleader who originally abandoned it. [P 48 C 1]

(b) Bengal Land Registration Act (1876), S. 78—Tenant can waive provision of S 78.

The provisions of S. 78 were framed for the protection of the tenant, and he is free to waive that benefit. If he does waive it he cannot be permitted at his choice to resile from the position deliberately adopted by him. [P 48 C 1]

(c) Bengal Land Registration Act (1876), S. 78—Suit for arrears of rent by assignee—It is sufficient if his name is registered subsequent to suit.

Where the purchaser of the interest of a landlord as well as the back rents, sues to recover these rents as well as the rent due since his purchase, it is sufficient for him to prove during the trial that his name was registered subsequent to the institution of the suit. [P 48 C 2]

Mahomed Mustafa Khan — for Petitioner.

Judgment —We are invited in this rule to set aside a decree of dismissal in a suit for rent, in which the value of the claim was under Rs. 100. On 2nd July 1908 the plaintiff purchased the interest of the landlord as well as the back rent due. On 5th February 1909 he instituted this suit for recovery of arrears for 1906, 1907, 1908 and two instalments of 1909. The claim in respect of the years 1906, 1907, 1908 was for back rent to which he had acquired title by purchase. The remainder of the claim has accrued due since his purchase. The defendant resisted the claim on the ground among others, that the plaintiff had not registered his name under the Land Registration Act of 1876, and was consequently not competent to sue in view of the provisions of S. 78. It is stated on behalf of the plaintiff in this Court, and not denied on the part of the defendant, that this objection was abandoned by the pleader for the defendant, in the Court of first instance. The plaintiff however applied to the revenue authorities for a copy of the land registration decree.

When the case came on for trial, a new pleader appeared for the defendant and was allowed to press this point, although it had been abandoned by the pleader who originally appeared for the defendant. The plaintiff was taken by surprise, and as he was not ready with the copy of the land registration decree, the suit was dismissed. He subsequently applied for review of judgment. Notice was thereupon issued to the defendant and although the copy of the land registration decree was produced, the application for review of judgment was ultimately dismissed. An appeal against the original decree was then lodged before the District Judge, and was sought to be supported on the ground that it was not obligatory upon the plaintiff to have his name registered under S. 78, Land Registration Act, in respect of the back rent. It does not appear however whether the copy of the land registration decree, which had been filed

in the Court of first instance along with the application for review of judgment, was produced before the District Judge. With regard to the back rent, the District Judge held thas the plaintiff was bound to have his name registered precisely in the same way as for rent which had accrued due in his time. We are now invited to set aside the order of the Court of first instance which has thus been affirmed by the District Judge. In our opinion the Court of first instance acted with material irregularity in the exercise of its jurisdiction.

After the objection, which was of an entirely technical and as is plain on the facts of the present case, an unsubstantial character, had been abandoned, it should not have been allowed to be revived at the hearing to the detriment of the plaintiff. The provisions of S. 78, Land Registration Act, were framed for the protection of the tenant, and the tenant is free to waive that benefit. It is also indispensable that if he does waive them, he cannot be permitted at his choice to resile from the position deliberately adopted by him. If this view were not taken, the gravest injury might be done to the plaintiff, as is illustrated by the very case now before us. The copy of the land registration decree has been produced before this Court, and there is no room for dispute that the plaintiff has complied with the requirements of the law. But with regard to the back rent the District Judge has taken an obviously erroneous view. The case of *Syed Serapat Hossein* v. *Tarini Prosad Dobey* (1) shows that the proivisions of S. 78, Land Registration Act, have no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the statute. In the case before us, the name of the vendor of the plaintiff was registered under the Land Registration Act. The plaintiff could not very well have been invited to do what was impossible, namely, to have his name registered in respect of the period during which he had no title and for which the name of his predecessor-in-interest was registered in accordance with law. We must consequently hold that the suit should not have been dismissed for the reasons stated by the Court below. We may further point out, as has been repeatedly laid down *Alimuddin Khan* v. *Hira Lall Sen* (2), *Belchambers* v. *Nawab Sir Syed Hussain Ali Mirza Bahadur* (3) and *Abul Khair* v. *Meher Ali* (4) that it would have been sufficient for the plaintiff to prove during the trial that his name was registered subsequent to the institution of the suit. In the present case, his name was registered before the institution of the suit.

The result is that this rule is made absolute, the decree of the Court below set aside and the case remanded to the Court of first instance for re-trial in the presence of both the parties. As the rule has not been opposed, we make no order as to costs.

V.B./R.K. *Case remanded.*

(1) [1907] 11 C. W. N. 141.

(2) [1896] 23 Cal. 87 (F. B.).

(3) [1898] 2 C. W. N. 493.

(4) [1899] 26 Cal. 712.

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RICHARDSON AND BEACHCROFT, JJ.

Hari Das and *others*—Plaintiffs—Appellants.

v.

Debendro Ram Banerjee and *another*—Defendants—Respondents.

Appeal No. 2341 of 1915, Decided on 18th January 1918, from appellate decree of Sub-Judge, Burdwan, D/- 23rd July 1915.

Limitation Act (9 of 1908), Art. 142—Possession obtained by force counts in favour of true owner in suit for recovery of possession on establishment of title.

Possession of the true owner however obtained counts in his favour for the purposes of Art. 142 in a suit brought by him for recovery of possession on establishment of title. [P 49 C 1]

The plaintiffs, having been dispossessed by the defendants of certain lands belonging to them, succeeded in ousting the latter therefrom and retained possession until they were evicted under a decree in a suit brought by the defendants under S. 9, Specific Relief Act:

Held: that time began to run against the plaintiffs from the moment they were evicted in execution of the decree under the Specific Relief Act, and not before. [P 49 C 1]

Sib Chandra Palit—for Appellants.

Amulya Charan Bhuttacharjee for *Mritunjoy Chatterjee*—for Respondents.

Judgment.—This is an appeal from the judgment and decree of the Subordinate Judge of Burdwan, dated 23rd July 1915, confirming the decree of the Munsif of Katwa, dated 30th June 1914. The suit is a suit in ejectment and both the Courts below have found that the plaintiffs have a good title to the land which they claim but that the suit is

barred by limitation inasmuch as it was not instituted within 12 years of the date on which they were dispossessed. The findings of the Courts below are findings of fact and we are unable to interfere with them except so far as they are vitiated by error of law. There is only one point in the case. In respect of a portion of the disputed land it appears that while the defendants were in possession the plaintiff succeeded in ousting them. The defendants thereupon brought a suit under S. 9, Specific Relief Act, to recover possession from the plaintiffs. It is admitted by the written statement of the defendants that in the interval, until the defendants recovered under the Specific Relief Act, the plaintiffs were in possession of this portion of the land. That being so it is clear on the face of the record that on the question of dispossession the Courts below have overlooked the fact that possession by the true owner however obtained counts in his favour for the purpose of Art. 142, Limitation Act. The appeal therefore succeeds to this extent.

The result is that this appeal is allowed in part, the decree of the Court below will be modified and the suit dismissed except in so far as it relates to the portion of the disputed land covered by the decree in the suit under the Specific Relief Act. As regards that portion the suit will be decreed. The plaintiffs do not appear to have made this point effectively in the Courts below and we therefore make no order as to costs.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1918 Calcutta 49 (1)

FLETCHER AND SHAMSUL HUDA, JJ.

Akrurmani Baisnabi — Defendant — Appellant.

v.

Madhab Chandra Chakrabarty and *others*—Respondents.

Appeal No. 2728 of 1916, Decided on 5th June 1918, from appellate decree of Dist. Judge, Rangpur, D/- 23rd August 1916.

Transfer of Property Act (1882), S. 108 (j) —Original lessee is liable for rent—He cannot plead willingness of his transferee to pay it.

Under S. 108, Clause (j), the liability of a lessee to pay rent continues even after he has parted with his interest in the lease, and it is no answer to a suit for rent that the transferee from the lessee is willing to pay the rent. [P 49 C 2]

Girija Prasanna Sanyal—for Appellant.

Atul Chandra Gupta—for Respondents.

Fletcher, J.—This appeal must stand dismissed. The suit was a suit for rent against the original lessee of a property to which the provisions of the Transfer of Property Act apply. The liability of the original lessee who has transferred the land is contractual; that liability subsists under the provisions of S. 108 (j), T. P. Act, notwithstanding that defendant 1 has parted with her interest in the leasehold property. Then, the next point is this: It is said that the Munsif found that the interest granted by the lease was perpetual, The learned District Judge says it was unnecessary to make such a finding for the decision of the case. I agree with the learned District Judge. Not only it was unnecessary but it was improper after defendant 1 had parted with her interest to adjudicate on what was the nature of the lease granted in the absence of the transferee. All that the learned Judge had to adjudicate on and did adjudicate on was that the lease was subsisting at the time the present suit was brought. The appeal is accordingly dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 49 (2)

FLETCHER AND SHAMSUL HUDA, JJ.

Baliram Koch—Appellant.

v.

Sabha Sheikh—Respondent.

Appeal No. 1076 of 1915, Decided on 31st January 1918.

Limitation Act (1908), S. 20—Endorsement of part payment of principal, not signed by payer does not save limitation.

An endorsement of a part-payment of the principal written on the back of a bond on behalf of the person making the payment, but not signed by the payer or bearing his mark, does not operate to save limitation under S. 20. [P 50 C 1]

Jogesh Chandra Roy and *Anilendra. nath Roy Choudhury*—for Appellant.

Lal Mohan Ghose for *N. C. Burdalois* —for Respondent.

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of the Assam Valley District, dated 16th February 1915, reversing the decision of the Munsif of Mangaldai. The plaintiff brought the suit to recover a certain sum of money said to be due on a simple money-bond

dated 8th February 1908. The suit was instituted on 23rd January 1915. In order to show that his suit was not barred under the provisions of the Limitation Act, the plaintiff relied upon a part-payment of the principal said to have been made on 24th January 1910 and evidenced by an endorsement in writing on the back of the bond. The ground on which the learned Judge decided the case was that the endorsement of the fact of part-payment of the principal on the back of the bond was not signed by the person making the payment, that is, the defendant, nor did it bear his mark, he being illiterate. It is quite clear on the evidence that the defendant could not write and that the endorsement was written by another man for him. It is quite clear also that he did not make any mark on the back of the bond, because we have looked at the bond and the learned Judge was right in saying that there was no sign of any mark to the endorsement. The question what is a sufficient handwriting of the person making the payment within the meaning of the proviso to S. 20, sub-S. (1), Limitation Act, has formed the subject-matter of judicial decisions and the latest case, so far as we have been referred to, is a decision of Jenkins C. J. and Aston, J. of the Bombay High Court [*Jamna* v. *Jaga Bhana* (1)] and the view adopted by the learned Judges in that case was that, if the payer affixed his mark beneath the endorsement written for him in the case of an illiterate person, that was a sufficient handwriting to satisfy the proviso to S. 20, sub-S. (1), Limitation Act. There is no case that has ever yet suggested that, in the absence of mark, the clear words of the section requiring the payment and the handwriting to be made by one and the same person are complied with. I think the learned Judge of the lower Appellate Court came to a correct conclusion when he held that, on the facts found, the fact of the payment did not appear in the handwriting of the defendant. In that view, the judgment appealed from is correct. The present appeal, therefore, fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(1) [1904] 28 Bom. 262.

A. I. R. 1918 Calcutta 50

RICHARDSON AND SHAMSUL HUDA, JJ

Jalaluddin Peshawari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn., No. 524 of 1918, Decided on 17th July 1918 against order of Chief Presidency Magistrate, Calcutta.

Bengal Excise Act (5 of 1909), Ss. 46 and 83 (a)—Offence under S. 46—Complaint by Police Officer below rank of Officer in charge of Police Station is illegal—Magistrate's proceedings are void under Criminal P. C., S. 530. (p).

On the report of a Junior Sub-Inspector of Police below the rank of an officer-in-charge of a Police Station, a Magistrate took cognizance of a case under S. 46 of the Bengal Excise Act and convicted the offender.

Held, (1) that the Magistrate's proceedings were void under Cl. (p), S. 530, Criminal P. C., inasmuch as he was debarred by S. 83 (a) of the Bengal Excise Act from taking cognizance of the case on such a report or complaint;

(2) that the defect in the proceedings was not a mere irregularity to which S. 537, Criminal P. C., applied, as that section presupposed a trial by a Court of competent jurisdiction. [P 51 C 2]

Langford James, Manoj Mohan Bose, Manmohan Bose and *J. M. Mitra*—for Petitioner.

Orr—for the Crown.

Judgment.— This Rule was issued on the Chief Presidency Magistrate of Calcutta to show cause why the conviction of the petitioner and the sentence passed upon him should not be set aside on the ground specified as ground (c) in the petition. Ground (c) is in these terms:

"For that the whole trial was irregular and invalid inasmuch as the junior officer Mr. R. K. Mukerjee was not legally competent to send up this case to the Magistrate."

The petitioner, it appears, has been convicted and sentenced under S. 46 of the Bengal Excise Act, 1909. Clause (a) S. 83 of the Act, lays down that no Magistrate shall take cognizance of an offence referred to in S. 46 except on his own knowledge or suspicion, or on the complaint or report of an Excise officer or an officer empowered in this behalf by the Local Government. Now, the only complaint or report which we can find in this case is the document marked Ex A. The heading is "Report of serious case of section E. Town on the 10th day of April 1918." The document purports to be signed by R. K. Mukerjee. In the first column the name of Sub-Inspector R. K. Mukerjee appears again as the name of the complainant. It may be

that Sub-Inspector R. K. Mukerjee had been authorised by one of his superior officers to make this complaint or report, but we can see no reason for saying that the case was not instituted by the report or complaint made by him or that the Magistrate did not take cognizance of the case on that report or complaint. The Sub.Inspector is not an Excise Officer and the question therefore is whether he was "an officer empowered in this behalf by the Local Government" within the meaning of S. 83 (a). Turning to Chap. 10, Vol. 2, Excise Manual, we find a number of rules or instructions issued by the Board of Revenue. Rule 18 refers to S. 83 (a) and states that the officers empowered by the Local Government are Police Officers not below the rank of officers-in-charge of a Police Station. The rule quotes a Government notification which was not placed before us, and there is no reason for supposing that the effect of the notification is not accurately reproduced. There is no definition of "officer-in-charge of a Police Station" in the Excise Act but the term is defined in the Criminal Procedure Code [section 4 (*h*)].

In the present case in our opinion Sub-Inspector R. K. Mukerjee was an officer below the rank of an officer-in-charge of a Police Station. He was a Sub-Inspector attached to the Jorasanko Police Station, but at all material times he appears to have been subordinate to Sub-Inspector Masud Hossein who was the officer-in-charge of the Station. The mere fact that both officers were Sub-Inspectors is not sufficient. Mr. Orr, appearing for the Crown, has urged that this objection to the trial was not taken in the Court below until the evidence had all been recorded. But it was taken at that stage and it was open to the Magistrate then to take additional evidence, if there was any doubt as to a question of fact on which his jurisdiction depended. He did not take that step. Apparently he had no doubt as to the facts and no suggestion seems to have been made that the facts were not as we have stated them. He seems to have thought that he had no power to quash the whole proceedings. He had power however if it was shown to him that the proceedings had not been legally instituted and that he had no jurisdiction to hear the case, to acquit the accused on that ground. The defect was not a mere irregularity to which S. 537, Criminal P. C., applies. Apart from anything else, that section presupposes a trial by a Court of competent jurisdiction. Here the Magistrate's proceedings are void under Cl. (*p*), S. 530. He had tried an offender whom he was not empowered to try. In the circumstances he was debarred by the Act from taking cognizance of the case.

We may mention that this is the second time within a few days in which the authority of a Police Officer to make a complaint or report under S. 83 (a) of the Bengal Excise Act has been brought in question before us, and we are of opinion that in such cases the complaint or report should show on its face that it is made by some officer who has the requisite authority. The result is that this Rule is made absolute and the conviction and sentence are set aside on the ground that the Magistrate's proceedings are void. The petitioner will be discharged from his bail-bond.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 51

MOOKERJEE AND BEACHCROFT, JJ.

Makund Singh and *others*—Decree-holders—Appellants.

v.

Saraswati Bibi and *others*—Judgment-debtors—Respondents.

Appeals Nos. 2 and 10 of 1910, Decided on 17th December 1912, against orders of Sub-Judge, Monghyr, D/- 6th October 1909.

(a) Civil P. C. (1908), S. 11—Execution—Question decided at one stage is conclusive and cannot be re-agitated in subsequent stages.

A decree directed that if possession of the property in dispute was delivered by the defendants to the plaintiffs within one month from the date thereof, the defendants would not be held liable for mesne profits, but that if possession was not so delivered, the defendants would be liable for mesne profits for the period antecedent to and during the pendency of the suit. The decree also contained a direction that in the event of ascertainment of mesne profits the shares of the parties would be first determined and possession would be delivered according to the shares so calculated. The decree-holders applied for execution of their decree, asking for delivery of possession and stating that an application for ascertainment of mesne profits would be made separately. In answer to this application the judgment-debtors objected that possession had already been delivered by them to the decree-holders. The Court investigated the question in controversy and came to the conclusion that possession had not been delivered. The extent of the shares of the

parties was determined and possession was delivered accordingly. Subsequently, the plaintiffs applied for ascertainment of mesne profits, whereupon the judgment-debtors objected that mesne profits could not be claimed as possession had been delivered within one month from the date of the decree.

Held: that the question whether or not possession had been delivered was directly and substantially in issue between the parties in the previous application for execution, and that the decision thereon must be deemed to be conclusive between them at all subsequent stages of the execution proceedings. [P 52 C 2]

(b) Civil P. C. (1908), O. 22, R. 3—**Decree for possession with mesne profits against *A*, *B* and *S*—*S* dying leaving three infants—Appeal decided in favour of appellants—Second appeal—All appellants in lower Court made respondents, but appeal as against two minors dismissed for non-prosecution — Appeal should not fail in its entirety.**

A decree for possession with mesne profits was obtained against three persons *B*, *A* and *S*. *S* died leaving as his representatives three infant sons. In an appeal against the decree the appellate Court decided in favour of the appellants. In second appeal all the appellants in the lower appellate Court were made respondents, but the second appeal against two of the minors was dismissed for want of prosecution.

Held: that the appeal should not fail in its entirety and that the whole claim for mesne profits should not be dismissed and that it was still open to the decree-holder to obtain a decree, as against the judgment-debtors other than the two minors against whom the appeal had been dismissed, in respect of what would be their share of the mesne profits. [P 53 C 2]

Karunamoyee Bose for *Khetra Mohan Sen*—for Appellants.

Dwarka Nath Chuckerbutty and *Harihar Prosad Singh*—for Respondents.

Judgment.—This appeal is directed against an order in a proceeding for assessment of mesne profits. The appellants, who were plaintiffs in the original suit, obtained a decree in the primary Court, on 30th June 1902, for recovery of possession and mesne profits. This decree was affirmed by this Court on 14th June 1905. The decree directed that if possession was delivered by the defendants to the plaintiffs within one month from the date thereof, the defendants would not be held liable for mesne profits; but if possession was not so delivered, the defendants would be liable for mesne profits for the period antecedent to and during the pendency of the suit. The decree also contained a direction that in the event of ascertainment of mesne profits, the shares of the parties would be first determined and possession would be delivered according to the shares so calculated. The case for the appellants is that possession was not amicably delivered, and on 13th December 1905 they applied for execution of the decree. In this application, they prayed that the shares of the plaintiffs and defendants might be determined and that joint possession might be delivered in accordance with the result of this inquiry; it was further stated that an application for ascertainment of mesne profits would be made separately. In answer to this application, the judgment debtors objected that possession had already been delivered by them to the decree-holders. The Court investigated the question in controversy and came to the conclusion that possession had not been delivered. The extent of the shares of the parties was determined and possession delivered accordingly. This order was made on 26th May 1906. On 20th May 1909, the plaintiffs applied for ascertainment of mesne profits.

The judgment-debtors objected that mesne profits could not be claimed as possession had been delivered within one month from the date of the decree. The Subordinate Judge has now found that possession was delivered as alleged. On the present appeal by the decree-holders, it has been contended that the matter is concluded by the order of 26th May 1906. On behalf of the respondents it has been argued that the question is open for consideration, inasmuch as the question now under discussion, namely, the amount of mesne profits payable by the defendants to the plaintiffs, was not before the Court on the application of 13th December 1905. In our opinion, there is no room for serious discussion that the rights of the parties must be taken to have been determined by the order of 26th May 1906. It is true that mesne profits were not claimed in the application of 13th December 1905, but possession was demanded by the decree-holders. This application was resisted by the defendants on the ground that possession had been previously amicably delivered by them. The Court was therefore invited by the parties to determine whether or not possession had been delivered. The question was directly and substantially in issue between the parties and the decision thereon must be deemed conclusive between them at all subsequent stages of the execution proceedings: *Mungal Per-*

shad v. *Grija Kant* (1), *Ram Kirpal* v. *Rup Kuari* (2) and *Beni Ram* v. *Nanhu Mal* (3). We hold accordingly that possession was not delivered as alleged by the defendants and that their liability to pay mesne profits must be determined on the basis of the order of 26th May 1906.

The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the case remanded to him in order that the amount of mesne profits may be calculated. The appellants are entitled to their costs both in this Court and in the Courts below. We assess the hearing-fee in this Court at two gold mohurs. A difficulty however has arisen, to which we must now advert. The decree for possession was obtained against three persons, Bolakilal, Abdulla Yunus and Sital Prosad. Sital Prosad subsequently died and left as his representatives three infant sons. The order of the Court below was made in favour of all these persons, and, in the present appeal, not only the widow of Bolakilal and Abdulla Yunus, but also the three infant sons of Sital Prosad were joined as respondents. These infants had been represented in the Court below by one of the officers in the Court of the District Judge as their guardian ad litem. In this Court, that officer has been discharged and the Deputy Registrar appointed guardian ad litem. The appellants were directed to deposit the prescribed costs for the appointment of a vakil on behalf of the Deputy Registrar, and to file the usual indemnity bond. This order they failed to carry out, and as a consequence, on 14th June 1912, the appeal was dismissed in so far as the minors were concerned. Before this order was made, it had been held on 27th July 1910 that one of the sons of Sital Prosad, Gobindo Prosad by name, had attained majority. The order of dismissal of 14th June 1912 would consequently apply to two of the three infant sons of Sital Prosad, namely, Hari Prosad and Giaya Prosad. It is plain that in so far as they are concerned, the order of the Subordinate Judge cannot be disturbed. This raises the question whether the appellants are entitled to any relief, and, if so, what.

The appellants have argued that it is immaterial that the appeal has already been dismissed as against the two infant sons of Sital Prosad, and, that it is still open to them to obtain a decree for the entire mesne profits against the widow of Bolakilal, Abdulla Yunus and the major son of Sital Prosad. In our opinion, this view cannot possibly be supported. Nor can we accept the extreme contention of the judgment-debtors that the appeal should fail in its entirety, and the whole claim for mesne profits be dismissed. The position is precisely the same as if the decree-holders had entered into a compromise with two of the three sons of Sital Prosad and released them from liability. In that event, the decree-holders would still be entitled to obtain a decree as against the three judgment-debtors in respect of what would be their share of the mesne profits. This is clear from the decision of this Court in *Ram Ratan Kapali* v. *Aswini Kumar Dutt* (4). We accordingly direct the Subordinate Judge to assess mesne profits on the basis of the order of 26th May 1906; but the amount will be calculated only in respect of the shares of Bolakilal and Abdulla Yunus and a third share of Sital Prosad. The Subordinate Judge will be at liberty to take evidence to enable him to determine the respective shares of the judgment-debtors; if no evidence is given, the presumption will be that the original judgment-debtors were liable in equal shares. It is conceded that this order will govern the other appeal (Miscellaneous Appeal No. 10 of 1910); but there will be no separate order for costs.

V.B./R.K. *Appeals allowed.*

(1) [1882] 8 Cal. 5=8 I. A. 123 (P.C.).
(2) [1884] 6 All. 269=11 I. A. 57 (P.C.).
(3) [1885] 7 All. 102=11 I. A. 181 (P.C.).
(4) [1910] 37 Cal. 559=6 I. C. 60.

A. I. R. 1918 Calcutta 53

FLETCHER AND SHAMSUL HUDA, JJ.

Iswar Chandra Kapali—Defendant—Appellant.

v.

Arjan and *another*—Plaintiffs—Respondents.

Appeal No. 606 of 1916, Decided on 12th March 1918, from appellate decree of Dist. Judge, Mymensingh, D/- 30th April 1915.

(a) Practice — Ex parte hearing — Party making ex parte application must call attention of Court to matters for and against — Order extending time for filing appeal can be cancelled by same Court — Limitation Act (9 of 1908), S. 5.

When an ex parte application is made, it is the duty of the party making the application to

call the attention of the Judge not only to the portion of the law or authority in favour of his case but also to the matters that are against him. [P 54 C 2]

On an ex parte application made to the District Judge, asking him under the provisions of S. 5, Lim. Act, to extend the time for filing an appeal and to give the appellant time for the purpose of paying the court fees, the Judge made an order that time would be extended. But subsequently and before the memo of appeal had in fact been admitted, he re-considered his order and revoked it:

Held: that the Judge had ample authority under the law to revoke or alter his previous order at any time before the appeal was admitted. [P 54 C 2]

(b) Limitation Act, (1908), S 5—Sufficient cause—Mistake of legal adviser — Proof of bona fide mistake must be furnished.

Before an extension of time can be granted under S. 5 on the ground that the appeal has been filed beyond time owing to a mistake made by the legal adviser of the appellant, there must be proper evidence establishing that mistake was committed and that it was a bona fide one. [P 55 C 1]

(c) Civil P. C. (1908), S 2 (2)—Order refusing to admit appeal whether decree—Quaere.

Whether an order refusing to admit an appeal filed out of time is a decree within the meaning of the Civil Procedure Code. [P 54 C 1]

Birendra Kumar De—for Appellant.

Chandra Kant Ghose and *Nilkant Ghose*—for Respondents.

Fletcher, J.—This is an appeal by defendant 1 against the decision of the learned District Judge of Mymensingh, dated 30th April 1915. The appeal is preferred against an order refusing to admit an appeal out of time. It is said that it is a decree under the terms of the Civil Procedure Code and is therefore, appealable. I will assume for the purposes of this case that it is so. There may be some other cases in which there may be arguments for considering whether or not that is a decree within the meaning of the Civil Procedure Code. Now what happened in this case was this. We are told that there was a conflict of legal opinion on this important case. There was a consultation amongst the pleaders practising in the Munsif's Court as to the course the plaintiff should adopt under the law. That opinion did not however agree with a similar consultation that took place amongst the pleaders practising in the Court of the District Judge and the appellant before us admittedly allowed the time to expire within which he had to prefer his appeal. On 27th April 1915, an ex parte application was made to the District Judge asking him under the provisions of S. 5, Lim. Act, to extend the time for appealing and to give the appellant time for the purpose of paying the court-fee. Now it is a well-established rule in all Courts that when an ex parte application is made, it is the duty of the party making the application to call the attention of the Judge not only to the portion of the law or authority in favour of his case but also to the matters that are against him and apparently, as far as one can gather from the records of this case, the attention of the learned Judge was not called to the provisions of S. 28, Court-fees Act and the Judge on his order sheet made the order that time would be extended. Subsequently the learned Judge discovered that under the Court-fees Act, the court-fee ought ordinarily to be paid on a plaint or memorandum of appeal before such plaint or memorandum of appeal is admitted. It is said that the learned Judge was wrong because S. 149, Civil P. C., is opposed to that view. But so far as appears from the order sheet, the pleader for the appellant did not call the learned Judge's attention to S. 149, Civil P. C., and the learned Judge clearly did not exercise any discretion that he had under S. 149. That being so the learned Judge said that the matter must be heard again. It is said that the learned Judge having discharged his duties on 27th April 1915 was incompetent to interfere with his order made on that date. With that I do not agree. The memorandum of appeal had not in fact, been admitted and the Judge had obviously power to revoke or alter that order at any time before the appeal was admitted. It seems to me that there cannot be the slightest doubt that the Judge had ample authority in this case to reconsider his order of 27th April 1915 when the matter was pointed out to him.

Then the next point is that the Court has not properly considered the case under S. 5, Lim. Act, and that the Judge has not taken into consideration any of the facts. There are a number of decisions now on this point and these authorities turn upon the mistake of the legal adviser. Take the case reported as *Rakhal Chandra* v. *Ashutash Ghosh* (1). There the appeal was sought to be admitted on the mistake of the pleader.

(1) [1913] 19 I. C. 931.

But in these cases we find that the legal adviser never comes forward and states that he made the mistake but somebody else pledges his oath for another and says that the legal adviser made the mistake. As a matter of fact I understand that in this case the legal adviser has not made any affidavit stating that he made the mistake and ordinarily, before a Court can act upon a statement that a gentleman made a mistake, there ought to be proper evidence establishing the fact that a mistake had been committed and that it was bona fide on. In this case that has not been established nor do I think there is any ground for interfering with the discretion exercised by the learned District Judge. It is said that it is not shown on what grounds the learned Judge exercised his discretion. The answer is that it is not shown in this appeal that there are grounds on which we are entitled to interfere with the exercise of that discretion. I see no reason in a case of this nature to interfere with the order passed by the learned District Judge. The appeal fails and is dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 55

MOOKERJEE AND CARNDUFF, JJ.

Misri Sahu—Plaintiff—Appellant.

v.

Vishnu Nath Sahu—Defendant—Respondent.

Appeal No. 1280 of 1910, Decided on 2nd January 1912, against decree of Dist. Judge, Durbhanga, D/- 12th February 1910.

(a) Civil P. C. (1908), S. 151—Appellate Court can remand case under S. 151.

A Court of appeal is competent to remand a case for re-trial under circumstances not mentioned in R. 23, O. 41 of the Code, where the ends of justice require this to be done.

[P 56 C 1]

(b) Civil P. C. (1908), S. 151—Appeal preferred by infant not represented by guardian ad litem is not competent—High Court can however under S. 151 make order necessary to meet ends of justice.

An appeal preferred by an infant not represented by a guardian ad litem cannot be entertained, but in such a case the High Court will exercise its powers under S. 151 and make such order as is necessary for the ends of justice.

[P 55 C 2, P 56 C 1]

Lakshminarayan—for Appellant.

Judgment.—This is an appeal on behalf of the plaintiff in a suit to enforce a mortgage security alleged to have been executed by the defendant in his favour on 14th May 1907. The suit was commenced on 15th June 1908. Amongst other defences the defendant urged that he was an infant at the time when the transaction took place. The Court found upon the evidence that the defendant was born on 17th August 1892 and that a guardian of his person and property had been appointed under the Guardians and Wards Act so that the defendant could not attain majority till 17th August 1913. Notwithstanding this finding, the Court heard the case on the merits and made a decree against the defendant though he was not represented by a guardian ad litem. The defendant appealed to the District Judge and although according to his own contention which had been accepted as well-founded by the original Court he was an infant, he preferred the appeal himself as if he was sui juris. No objection was taken by the plaintiff-respondent that the appeal was not properly constituted; on the other hand the plaintiff attacked the finding of the primary Court as to the date of birth of the defendant. Upon that point his contention failed and the District Judge affirmed the finding of the first Court. The District Judge then proceeded to hold that the suit was improperly constituted because the defendant, an infant, was not represented by a guardian ad litem; but he held that he had no authority to remand the case under R. 23, O. 41 of the Code of 1908, inasmuch as the suit had not been decided in the Court of first instance upon a preliminary point. The Judge thereupon allowed the appeal and dismissed the suit.

The plaintiff has now appealed to this Court and on his behalf it has been contended that the appeal before the District Judge was incompetent because it had been preferred by an infant not represented by a guardian ad litem. The learned vakil for the appellant has however conceded that if his contention is well-founded, the present appeal must also be treated as incompetent because he has not taken any steps to have the respondent represented by a guardian for the purposes of his appeal, though according to the concurrent findings of the Courts below the defendant-respondent is still an infant. Under these circumstances we have to exercise our powers under

S. 151 of the Code and to make such order as is necessary for the ends of justice. It is clear, in our opinion, that the learned Judge took a restricted view of his powers as a Court of appeal. No doubt it has been held by this Court in the case of *Abdul Karim* v. *Fayez Buksh* (1) that a Court of appeal is competent to make an order of remand only when the conditions mentioned in R. 23, O. 41, are fulfilled. We are however not prepared to accept that view as sound. S. 564 of the Code of 1882, which restricted the powers of an appellate Court to remand a case, is not reproduced in the Code of 1908 and as already explained by this Court in the case of *Tohra Bibi* v *Zabeda Khatoon* (2), it is competent to a Court of appeal to remand a case under circumstances not mentioned in R. 23, O. 41, where the ends of justice require that the case should be retried. In the case before us the proceedings have been throughout irregular, and the only course which the Court can possibly pursue is to discharge the decrees of both the Courts below and to remand the case to the Court of first instance. The plaintiff will be at liberty to take steps for the appointment of a guardian ad litem for the defendant. When he has done so, the suit will be tried out on the merits. There will be no order for costs as the respondent is not represented before us.

V.B./R.K. *Case remanded.*

(1) [1911] 9 I. C. 224.
(2) [1910] 7 I. C. 75.

A. I. R. 1918 Calcutta 56

MOOKERJEE AND BEACHCROFT, JJ.

Umesh Chandra De—Plaintiff—Appellant.

v.

Jakhomal Mehera—Defendant—Respondent.

Appeal No. 3157 of 1912, Decided on 13th May 1913, from appellate decree of Dist. Judge, Burdwan, D/- 9th August 1912.

Contract Act (1872), S. 69 — Arrears of rent due by patnidar to zamindar paid by dar-patnidar and he entered possession in 1862 —Possession formally terminated in 1899— Suit by patnidar in 1901 for rent against dar-patnidar—During pendency of suit dar-patnidar paying rent on behalf of patnidar—Suit by dar-patnidar to realize these sums after allowing defendant putnidar credit for rents payable by him as dar-patnidar— Dar-patnidar is entitled to decree — His claim cannot be postponed merely because account is not taken of his possession from 1862 as such claim if put forward can be met by plea of limitation.

A dar-patnidar paying up the arrears of rent due by the patnidar to the zamindar came into possession of the p tni under Cl (4), S. 13, Patni Regulation of 1819 on 17th November 1862. He continued in possession for many years. It was not till 7th August 1899 that his possession was formally terminated. On 1st February 1901 the patnidar instituted a suit for rent against the dar-patnidar for the period between May 1895 and January 1901. During the pendency of this litigation the patnidar repeatedly made defaults in payment of rent and the dar-patnidar had to satisfy the demand of the superior landlord on seven successive occasions from 4th November 1905 to 15th November 1908. The dar-patnidar then brought a suit to realize these sums after allowing the defendant patnidar credit for the rents payable by him as dar-patnidar during the period :

Held : (1) that as the payments made by the plaintiff benefited the defendant, the plaintiff was entitled to a decree ; (2) that the claim of the plaintiff could not be postponed merely because accounts had not been taken of the possession of the plaintiff from 17th November 1862, inasmuch as if a claim were now put forward for an account of this period, it would be successfully met by the plea of limitation. [P 57 C 2]

Mahendra Nath Ray and *Hira Lal Sanyal*—for Appellant.

Ram Chandra Mojumdar and *Nagendra Nath Sen*—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of money paid by him for the benefit of the defendants. The circumstances under which the payments have been made are not disputed. The defendants on 6th May 1895 acquired a putni taluk created on 17th February 1811. The plaintiff is the owner of a dar-patni of four out of the five villages comprised in the patni. This dar-patni was created on 16th May 1862. Shortly after the creation of the dar-patni the patnidar made default in the payment of rent to the superior landlord, The dar patnidar thereupon paid up the arrears and on 17th November 1862 came into possession under Cl. (4), S. 13, Patni Regulation of 1819. The dar-patnidar continued in possession for many years. Indeed, it was not till 7th August 1899 that his possession was formally terminated. On 1st February 1901 the patnidar instituted a suit for rent against the dar-patnidar for the period between May 1895 and January 1901. It was stated in the plaint of this suit that possession of the dar-patnidar as usufructuary lienholder under the regulation had terminated on 7th August 1899. It is clear

however that as rent was claimed from 1895, the case for the putnidar must have been that the lien had ceased to exist at least from that date. On any other theory it would be impossible to substantiate the claim for rent from the dar-patnidar, because it has not been and cannot be disputed that so long as the dar-patnidar lawfully remained in possession as lien-holder he was not liable to pay rent to the putnidar.

This suit was decreed by the Subordinate Judge in part and that decree was ultimately affirmed on appeal by this Court on 7th April 1908 : *Jakhomull* v. *Saroda Prosad Dey* (1). During the pendency of this litigation the patnidar repeatedly made default in payment of rent. The consequence was that the present plaintiff (the dar-patnidar) was driven to satisfy the demand of the superior landlord on seven successive occasions from 4th November 1905 to 15th November 1908. The plaintiff now seeks to realize these sums ; but he has very properly allowed the defendants credit for the rent payable by him as dar-patnidar during this period. The Court of first instance decreed the claim in part. Upon appeal the District Judge has reversed that decision. He has held, first, that the plaintiff claims to be in possession during these years as usufructuary lien-holder and he must consequently be deemed to have made the payments for the protection of his alleged lien ; and secondly, that if accounts are taken from 17th November 1862 when the dar-putnidar came into possession upon payment of the dues of the superior landlord up to the date when his possession actually terminated, a large sum would probably be found to be due to the putnidar, and that till this account has been taken the plaintiff should not be allowed to recover sums paid by him to save the patni In our opinion, there is no foundation for either of these propositions.

In so far as ground 1 is concerned, it is clear that the plaintiff did not claim to be in occupation as usufructuary lien-holder during the years 1905 to 1908. As already stated, the case for the putnidar in the previous suit for rent was that possession of the dar-patnidar as lien-holder had ceased on 7th August 1899. In fact, the suit was founded on the theory that possession had been terminated at least as early as 1895. That allegation was not repudiated by the defendant. The defendant stated that a large sum of money was due to him on account of the payment made by him to the superior landlord on 17th November 1862, and he made a grievance that as this large sum was still due to him, he could not be held responsible for the payment of rent. But there was no allegation on his part that he was actually in occupation as a lien-holder. Under these circumstances it is impossible for us to hold that the present plaintiff may regularly be deemed to have made successive payments to the superior landlord for the protection of his alleged lien. Consequently the principle of the decision in the case of *Jinnat Ali* v. *Fateh Ali* (2), upon which the District Judge relies, cannot apply. The payments were made by the plaintiff in his character as dar-patnidar and there is no question that the defendant as putnidar has profited by the payments.

In so far as ground 2 is concerned, it is clear that the claim of the plaintiff cannot be postponed merely because accounts have not been taken of the possession of the plaintiff from 17th November 1862. It is plain that if a claim were now to be put forward for an account of this period, it would be successfully met by the plea of limitation. It is also clear that during this long series of years the putnidar has not put forward a claim for recovery of any excess amount which might have been realized by the dar-patnidar. The grounds assigned by the District Judge in support of his judgment therefore cannot be supported. The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Courts below.

V.B./R.K. *Appeal allowed.*

(1) [1908] 7 C. L. J. 604.

(2) [1911] 9 I. C. 219.

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CHITTY AND WALMSLEY, JJ.

Kamal Baidya and *another*—Defendants—Appellants.

v.

Ganesh Chandra Biswas and *others*—Plaintiffs—Respondents.

Appeal No. 2305 of 1916, Decided on 17th June 1918, from appellate decree of Sub-Judge, 24-pergannahs, D/- 3rd August 1916.

Bengal Tenancy Act (1885), S. 182—Homestead—Mere occupation for more than twelve years does not make occupier settled raiyat.

Before a person can become a settled raiyat of a village he must be a raiyat. Mere occupation of a homestead in a village for more than 12 years would not make the occupier a settled raiyat of the village. [P 58 C 1]

Probodh Chandra Roy — for Appellants.

Surendra Chandra Sen and *Hem Chunder Sen*—for Respondents.

Judgment.—This was a suit in ejectment, and the only question was whether the defendants had acquired occupancy rights in the land which would protect them from eviction. The lower appellate Court found that though the defendants had a homestead in the village for over 30 years, they had no land in the village other than the land on which they entered under the kabuliyat in 1903 and that therefore they had not acquired any such rights. Before they could become settled raiyats in the village they would have to be raiyats, and that they entirely failed to prove. S. 182, Ben. Ten. Act does not help the appellants. The appeal must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 58

MOOKERJEE AND CARNDUFF, JJ.

A. Whyte—Appellant.

v.

Bhairab Maji—Respondent.

Appeals Nos. 869 and 1068 of 1909, Decided on 7th July 1911, against appellate decree of Sub-Judge, Burdwan, D/- 27th January 1908.

Contract Act (1872), S. 15—Suit for rent on basis of kabuliyat resisted on plea of coercion—Defendant is bound by terms unless he proves his allegation.

Where a suit for rent upon a kabuliyat is resisted by the defendant on the ground that the kabuliyat, having been obtained from him by coercion, is not binding on him, it is for him to prove his allegation and, unless he does so, he is bound by the terms of the kabuliyat. In such a case it is not for the plaintiff to prove the inception of the tenancy, the area of the land demised and the rent payable by the defendant. [P 58 C 2; P 59 C 1]

Umakali Mukherjee and *Khetter Mohan Sen*—for Appellant.

Surendra Nath Ghoshal—for Respondent.

Mookerjee, J.—This an appeal on behalf of the plaintiff in a suit for rent. The case for the plaintiff is that the defendant on 13th August 1889 executed a kabuliyat in his favour, in which he admitted that he held 7 bighas 15 cottahs of land measured with a rashi of 18 inches a cubit at the annual rental of Rs. 12.3.0. He further agreed that if any excess land was found in his possession, he would pay rent thereof in addition to the aforesaid rental without any objection and neither he nor his heirs would raise any objection thereto. The plaintiff now seeks to recover rent at the rate mentioned in the kabuliyat and also additional rent for excess land, which he alleges is in the occupation of the tenant. The tenant resists the claim on two grounds, namely, first, that the kabuliyat was obtained from him by coercion and was not binding on him; and secondly, that there was no excess land in his possession for which he was liable to pay additional rent.

The Courts below have dismissed the suit on the authority of the decision in the case of *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1). The Subordinate Judge has held that inspite of this contract between the parties it was necessary for the plaintiff to prove the inception of the tenancy and to establish to the satisfaction of the Court the quantity of land and the rent payable by the defendant at that time. He has further held that as the plaintiff has failed to discharge the onus which lay upon him his suit must fail in so far as the claim relates to excess land. In our opinion this view cannot possibly be supported. The Subordinate Judge has misunderstood the decision of this Court on which he has placed reliance. In that case there was no written contract between the parties, the terms of the tenancy were not known with certainty, and the origin of the tenancy had not been established. There was an entry in the rent receipts to the effect that the rent was paid in respect of an area mentioned. Under these circumstances, the Court held that the plaintiff had failed to prove that there was really any excess land in the possession of the defendant for which he was liable to pay rent. In the case before us, unless the allegation of the defendant as to the circumstances under which the kabuliyat was obtained from him are established he is bound by its terms and the kabuliyat shows conclusively that he

(1) [1907] 5 C. L. J. 538.

held 7 bighas and 15 cottahs of land measured according to a rashi of 18 inches to the cubit at an annual rental of Rs. 12-3-0. If, upon measurement according to the same standard, it is now established that he holds more than 7 bighas and 15 cottahs of land, he is obviously bound to pay additional rent for the excess area.

The result therefore is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that he may raise an issue as to the circumstances under which the kabuliyat was obtained by the plaintiff from the defendant. As the question does not appear to have been properly appreciated at the original trial, the parties will be at liberty to adduce additional evidence, such evidence to be taken by the Subordinate Judge himself or under his direction by the Court of first instance. If the Subordinate Judge finds that the kabuliyat is binding upon the defendant, additional evidence will have to be taken to determine the area now in the occupation of the defendant. The costs of this appeal will abide the result. It is conceded that this judgment will govern the other case (Second Appeal No. 1068 of 1909) which will also be remanded, and the costs will abide the result.

V.B./R.K. *Appeals allowed.*

A. I. R. 1918 Calcutta 59

MOOKERJEE AND CARNDUFF, JJ.

Ram Lal Dubey — Plaintiff — Appellant.

v.

Secy. of State—Defendant — Respondent.

Appeal No. 2135 of 1909, Decided on 11th April 1912, against appellate decree of Dist. Judge, Jalpaiguri, D/- 9th July 1909.

(a) Landlord and Tenant—Renewal—Lessee required to give notice of intention to take renewal before expiry of term—Absence of notice in time—Lessee loses his rights.

Where an unconditional covenant for renewal of a lease expressly requires the lessee to notify to the lessor his intention to take a renewal before the determination of the term, the lessee loses his right if he fails to give notice in time. But under special circumstances the lessee may get relief against failure to give notice in time. [P 60 C 1, 2]

(b) Landlord and Tenant—Renewal conditional on observance of covenant—Right of renewal is not enforceable if there is subsisting breach.

Where renewal of a lease is made conditional on the observance of certain covenants by the lessee and not otherwise, such observances is a condition precedent to the right of renewal and the right of renewal is not enforceable if at the time for renewal there is a subsisting breach of covenant. [P 61 C 1]

Brojo Lal Chuckerbutty and *Bimal Chunder Das Gupta*—for Appellant.

Ram Charan Mitra—for Respondent.

Judgment.—The sole point in controversy in this appeal is whether the plaintiff-appellant has forfeited his right to renewal of a lease granted on 1st April 1899 for a term of five years under the Arable Waste Land Rules. After the expiry of the lease on 31st March 1904, the plaintiff made an application for renewal on the 9th April following. Proceedings were then taken for the survey and measurement of the land, which did not terminate till 13th December 1905. On that date the Settlement Officer called upon the plaintiff to execute a kabuliyat within 3rd January 1906; the plaintiff complied with the requisition on the very next day. The records were thereupon submitted to the Deputy Commissioner, who however refused sanction on the ground that the plaintiff was not a suitable tenant. On 16th January 1908, the plaintiff commenced this action for declaration that he was entitled to a renewal of the lease. The claim was resisted on the ground that the plaintiff had not applied for renewal before the expiry of the term and was consequently not entitled to a re settlement under Cl. 8 of the preliminary lease granted to him in 1899. It was also contended on behalf of the Secretary of State that by breach of the other conditions in the preliminary lease the plaintiff had forfeited his right to re-settlement. The Court of first instance overruled all these contentions and made a decree in favour of the plaintiff. Upon appeal the District Judge has confined his attention to one question only namely whether upon a true construction of the preliminary lease the plaintiff had forfeited his right to renewal of the lease by reason of his failure to make an application in that behalf before the expiry of the term. This question the District Judge has answered in favour of the defendant; in our opinion his view cannot be supported.

Clause (8) of the lease authorizes the Deputy Commissioner to enter at all

times upon all lands that are used for agricultural purposes, with a view to inspection and measurement. The same clause also entitles the tenant at any time to apply for inspection and measurement. But it provides that in the latter contingency if the tenant makes an application of this character before the expiry of the term of the lease, the costs of the measurement shall be payable by him as rent. Cl. (8) further makes it obligatory upon the Deputy Commissioner to inspect and measure the land upon the expiry of the term of the lease. It then lays down that if upon measurement it is found that a moiety of the land is covered by homestead or is used for agricultural purposes or that a portion of the same is allowed to be uncultivated according to the good practice adopted in cultivation or has been properly used in any other way for the purposes of cultivation, the original lessee subject to the rules set forth will at all times be entitled to have the lease renewed for such additional period as corresponds to the last date of the term of the settlement, and after that for the term of every new settlement of the taluk. Cl. (10) provides that if no application is made for a renewed lease before the expiry of the term of the preliminary lease, the lessee may be allowed to hold the land as a tenant at will so long as the Deputy Commissioner does not make any other arrangement, but cannot be allowed to hold the same in any other manner.

The learned Government Pleader has contended that the terms Cls. 8 and 10 taken together indicate that the lessee has no claim to a re-settlement of the land comprised in the preliminary lease, unless he has before the expiry of the term thereof, made an application in that behalf. In our opinion this contention is not well founded. What determines the right of the lessee to claim re-settlement is not the fact of an application before the expiry of the term but the diligence he has displayed during the subsistence of the term. If half of the land has been reclaimed, he has a right to re-settlement. If half of the land has not been reclaimed, notwithstanding an application made prior to the expiry of the term of the preliminary lease, he has no claim to a re-settlement. The present case is therefore distinguishable from the class of cases in which there is an unconditional covenant for renewal expressly requiring the lessee to notify to the lessor his intention to take a renewal before the determination of the term; when that is the case the lessee loses his right if he fails to give notice in time: *Bayly* v. *Leominster Corporation* (1), *Wight* v. *Hopetoun (Earl)* (2) and *Nicholson* v. *Smith* (3). But it is worthy of note that even in that class of cases, relief will be granted against failure to give notice in time under special circumstances: *Ross (Earl)* v. *Worsop* (4), *Statham* v. *Liverpool Dock Co.* (5) and *Hunter* v. *Hopetoun (Earl)* (6). In the case before us there was no express provision for notice of renewal before expiration of term, and as renewal could not be claimed merely at the option of the lessee, the rule that where the lease is silent as to the time of application for renewal, it should be made a reasonable time before expiration of the term cannot be applied: *Lewis* v. *Stephenson* (7) and *Joggi Lal* v. *Cooper* (8). Much reliance was placed by the respondent on Cl. 10; that clause in our opinion does not militate against the view we take; it was inserted to provide for the contingency that the lessee might continue in possession pending inspection and measurement of the land. In the absence of such a provision, the lessee might ultimately put forward a claim that he had acquired the status of an occupancy or non-occupancy raiyat or that he was entitled to remain in occupation till an adequate notice to quit had been served upon him. The effect of Cl. 10 is to place him in the position of a tenant at will, so that if the land is not ultimately settled with him, he has to quit the premises as soon as the new comer is ready to enter into occupation. The ground upon which the District Judge has dismissed the suit cannot therefore be supported.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the other points which arise in the appeal may be considered. Here we may add that it was contended

(1) [1792] 1 Ves. J. 476.
(2) [1886] 4 Macq H. L. 729.
(3) [1882] 22 Ch. D. 640.
(4) [1741] 1 Brown P. C. 281.
(5) [1830] 3 Y. & J. 565.
(6) [1865] 13 L. T. 130.
(7) [1898] 67 L. J. Q. B. 296.
(8) [1905] 27 All. 696.

on behalf of the Secretary of State that as the plaintiff, during the continuance of the preliminary lease, broke a condition of the lease he has forfeited his right to a re-settlement. This question will be open for consideration by the District Judge and may be of great importance in view of the decisions in *Job* v. *Banister* (9), *Finch* v. *Underwood* (10) and *Greville* v. *Parker* (11) which affirm the doctrine that where the renewal is made conditional on the observance of his covenants by the lessee, but not otherwise: *Hare* v. *Burges* (12), such observance is a condition precedent to the right of renewal and the right of renewal is not enforceable, if at the time for renewal, there is a subsisting breach of covenant. The costs of this appeal will abide the result.

V.B./R.K. *Appeal allowed.*

(9) [1856] 2 K. & J. 374.
(10) [1876] 2 Ch. D. 310.
(11) [1910] A. C. 335.
(12) [1857] 5 W. R. (Eng.) 585.

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CHITTY AND RICHARDSON, JJ.

Mohesh Chandra Chaudhury and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 476 and 484 of 1915, Decided on 19th August 1915.

Penal Code (1860), Ss. 192, 193, 465 and 109—Sale written out by *N* fallen through—Date in document altered at *M's* instance to bring application for refund within two months—Alteration unnecessary, period for refund being six months—Both were held guilty of fabrication of false evidence—Offences whether forgery—(*Quaere*).

A sale under a Kobala written out by one *N* on a stamp paper of Rs. 5 and dated 23rd May having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. *N* was told by one *M* that as no refuud could be made after two months the date in the document might be altered from 23rd May to 23rd September. Accordingly the alteration was made although it was quite unnecessary as the period for getting refund was not two months but six months :

Held : that *N* and *M* were respectively guilty of fabricating and abetting the fabrication of false evidence

Quaere—Whether the offences committed were not forgery and abetment of forgery.

[P 61 C 2 ; P 62 C 1]

Manmathanath Mukherjee, *Dasarathi Sanyal*, *Sasadhar Roy* and *Govinda Chandra Dey Roy*—for Appellants.

Orr and *Jyotish Chandra Hazra*—for the Crown.

Judgment.—These are two appeals by Nosha Mia and Mohesh Chandra Chaudhury who were convicted of forgery and abetment of forgery respectively, and sentenced, Nosha Mia to six months' rigorous imprisonment, and Mohesh Chandra Chaudhury to one year's rigorous imprisonment. The case is a somewhat peculiar one. It appears that Nosha Mia was proposing to sell some property to another person of the same name. A Kobala was written out by Nosha Mia—the appellant—on a stamp paper of Rs. 5. The Kobala was to have been executed sometime in May 1914 and bore the date 23rd May written by the appellant Nosha Mia. The sale having fallen through, it became necessary to apply to the Collector for a refund of the stamp duty. The appellant Nosha Mia took advice with regard to this and he was told that no refund would be made after two months. The other appellant Mohesh Chandra Chaudhury, who is a pleader's clerk of some three years' standing, gave him this advice, and also told him that he might alter the date in the document from 23rd May to 23rd September, which would bring the application for the refund within the two months. This was quite unnecessary on their part inasmuch as the period was not two months but six months. The application for the refund would therefore have been within six months from the date 23rd May inserted in the document. Upon this they were charged with forgery and abetment of forgery and found guilty as above stated.

The question then arises what was the offence committed. There was undoubtedly a dishonest and fraudulent intention for the appellants clearly intended to cheat the Government, being unware that they could, in fact, obtain their object honestly. At the same time it may be argued with some show of reason that what they did does not fall within the definition of forgery contained in S. 464, I. P. C. So far as the document was an unexecuted Kobala, the appellant Nosha Mia had authority to alter it as it was his own document. But for the purposes of this case, the document must be regarded rather as an used or spoilt stamp paper, on which the appellants were applying for a refund. It is however unnecessary to decide this point, as they were clearly guilty of fabricating

and abetting the fabrication of false evidence (Ss. 192, and 193, I. P. C.). As was done in the case of *Empress* v. *Mir Ekrar Ali* (1) we convict the appellants under S. 193 and Ss. 193,-109 respectively. The term of imprisonment already undergone by Nosha Mia is, in our opinion sufficient. We accordingly reduce the sentence in his case to the period of imprisonment already undergone, and direct that he be released.

In the case of Mohesh Chandra Chaudhury we think that the period of imprisonment which he has already undergone (i. e, nearly two months) is sufficient imprisonment, and we accordingly reduce the term of imprisonment in his case to that period, but we sentence him in addition to a fine of Rs. 50, and, in default, one month's rigorous imprisonment.

V.B./R.K. *Sentences reduced.*

(1) [1881] 6 Cal. 282.

A. I. R. 1918 Calcutta 62

MOOKERJEE AND BEACHCROFT, J.J.

Ligraj Patjosi—Plaintiff—Appellant.

v.

Mahadeb Ram—Defendant—Respondent.

Appeal No. 69 of 1912 Decided on 24th May 1912, against order of Dist. Judge, Cuttack. D/. 4th December 1911.

Civil P. C. (1908), O. 21, R. 2—Consent decree providing that judgment-debtor should deliver to decree-holder land and raise wall within certain time—Application by judgment-debtor intimating to Court that terms of decree have been performed does not fall under O. 21, R. 2—Judgment-debtor failing faithfully to carry out terms of decree—Remedy of decree-holder is to apply for execution.

A consent decree provided that the defendant-judgment-debtor should deliver to the plaintiff a parcel of land and should raise a wall within a time specified in the decree. The decree further provided that the defendant, as soon as he had carried out the terms of the decree, should notify that fact to the Court. Within the specified time the defendant made an application intimating to the Court that he had complied with the terms of the decree. The application was received but no action was taken upon it.

Held, (1) that the application of the defendant did not fall under O. 21, R. 2, Civil P. C.

(2) that if the defendant had not faithfully carried out the terms of the decree, the proper course for the plaintiff was to apply for execution of the decree and the Court would then consider whether the terms of the decree had been carried out. [P 63 C 1]

Narendra Kumar Bose—for Appellant.

Surendra Nath Ghosal—for Respondent.

Judgment—This appeal is directed against an order made apparently under O. 21, R. 2, Civil P. C. 1908. On 14th September 1910, a consent decree was made between the parties to this appeal. Under that decree the respondent, who was the defendant in the suit, undertook to deliver to the plaintiff-appellant, within seven days, a parcel of land and to raise a wall within 14th January 1911. The decree further provided that if the defendant failed to carry out the terms of the decree, the plaintiff would be at liberty to execute the decree. The decree further stated that the defendant, as soon as he had carried out the terms of the decree, would notify the fact to the Court. On 12th January 1911 the defendant intimated to the Court that he had complied with the terms of the decree. This application was received but no action was taken upon it. On 17th February 1911 the pleader for the plaintiff discovered that this application had been made and he forthwith preferred objections. On next day, the Court directed notice to issue upon the plaintiff as well as the defendant and fixed the case for disposal on 4th March 1911. On that date, the defendant did not appear and his application was dismissed. On 4th April 1911 the defendant renewed his application with an express prayer that satisfaction might be entered in the decree under R. 2, O. 21 of the Code. This was opposed by the plaintiff and the result was that the Court on 8th July 1911 dismissed the application as barred by O. 9, R. 9. The defendant thereupon appealed, and the District Judge on 4th December held that the second application was not barred. In this view, he remanded the case in order that the truth of the allegation of the defendant might be investigated. The present appeal is directed against that order. On behalf of the appellant it has been contended, first, that the second application is not maintainable, and secondly, that, if maintainable, it is barred by limitation under Art. 174, Sch. 1, Limitation Act. In our opinion, there is no substance in either of these contentions and that the proceeding have been throughout misconceived.

The application of 12th January 1911 was not an application under R 2, sub-R. (1), O. 21, which provides that where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. Even if it could be said in this case that there was an adjustment of the decree, it was not alleged by the defendant judgment debtor that there was an adjustment either in whole or in part to the satisfaction of the decree-holder, and his application of 12th January 1911 was not an application under sub-R. (2) R. 2 for issue of notice to the decree-holder to show cause why the adjustment should not be recorded as certified. The defendant was bound by the decree to notify to the Court that he had carried out its terms, and this he did. He did not invite the Court to take any action, and, as we have seen, no action was taken till the pleader of the plaintiff discovered that the application had been made. In our opinion, the application is clearly not one under sub-R. 2, R. 2, O. 21 and no action ought to have been taken thereon. The proper course for the plaintiff is to apply for execution of the decree, if his case is that the terms of the decree have not been faithfully carried out by the defendant. If such application is made, it will be open to the defendant to show that he has, as a matter of fact, carried out the terms of the decree. The Court will then be in a position to consider whether the terms of the decree have been carried out. We are informed that an application for execution was presented but was struck off by reason of the pendency of the appeal in this Court. If that is so, it will be open to the plaintiff to apply for revival of that application and proceedings may be taken on the basis of the application so revived or of a fresh application for execution.

The result is that this appeal is allowed and the orders of both the Courts below are discharged. Under the circumstances, each party will pay his own costs throughout the litigation.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 63

RICHARDSON AND BEACHCROFT, JJ.

Jillor Rahman — Plaintiff — Appellant.

v.

Ebrahim Khan and *others* —Defendants —Respondents.

Appeals Nos. 3195 and 3253 of 1915, Decided on 1st February 1918, against appellate decrees of Sub-Judge, Birbhum, D/. 13th September 1915.

Bengal Tenancy Act (1885), S. 153—Mere controversy on question of title is not sufficient—Some question of title should be decided as between parties—Suit for rent—Lower Court not deciding question of title—No appeal lies under S. 153.

Under S. 153 it is not sufficient merely that there should be a controversy on the question of title as between parties having conflicting claims to land but the section requires that some question of title should be decided as between such parties. Therefore where in a suit for rent the lower Court does not decide the question of title which is raised between parties having conflicting claims thereto, no appeal lies under S. 153. [P 63 C 2; P 64 C 1]

Jogesh Chandra Roy and *Mohesh Chandra Banerjee*—for Appellant.

Baranashibasi Mukerjee—for Respondents.

Richardson, J.—A preliminary objection is taken to the hearing of this appeal on the ground that the appeal is incompetent under the provisions of S. 153, Ben. Ten. Act. It is urged that the Courts below have decided no question relating to title to land or to any interest in land as between parties having conflicting claims thereto. The plaintiff brought this suit for rent on the footing that he was originally a cosharer to the extent of two annas three pies in the estate within the ambit of which the land in question is situated. That share of the estate, it appears, had been sold under Act 11 of 1859 for arrears of revenue. But the plaintiff claims that he is entitled to his original share in respect of the land, inasmuch as it is resumed chowkidari chakran land which he says did not pass at the sale. As defendants the plaintiff impleaded not only the tenant from whom the rent was claimed but also the purchaser of the share of the estate sold for arrears of revenue. A controversy no doubt arose between the plaintiff and the purchaser as to the title of the land; but under S. 153, Ben. Ten. Act, it is not sufficient merely that there should be a controversy on the question of title, but the section requires that some question

S. N. Das
Advocate High Court

of title should be decided. On this point reference may be made to the case of *Gangadhar Karmakar* v. *Shekharbasini Dasya* (1). A perusal of the judgments of the Courts below will show that the question of title though raised was not decided. The learned Munsif in the trial Court expressed himself thus:

"Considering the evidence on the record I am of opinion that the plaintiff was dispossessed from these lands by the auction-purchaser even if he had any separate right to these lands and the auction-purchaser has been in peaceful possession by receiving rents from the defendants and his possession should not be disturbed in these rent suits."

The learned Subordinate Judge in the lower appellate Court concurred generally with the Munsif and dealt in his judgment merely with the question whether the relationship of landlord and tenant existed between the plaintiff and the tenant defendants. He decided that question in the negative and passed over the question whether the plaintiff or the purchaser at the auction-sale was entitled to the resumed chowkidari chakran lands. There is nothing, therefore in the judgments of the Court below to prevent the plaintiff from raising this question of title again, if he be so advised in a regular suit. In my opinion the preliminary objection must prevail and the appeal must be dismissed with costs. This judgment governs second appeal No. 3253 of 1915.

Beachcroft, J.—I agree.

V.B./R.K. *Appeals dismissed.*

(1) [1916] 35 I. C. 248.

A. I. R. 1918 Calcutta 64 (1)

NEWBOULD AND PANTON, JJ.

Chand Bibi—Appellant.

v.

Lal Mohamed & others—Respondents.

Appeal No. 2963 of 1916, Decided on 1st August 1918, against appellate decree of Dist. Judge, Burdwan, D/- 5th September 1916.

Adverse possession—Co-heirs—Possession of co-heir exclusive to knowledge of others is adverse.

The plaintiff claimed her share of the properties left by her father, who died 37 years before the date of the institution of the suit, her from brother who had been in exclusive possession of the same to the knowledge of the plaintiff since the death of her father.

Held that the possession of the brother was adverse to the plaintiff, even though it was not shown that there was any demand made by the plaintiff which was refused by the brother.

[P 64 C 2]

Jogesh Chandra Roy, Shibo Prosanna Bhottacharjee and *Poshupatinath Sastri*—for Appellant.

Mahendra Nath Roy, Baranasibashi Mukherjee and *Biraj Mohan Mozoomdar*—for Respondents.

Judgment.—This is a suit between a sister and a brother, in which the plaintiff claims her share of the properties left by her father who died 37 years before the date of the institution of the suit The Munsif decreed the suit and the learned District Judge has dismissed it on the ground that it is barred by limitation. The principles to be applied in cases of this sort will be found set out in the cases of *Ayennessa Bibi* v. *Sheik Isuf* (1) and *Faizuddin Khan* v. *Reju Akub* (2). It appears to us, on reading the judgment of the learned District Judge, that he fully appreciated the legal point in this case and having done so, his findings as to the facts cannot be attacked in second appeal. It is contended that the possession of the brother cannot be adverse unless it is shown that there was a demand made by the sister which was refused. Though this contention finds some support in the decision in the case of *Shurfunnissa Bibee Chowdhrain* v. *Kylash Chunder Ganopadhya* (3), it cannot be laid down as a test applicable to all cases of this sort. It is found that the plaintiff in this case gave up her rights shortly after her father's death and that the defendant has exercised exclusive right for all those years to the knowledge of the plaintiff. If the plaintiff gave up her rights and never asserted them, obviously it could not be proved that there have been a demand and a refusal. We dismiss this appeal with costs,

V.B./R K. *Appeal dismissed.*

(1) [1912] 14 I. C 722.
(2) [1915] 28 I C. 22.
(3) 25 W. R. 53.

A. I. R. 1918 Calcutta 64 (2)

GHOSE AND GEIDT, JJ.

Mahomed Faiz Chowdury—Appellant.

v.

E. F. Sandys—Respondent.

Appeal No. 179 of 1899, Decided on 25th July 1902, from original decree of Sub-Judge, Tipperah, D/- 27-12-1899.

Bengal Tenancy Act (1885), Ss. 95, 98 and 100—Rules framed by Calcutta High Court under S. 100, R. 4—Suit by common manager against ex-manager for account and recovery of balance due is maintainable—Sanction of

District Judge is however necessary for its maintainability — Order allowing common manager to go on with suit instituted by him is sufficient compliance with S. 98 and R. 4.

A suit by the common manager of an estate against an ex-manager for account and for recovery of such sums of money as may upon account being taken be found due by the latter is for the purposes of management of the estate as contemplated by Cl. 3, S. 98, Ben. Ten. Act, and is maintainable. [P 65 C 2]

Per *Ghose, J.*—But such a suit is not maintainable without the sanction of the District Judge as required by R. 4 of the rules framed by the High Court under S. 100, Ben. Ten. Act. Where the District Judge is cognizant of the steps being taken by a common manager for the purpose of recovering what he considers to be due to the estate and passes orders practically allowing the common manager to go on with a suit he has instituted this is a sufficient compliance with the requirements of S. 98, Ben. Ten. Act and of the rules of the High Court under S. 100. [P 66 C 2; P 67 C 1]

Per *Geidt, J.*—R. 4 of the rules framed by the High Court under S. 100, Ben Ten. Act, does not lay down that a suit which requires the sanction of the District Judge must be dismissed if instituted without such sanction. This rule is a check on expenditure and the only necessary consequence of the infringement of the rule is to make the manager liable for all expenses improperly incurred. The check contemplated by the rule is fully met by imposing this penalty on the manager and the penalty is applicable to all breaches of it. [P 67 C 2]

Sera-ul-Islam and *Akshay Kumar Banerjee*—for Appellant.

Dwarka Nath Chuckerbutty—for Respondent.

Ghose, J.—This appeal arises out of a suit for account and for the delivery of account papers instituted by a common manager, Mahammad Faiz Chowdhury, appointed as such by the District Judge of Tipperah under S. 95, Ben. Ten. Act, against Mr. E. F. Sandys an ex-common manager. The defendant was discharged from the office of common manager and Mahammad Faiz, the plaintiff was appointed in his place as the common manager. The suit has been dismissed by the Subordinate Judge on the ground that the right to sue for accounts was in the owners of the estate and not in the common manager, and that at any rate the common manager could not maintain a suit such as was brought without the express sanction of the District Judge, and that such sanction had not been obtained. The suit, we may here mention, was a suit not only for account, but also for recovery of such sums of money which upon the account being taken, might be found due by the defendant to the estate; and the plaintiff valued the claim at Rs. 5,482-15 0 odd. S. 98, Ben. Ten. Act, provides in Cl. (3): "He" that is to say, the manager

"shall subject to the control of the District Judge have for the purpose of management the same powers as the co-owners jointly might but for his appointment have exercised and the co owners shall not exercise any such power."

And the question which in the first place demands our consideration is whether a suit for account and for recovery of such sums of money as may upon account being taken be found due by an ex-manager, is for the purposes of management of the estate as contemplated by Cl. (3), S. 98 of the Act. The matter is not altogether free from doubt but after the best consideration that we have been able to give to it, it seems to us that it is for the purposes of management. Under S. 98 a common manager is entitled for the purposes of management to exercise, though under the control of the District Judge, all the powers which the co-owners jointly might exercise. He could for the purposes of such management realise rents from tenants; he could if necessary take such proceedings in Court for the purpose of realising rents; he could so far as we can see recover or take proceedings to recover moneys due to the estate from debtors—all this no doubt, subject to the control of the District Judge, but still as regards the recovery of such dues whether they be rents or other moneys it would, we think, be for the purposes of the management of the estate in the hands of the common manager. As bearing upon the question whether the common manager is entitled to bring such a suit or whether the right is in the owners of the estate the Subordinate Judge in his judgment has relied upon Cls. (5) and (7), S. 98 and S. 103 of the Act. Cl. (5) simply declares that the common manager shall keep regular accounts and that the co-owners or any of one them is entitled to inspect or take copies of the accounts kept by the manager. A proprietor is certainly entitled to inspect the accounts in order to keep himself informed as to what is going on but it does not follow from this as the Subordinate Judge thinks that the right to bring a suit for account against an ex-manager is in the proprietors and not in the common manager. Cl. (7) of the section simply says that the manager may make any application which the

proprietors could make under S. 103. That section as it stood in the Act of 1885 declared that:

"on the application of proprietors or tenure-holders and on depositing or giving security for the required amount for expenses a revenue officer may subject to and in accordance with the rules made in this behalf by the Local Government ascertain and record the particulars specified in S. 102 with respect to the estate or tenure or any part thereof."

Section 188 of the Act, however provides:

"Where two or more persons are joint landlords anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together or by an agent authorized to act on behalf of both or all of them."

Reading these two sections together it would seem that one of the co owners of an estate could not apply for the Record of Rights and in view of this disability of one of the co-owners of an estate S. 98 of the Act provided in Cl. (7) that a common manager might make any application which the proprietors could make under S. 103, so as to empower him as the agent of the whole body of owners to make an application for the purpose of the Record of Rights S. 103 has however been molified by the Amending Act so as to empower one or more of the proprietors to apply for a Record of Rights. But however that may be, it seems to us that the Subordinate Judge is in error in thinking that the existence of Cl. (7) in S. 98 is a strong ground in support of the view that it was not the intention of the legislature to confer upon a common manager the right to bring a suit of this kind or any suit whatever. The next question that demads our consideration is whether the common manager could institute the suit without the sanction of the District Judge. As bearing upon this question we have to refer to S. 100 of the Act, and the rules which the High Court has framed in accordance with that section. It provides:

"The High Court may from time to time make rules defining the powers and duties of managers under the foregoing section."

Rule 3 of the rules framed by the High Court lays down that:

"No manager shall have power to sell or mortgage any property nor shall he grant or renew a lease for any period exceeding three years without the express sanction of the District Judge,"

and so forth. Then comes R. 4:

"The manager shall apply for the sanction of the District Judge to any act which may involve extraordinary expense."

Rule 5 Provides that:

"No manager shall have power to compromise any suit or relinquish any claim without the express sanction of the District Judge."

These rules have the force of law and it seems to us having regard to R. 4, that the manager was bound to have applied to the District Judge for sanction before bringing a suit for account and recovery of moneys that may be found due from the defendant because the bringing of such a suit would certainly involve extraordinary expense and so the manager did apply to the Judge for such sanction. We find that on 7th January 1898 an application was made by Mr. Sandys, the ex-manager, for return of the security that he had deposited. Upon that the then District Judge ordered as follows:

"I will put this matter off till 2nd February. If no suit is instituted by that date I will order the security to be returned."

On 31st January 1898 the following application was made by the plaintiff, the common manager, to the District Judge:

"That as it is necessary to bring a suit against Mr. E. F. Sandys, late manager of Durgacharan Taluk, on behalf of the proprietors of the said Taluk, for accounts and money and as the plaint has already been drawn up, the proprietors wish your petitioner to bring the suit and defray the cost of the said suit from the estate fund, but he is unable to do so unless ordered by your Honour. Therefore respectfully the petitioner solicits your permission to bring the suit and to defray the costs of the same from the estate fund. The valuation of the suit is at present put down as Rupees 5,982-15-0. Your petitiener as in duty bound shall ever pray."

Upon this petition the following order was recorded by the then District Judge:

"It does not appear that my sanction is necessary; the manager can act on his own initiative."

The manager then instituted this suit. Later on we find that the District Judge recorded the following order:

"I am informed to-day that a suit has been instituted against Mr. Sandys for recovery of moneys received by him as manager; till the suit is decided, it would not be proper to return the security (that is, the security deposited by the ex-manager) Let this application be struck off the file."

So that the District Judge was fully cognizant of the steps that were being taken by the common manager for the purpose of recovering what he considered to be due to the estate. The learned Judge did not say to him:

"You must not bring, or go on with the suit and I do not authorise you to incur the expenses for bringing such a suit."

On the contrary he passed orders practically allowing the plaintiff to go

on with the suit, though under a mistaken notion. If that is the correct view to take, it would seem that the requirements of S. 98 and the rules framed by the High Court under S. 100 were substantially complied with. S. 98, as already mentioned, provides that common manager, subject only to the control of the District Judge, may, for the purpose of management, do all acts which the co-owners jointly might perform. It was quite open to the Judge to disallow the application that was made by the plaintiff on 31st January 1898, or to prohibit him from continuing that suit when the matter was distinctly brought to his notice; but, as I have already said, he practically acquiesced in the suit being brought, and in allowing it to go on. It may, no doubt, be said that the Judge did not exercise, or rather declined to exercise, any control in the matter which was brought to his notice. Yet it seems to me that it does not really affect the question in the present case, because the law allows the common manager to do every act in connexion with the management, only subject to the control of the District Judge, if he chooses to exercise such control—and the common manager, so far as he was concerned, complied with what R. 4 directs. I am of opinion, as already indicated, that the requirements of the law and rules framed by the High Court were substantially complied with in this case and that the suit was maintainable. For these reasons we are of opinion that the decree of the Court below dismissing the suit should be set aside, and the case sent back to the Subordinate Judge for trial upon the merits.

Costs will abide the result.

Geidt, J.—I concur with my learned brother in the order to be passed in this case, and generally in the reasons stated by him for passing that order. I only wish to add that though I agree with him in thinking that S. 98, Ben. Ten. Act, confers on a common manager the power to bring against an ex-manager a suit for papers and accounts, I am doubtful whether the effect of R. 4 framed by the High Court under S. 100 of the Act is to withdraw that power unless the common manager first obtains the sanction of the District Judge. The rule runs as follows:

"The manager shall apply for the sanction of the District Judge to any act which may involve extraordinary expense."

It is not framed in the negative like the rule which immediately precedes and the rule which immediately follows it. R. 3 lays down that:

"No manager shall have power to sell or mortgage any property nor shall he grant or renew a lease for any period exceeding three years without the express sanction of the District Judge, etc."

Rule 5 lays down that

"No manager shall have power to compromise any suit or relinquish any claim without the express sanction of the District Judge."

The effect of these two rules is clear and unmistakable; the acts forbidden by these rules are null and void ab initio, and the parties to such transactions are in the same position as though the transaction had never taken place. Can we attribute the same effect to R. 4? It is obvious, I think, that a similar result does not necessarily follow on all infringements of R. 4. If a manager spends extraordinary sums without the sanction of the District Judge, I take it that those sums could not be recovered from the person to whom they have been paid on the ground that this sanction had not been obtained. R. 4 is a check on expenditure and the only necessary consequence of the infringement of the rule could, in my opinion, be to make the manager liable for all expenses improperly incurred. Take for instance a concrete case, where a manager without the District Judge's sanction brings up at great expense from Calcutta counsel to conduct a suit. Counsel would be entitled to his fees from the manager, but the manager, if the District Judge disapproved of his act, would be personally liable for those fees. In the same way a manager, who, without the sanction of the District Judge, institutes a suit which requires that sanction on the ground of its involving extraordinary expense, would be liable personally for all sums thus improperly spent. The check contemplated by the rule is fully met by imposing this penalty on the manager, and the penalty is applicable to all breaches of it. But if you go further and say that a suit instituted by a manager without the sanction of the District Judge is not maintainable and must be dismissed, you add a second consequence which can only be imposed on a few breaches of the rule you do not subject the manager to any

penalty but you may subject to a severe penalty the proprietors who may be no way concerned with the breach.

For the reasons above given I am inclined to hold that R. 4 does not even by implication lay down that a suit which requires the sanction of the District Judge, must be dismissed if instituted without such sanction. When powers conferred by law are defined by rules, the rules, in my opinion, should not be interpreted as imposing any restriction on those powers, except such as is in terms expressed or can be clearly inferred from the wording used.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 68

MOOKERJEE AND BEACHCROFT, JJ.

Chintamani Pramanik — Plaintiff — Appellant.

v.

Hriday Nath Kamila—Defendant — Respondent.

Appeal No. 674 of 1911, Decided on 1st May 1913, against appellate decree of Sub-Judge, Midnapur, D/- 3rd January 1911.

(a) Vendor and Purchaser — Suit for declaration of title by purchaser — Title admitted by vendor cannot be questioned by stranger.

Plaintiff brought a suit for a declaration of title to and for recovery of possession of certain property on the allegation that he had purchased the same from its owner. The vendor, who was made a party defendant, acknowledged the validity of the conveyance in a written statement and when examined in Court, not only did not repudiate the transaction but explicitly supported the case of the plaintiff:

Held: that the question of the validity of the sale could not be raised by the other defendants. [P 69 C 1]

(b) Limitation Act (9 of 1908), Art 136 — Expression "out of possession" implies that some person is in possession adversely to vendors.

The expression "out of possession" as used in Art. 136, implies that some person is in possession adversely to the vendor—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor. The possession contemplated in the article includes not merely actual possession, but also such possession as a member of a joint family is presumed to have in the family property until excluded therefrom. [P 69 C 1, 2]

(c) Adverse Possession—Co-owners—Possession of one is possession of all unless he sets up hostile title and excludes others.

The possession of one of several joint owners is in law the possession of all, unless it is proved that the joint owner in actual possession set up a hostile title and excluded the other owners, who were not in actual possession [P 69 C 1]

(d) Civil P. C. (1908), S. 100—Adverse possession—Co-owners—It is mixed question of law and fact.

The question whether there has been such adverse possession on the part of one joint owner as would extinguish the title of the other owners is a mixed question of fact and law. [P 69 C 2, P 70 C 1]

Mohini Mohan Chatterjee—for Appellant.

Jogesh Chunder Dey—for Respondent.

Judgment.—This is an appeal by the plaintiff's for declaration of title to a share in two tanks and for recovery of joint possession thereof. The case for the plaintiffs was that the disputed tanks originally belonged to one Nityanand Kamila, and after his death, were held in equal halves by his two sons. The plaintiffs claimed to have purchased one-thirtieth share in the tanks from Nirupama Dasi, wife of Dinanath Kamila, who was a great-grandson of the original proprietor by one of the five sons of his second son. The defendants are the representatives of the first son of the original proprietor. Their defence was twofold; namely, first, that they had acquired title to this share by purchase; and secondly, that the claim was barred by limitation. Upon the question of limitation, the Courts below have concurrently held against the plaintiffs. Upon the question of title, the Subordinate Judge has held that the defendants have failed to prove the alleged sale by Dinanath to his uncle Kishore. But he has not decided the question, whether the purchase by the plaintiffs from Nirupama is or is not bona fide, although he is of opinion that there are circumstances which throw great suspicion upon the transaction. On behalf of the plaintiffs, the decree of the Subordinate Judge has been assailed on two grounds; namely, first, that the question of the bona fides of their purchase from Nirupama does not arise in these proceedings; and, secondly, that the findings of the lower appellate Court do not show that the title of their vendor was extinguished by adverse possession on the part of her co-sharers. In our opinion, both these contentions are well founded.

In so far as the first ground is concerned the vendor of the plaintiffs is a party to this litigation. In her written statement she acknowledged the validity of her conveyance. She was examined in the lower Court; not only did she not repudiate the

transaction; she explicitly supported the case of the plaintiffs. Under these circumstances, it is obvious upon the decision of their Lordships of the Judicial Committee in *Achal Ram* v. *Kazim Husain Khan* (1) that the question of the validity of the sale cannot be raised by the other defendants. This position is in no way affected by the late decision in *Basant Singh* v. *Mahabir Pershad* (2). In so far as the second ground is concerned, it has been argued on behalf of the respondents that Art. 156, Sch. 2, Lim. Act, is applicable to this case. That article provides that a suit by a purchaser at a private sale for possession of immovable property sold, when the vendor was out of possession at the date of sale, must be commenced within 12 years from the time when the vendor is entitled to possession. It has been argued that the vendor of the plaintiff was not in possession at the date of the sale because the Subordinate Judge has found that she did not enjoy the profits of the disputed property. The contention of the respondents in substance is that it is necessary for the plaintiffs to establish that their vendor was in actual occupation of the disputed property at the date of the sale. In our opinion there is no foundation for this contention. The expression "out of possession" as used in Art. 136 implies that some person is in possession adversely to the vendors—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor: *Taylor* v. *Harde* (3). In the case before us, Nirupama was prima facie in possession of the tanks through her cosharers; in other words, the possession of the joint owners was her possession in law. It is clearly incumbent upon the defendants to establish that the co-owners had set up a hostile title and had excluded her from possession. Of this there is no evidence.

It has been found that on two occasions within the last 12 years, the defendants caught fish from the tanks and appropriated the same entirely for themselves. This does not constitute exclusion of the plaintiffs or their vendor, nor does this amount to adverse possession on the part of the defendants. It is not proved that the vendor of the plaintiffs claimed a share in the fish and that her title was repudiated. It is not shown that she ever attempted to catch fish and was successfuly prevented. Stress is laid by the defendants respondents on the circumstance that within 12 years before the commencement of the suit, they had exclusively received rent from a tenant on the bank of the tanks. This also does not in law amount to exclusion of the vendor of the plaintiff. The case before us is very similar to that of *Bhogavalli Venkayya* v. *Bhogavalli Ramakrishnamma* (4). There the plaintiffs sued on the basis of a purchase from a cosharer in the joint property, who, it was found, had left the village more than 40 years before suit. It was contended on behalf of the defendants that Art. 136 was applicable, and that it was obligatory upon the plaintiffs to establish that their vendor had been in actual occupation within 12 years of the institution of the suit. This contention was negatived. It was held that the possession contemplated in Art. 136, includes not merely actual possession but also such possession as a member of a joint family is presumed to have in the family property, until excluded therefrom. The learned Judges thereupon directed an inquiry into the question: Whether the vendor of the plaintiffs was ever excluded from the joint family property, and, if so for what period before the suit.

The Subordinate Court found upon the evidence that such exclusion had not been established and the result was that the plaintiffs succeeded. In the case before us, as already explained, there is no evidence on the record to show that the vendor of the plaintiffs had ever been excluded or that her title had been denied. We may add that it has been argued by the learned vakil for the respondents that the question at issue is one of fact and that consequently it is not competent to this Court to interfere in second appeal. This contention is opposed to the decision of their Lordships of the Judicial Committee in the cases of *Lachmeswar Singh* v. *Manowar Hossein* (5), and *Ramgopal* v. *Shamskhaton* (6). The question whether there has been such adverse possession on

(1) [1905] 27 All. 271=8 C. C. 155=32 113 (P. C.).
(2) [1918] 35 All. 278=19 I.C. 340=40 I. A. 86 =16 C. C. 136 (P. C.).
(3) [1757] 2 Sm. L. C. 575.
(4) [1911] 9 I. C. 495.
(5) [1892] 19 Cal. 253=19 I. A. 48 (P. C.).
(6) [1893] 20 Cal. 93=19 I. A. 228 (P. C.).

the part of the defendants as would extinguish the title of the vendor of the plaintiffs is a mixed question of fact and law. Whether the defendants did act in a particular manner is a question of fact, but when the Court is called upon to decide the true legal effect of that act upon the title of the plaintiffs, the Court has plainly to determine a question of law. As already stated, upon the facts found, it is plain that the title of the vendor of the plaintiffs was not extinguished by adverse possession on the part of the defendants or their predecessors-in-interest. The result is that this appeal is allowed, the decrees of the Courts below discharged and the suit decreed with costs in all the Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 70

MOOKERJEE AND BEACHCROFT, JJ.

Behary Lal Pandit—Plaintiff—Appellant.

v.

Narain Misra and *others*—Defendants—Respondents.

Appeal No. 1882 of 1909, Decided on 8th May 1912, against decision of District Judge, Cuttack, D/- 14th June, 1909.

(a) Civil P. C. (1908), S. 11—Court must have jurisdiction to decide subsequent suit in which matter is subsequently raised.

A decree in a previous suit cannot be pleaded as res judicata in a subsequent suit, unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself, in which the issue is subsequently raised.

[P 70 C 2, P 71 C 1]

(b) Bengal Tenancy Act (1885)—S. 104-G—Board of Revenue has no authority to alter record finally published before 6th April 1898.

It was not the intention of the legislature to apply S 104 G to records finally published before Act 3 of 1898 B. C. came into force, Therefore the Board of Revenue has no authority under S. 104-G of the Ben Ten. Act to alter a record finally published on 6th April 1898.

[P 71 C 1,2]

(c) Practice—Fraud committed with plaintiff's connivance—He cannot invite Court to extricate him from difficulties brought by himself—Fraud.

Where a fraud has been committed with the connivance of the plaintiff, he is not entitled to invite a Court of justice to interpose actively in his favour with a view to extricate him from the difficulty in which he has placed himself.

[P 71 C 2]

Bepin Chandra Mallik—for Appellant.

Provas Chandrah Mitter and *Hira Lal Sanyal*—for Respondents.

Judgment.—This is an appeal on behalf of the plaintiff in a declaratory suit The plaintiff alleges that on 6th April 1898, a Record of Rights was finally published in which the rent payable by the tenant-defendant was stated to be Rupees 80-12-6, that subsequently the entry was altered on 9th September 1899 to Rs. 258.2.0, and that later on, when he brought a suit for rent against the tenant with a view to recover rent at the higher figure mentioned, his claim was disallowed by the District Judge and finally by this Court on 1st February 1904. It was held on that occasion that the alteration of the record had been made without authority, and that consequently the plaintiff was not entitled to realize rent at any rate higher than what was admitted by the defendant, namely, the rate as entered in the Record of Rights finally published on 6th April 1898. The plaintiff therefore commenced this action on 29th May 1905 for a two fold declaration, namely, first, that the alteration of the Record of Rights was made with jurisdiction and that the entry as it now stands is binding upon both the landlord and the tenant, and secondly, that the original entry of Rs. 80-12-6 was obtained by fraud and does not bind the landlord. The Courts below have concurrently dismissed the suit. The District Judge has held in substance that as in the suit for rent, the Record of Rights was found to have been altered without authority, that decision is binding upon the parties to this litigation; in this view he has declined to determine, whether the alteration was really unauthorized. As regards the question of fraud, the District Judge has held that the plaintiff had failed to prove the allegation; but there is indication in the judgments of the Courts below that if there was any fraud, the fraud was committed with the connivance of the appellant.

The decision of the District Judge has been assailed before us on the ground that the matter is not res judicata and that the question, whether the record was altered without authority, is still open for consideration. In our opinion, this contention is well founded. As was explained by this Court in the case of *Shib Raut* v. *Baban Raut* (1), in order to establish the plea of res judicata the Court which decided the former suit

(1) [1908] 35 Cal. 353.

must have been such a Court as would have been competent to try and decide not only the particular matter in issue, in the later suit but also the later suit itself in which the issue is subsequently raised. It was also pointed out by the Judicial Committee in the case of *Gokul Mandar* v. *Pudmanund Singh* (2):

"that under S 13, Civil P. C. of 1882, a decree in a previous suit cannot be pleaded as res judicata in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised"

Now, in the case before us, the suit for rent was tried by a Revenue Court. That Court was not competent to try the present declaratory suit. It is clear, therefore that the decision in the suit for rent does not operate as res judicata. This view is in accordance with the decision in the case of *Gomti Kunwar* v. *Gudri* (3). The question, whether the alteration was or was not unauthorized, is therefore still open for considera tion. It appears that the alteration in the Record of Rights, though not initialled, was made by a duly qualified officer and was based upon an order of the Board of Revenue. The Board appears to have acted under S. 104-G, which was introduced into the Ben. Ten. Act by Act 3 of 1898 B. C.; the new section came into force on 2nd November 1898, and was shortly afterwards extended to Orissa. The real question in controversy between the parties is whether under S. 104-G, the Board of Revenue had authority to alter the record finally published on 6th April 1898. It has been argued for the respondent that as the record had been finally published before Act 3 of 1898 B. C. came into force, no proceedings could be taken under S 104-G for the alteration of such record In our opinion this contention is well founded. S. 104-G provides that

"the Board of Revenue may, in any case under this part, on application or of its own motion, direct the revision of any Record of Rights or any portion of a Record of Rights, at any time within two years from the date of the certificate of final publication."

It is clear that the case in which such an action may be taken by the Board of Revenue must be a case under part 2 of Ch. X as it was remodelled by Act 3 1898 B. C. Now, S. 7 of the Act lays down that Ch. X, Ben. Ten. Act, as it stood in 1885 was completely repealed, and in lieu thereof, a new chapter was substituted. In the original Ch. X, there was no such division into parts, and it is impossible to say that the Record of Rights finally published on 6th April 1898 was a record under P. 2 of Ch. X, Ben. Ten Act, as altered by Act 3 of 1898 B. C. It is further plain from S. 9, Act 3 of 1898 B. C. that

"every settlement of rent or decision of a dispute by a Revenue Officer under S. 104 or S. 106 Ben. Ten Act. 1885, before the commencement of this Act in respect of which no appeal has, before the commencement of this Act, been preferred to the Special Judge appointed under S. 108 of that Act, shall have the force and effect of a decree of a civil Court in a suit between the parties and shall be final."

Now in the case before us, no appeal had been preferred as contemplated by S. 9. Consequently, the effect to be attributed to the entry of the rent as settled in the Record of Rights published on 6th April 1898 is that of a decree of a civil Court in a suit between the parties. In view of this circumstance, it is impossible for us to hold that the Board of Revenue could proceed under S. 104-G to alter an entry of this description. We are clearly of opinion that it was not the intention of the legislature to apply S. 104-G to records finally published before Act 3 of 1898 B. C. came into force. The alteration made on 9th September 1899 was consequently unauthorized. In view of this conclusion, the prayer for the first declaration must be refused.

In so far as the prayer for the second declaration is concerned, the plaintiff is obviously not entitled to any relief. If we adopt the view of the District Judge that the alleged fraud has not been established, the plaintiff is not entitled to challenge the Record of Rights. If on the other hand, fraud has been committed with the connivance of the plaintiff, he is undoubtedly not entitled to invite a Court of justice to interpose actively in this favour with a view to extricate him from the difficulty in which he has placed himself. The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(2) [1902] 29 Cal. 707=29 I. A. 196. (P. C.).
(3) [1903] 25 All. 138.

A. I. R. 1918 Calcutta 72

CHITTY AND SMITHER, JJ.

Emperor

v.

Kabili Katoni—Accused.

Criminal Ref. No. 26 of 1917, and Appeal No. 722, of 1917, Decided on 14th January 1918, made by Sess. Judge, Assam Valley, District, D/- 6th December 1917.

Criminal P. C. (1898), Ss. 298 and 299—Confession -- Judge has to decide questions of relevancy and admissibility—Illtreatment by police alleged — Burden of proof lies on accused—Trial by jury — Value of confession has to be appraised by jury.

The question of the relevancy and admissibility of a confession is for the Judge to decide. When he has decided that it is relevant and it has been laid before the jury, it is for them to appraise its value as evidence and one test which they will have to apply is whether it appears to them to have been freely and voluntarily made: An accused person who at his trial retracts his confession recorded by the Magistrate, alleging that it was the outcome of ill-treatment and inducement by the police, should prove his allegations.

[P 72 C 2]

Orr—for the Crown.

Jatindra Mohan Chowdhuri and *Gogan Chandra Boral*—for Accused.

Judgment. — The accused Kabili Katoni has been found guilty by the unanimous verdict of the jury of the murder of one Mangal Singh and has been sentenced to death by the Sessions Judge of the Assam Valley District. The case has come before us under S. 374, Criminal P. C., and there is also an appeal by the accused to this Court.

It was argued that there had been such a misdirection by the learned Sessions Judge as vitiated the verdict of the jury and that the accused was entitled to a new trial. The passage relied upon was that where the learned Judge was dealing with the burden which lay upon either side to prove such facts as they asserted. "In this case" (he said) "it is for Kabili to satisfy the jury that he was ill treated by the police or that inducements were offered." On 12th September 1917, Kabili had made a detailed confession before a Magistrate. To that confession he adhered, with some slight differences and additions, before the committing Magistrate on 27th September. On 5th December 1917, before the Court of Session he retracted his confession. He said that after his arrest the police tied his hands behind him and kept him in confinement; they ill-treated him in various ways and pressed him to tell everything and make a confession; as the police ill-treated him he repeated the story they told him. Further, he said that he was brought to the Magistrate by two constables, who told him that he would be released if he told the Magistrate everything they instructed him to say; that he confessed to the Magistrate through fear of the police; and that his statement to the Magistrate was false. Now the question of the relevancy and admissibility of the confession is for the Judge to decide; when he has decided that it is relevant, and it has been laid before the jury, it is for them to appraise its value as evidence, and one test which they will have to apply is whether it appears to them to have been freely and voluntarily made.

Speaking generally, the burden of proving any fact which he asserts is upon the accused. In this case, if he alleged ill-treatment by the police or any inducement by them to him to confess he should have done something to prove it. Here the prosecution tendered the confession and examined the Magistrate recording it to show that it was voluntarily made. Not a question was asked of the Magistrate in cross-examination to suggest the contrary, nor was a question asked of the Sub-Inspector who had charge of the case throughout to suggest that there had been any improper conduct on the part of the police by way of either ill-treatment or inducement. Fifteen days after the confession the accused adhered to it before the committing Magistrate. It was not until the trial in the Court of Session that the accused withdrew his previous statements. It cannot be said that the direction of the learned Judge was erroneous, still less that it vitiated the verdict. The charge must be read as a whole, and later on the learned Judge was careful to impress upon the jury that it was only if they found the statement to have been voluntarily made that they could take it into account as evidence. He left it to the jury to decide whether in the circumstances the confession should be regarded as genuine or not. There seems to be no force in the contention that the jury were misdirected by the Judge.

Turning to the facts, which we are entitled, and indeed bound, to consider under Ch. 27, Criminal P. C., they are

very simple and it is unnecessary to recapitulate them, as they are set out clearly and succinctly in the charge to the jury. The story told by Nepali Lalung clearly implicates Kabili, Rabiram and himself in the murder of Mangal Singh. The question is whether it can be accepted as the true version of the matter. Nepali was on his own showing an accomplice and was tendered and accepted a pardon under S. 337, Criminal P. C. It was essential that his evidence should be corroborated in material particulars. The jury evidently were of opinion that it was, and also the Judge, as he accepted the jury's verdict. We see no reason to differ. In the first place we have the confession of the accused Kabili which appears to have been freely and voluntarily made. It differs from Nepali's story in some important particulars. Nepali describes Rabiram, the brother of Kabili, as being present and taking a leading part in the murder. Kabili's confession makes no mention of Rabiram, but this was, no doubt, from a desire on his part to screen his brother. Rabiram was also put upon his trial but was acquitted by the jury, presumably because there was nothing against him but Nepali's statement.

Then Nepali states that Mangal and Kabili went away in Dasibar's boat and that he followed in another boat and joined them afterwards; while Kabili says that Mangal and Nepali were in Dasibar's boat, and that he joined them afterwards. Dasibar corroborates Nepali. The motive for the crime spoken to by Nepali is corroborated both by Kabili's confession and by the evidence of Namala, the wife of Sat Singh, with whom Mangal is said to have had an intrigue. Kabili adds on this point that both Mangal and he used to visit Namala. It would appear at first sight that Nepali's story was improbable, inasmuch as he poses as a close friend of Mangal Singh. Why then should he for a paltry sum of Rs. 20, which does not appear to have been paid, join with Kabili and Rabiram in murdering Mangal Singh deliberately and in cold blood? It may be that Nepali has not told the whole truth on the question of motive. Something of that kind is indicated by Kabili, when in his confession he stated that Mangal Singh and Nepali Lalung also had quarrels between them. But Nepali has never sought to exculpate himself with regard to the share which he took in the actual murder. After giving the case our best consideration, we find it to be a true case against Kabili Katoni. There appear to be no mitigating circumstances, which would justify the infliction of the lesser sentence. The murder was most cruel and deliberate. We accordingly dismiss the appeal and confirm the sentence of death.

V. B./R.K. *Appeal dismissed.*

A. I. R 1918 Calcutta 73

TEUNON AND NEWBOULD, JJ.

Gnanendra Kumar Rai Chowdhury — Plaintiff—Appellant.

v.

Shayama Sunder Jen and *others*—Respondents.

Appeal No. 487 of 1915, Decided on 28th January 1918, against appellate order of Dist. Judge, 24 Parganahs, D/- 1st July 1915.

Civil P. C. (1908), O. 21, Rr. 13 and 17 (2) —Application for execution—Supplementary list of property can be allowed after registration of application—Fresh application if necessary, it can be treated as one in continuation of first application—No question of limitation arises.

An application for execution, which was on the face of it, in accordance with law, was subsequently, on objection taken by the judgment-debtor, discovered to be defective, inasmuch as against the properties specified in the list furnished under O. 21, R. 13, proceedings could not be taken. The decree-holder then applied to the Court requesting it to accept a further and supplementary list of the properties and praying that execution should proceed by attachment and sale of those properties:

Held: that even after the admission and registration of the original application for execution it was open to the decree-holder to ask the Court to proceed against the properties specified in his supplementary list, which should be taken as part of the original application under the provisions of O. 21, R. 17 (2), or if a fresh application were at all necessary that application should be treated as one made in continuation of the application first presented so that no question of limitation could arise in the case: 17 *Cal.* 631 and 22 *I. C.* 337, *Dist.* [P 74 C 1]

Surendra Madhab Mallick—for Appellant.

Jogesh Chandra De and *Khitish Chandra Chackerbutty*—for Respondents.

Judgment.—This appeal arises out of certain proceedings in execution. The decree in question being a rent-decree was obtained against certain persons as shebaits of a certain Thakor on 28th November 1911. The application for execution was made on 23rd November 1914.

On its face the application was one in accordance with law. Later, on objection taken by the judgment debtors it was discovered that against the properties specified in the list furnished under O. 21, R. 13, proceedings could not be taken and accordingly on 14th January 1915 the decree holder made an application to the Court requesting the Court to accept a further list of properties and praying that execution should proceed by attachment and sale of those properties. It has been held by the first appellate Court that the application having been admitted and registered the proposed amendment could not be accepted and that it would be necessary for the decree holder to make a fresh application in execution. In coming to this conclusion the Court relied upon the decision of a Full Bench of this Court reported as *Asgar Ali* v. *Troilokya Nath Ghose* (1). We may observe, a further reference has been made to the case reported as *Salimulla Bahadur* v. *Sainaddi Sarkar* (2). But the present case may be distinguished from both these cases, in that in those two cases the application as originally made was one not made in accordance with law and that it contained no list of properties against which the proceedings were intended to be taken. In the present case, as we have already pointed out, the matter is different. Here there was a list of properties, the application was one made in accordance with law and it was only on the objection taken by the judgment-debtors that it was discovered that against these properties execution could not proceed. We are not of opinion that in a case such as this the decree-holder should be confined to the properties he had originally specified, and we think that it was open to him to ask the Court to proceed against the properties specified in his further and supplementary list. We are further of opinion that that list should be taken as part of the original application under the provisions of O. 21, R. 17 (2), or if a fresh application were at all necessary that that application should be treated as one made in continuation of the application first presented on 23rd November 1914.

In this view no question of limitation arises and we therefore set aside the order of the first appellate Court and decree this appeal with costs. The decree-holder will now be at liberty to proceed in execution as on his application of the date 23rd November 1914. We assess the hearing fee at three gold mohurs.

V.B./R.K. *Order set aside.*

(1) [1890] 17 Cal. 63.
(2) A. I. R. 1914 Cal. 359=22 I. C. 337.

A. I. R. 1918 Calcutta 74

CHITTY AND SMITHER, JJ.

Superintendent and *Remembrancer of Legal Affairs, Bengal*—Appellant.

v.

Mozam Molla and *others*—Accused—Respondents.

Government Appeal No. 2 of 1918, Decided on 20th February 1918, against the order of Sessions Judge, Jessore, D/- 3rd September 1917.

Criminal P.C (5 of 1898), Ss. 96 and 100—Warrant under S. 100—Form of warrant under S. 96 used—Warrant held legal.

If the substance of a warrant issued under S. 100, complies with the requirements of that section, the warrant is perfectly legal, no matter what prescribed form is used for the warrant. There being no prescribed form of warrant under S. 100, a Magistrate issuing such a warrant adapted a form under S. 96, to the provisions of S 100 by altering the figures and also by drawing up the warrant in terms required by S. 100.

Held : that the warrant was perfectly legal.

[P 75 C 1]

Orr—for Appellant.

Khoda Bux and *Satindra Nath Mukherjee*—for Accused.

Judgment.—In this case the accused persons were convicted by a Deputy Magistrate of offences under Ss. 353 and 147, Penal Code, and sentenced Israil to eight months' and the rest to six months' rigorous imprisonment each. The accused appealed to the Sessions Judge who acquitted them on a question of law. He held that the ruling in the case of *Bisu Haldar* v. *Emperor* (1) was conclusive in this case. The facts, he said, were identical. Against that acquittal the Government have appealed. It appears clear that the facts of the two cases are not identical. A perusal of the judgment in the case of *Bisu Haldar* v. *Emperor* (1) shows that not only was the warrant in that case issued under S. 96, Criminal P. C., but that the terms of the warrant indicated that it was issued under that section. In this case there being no prescribed form of warrant under S. 100, the Magistrate who issued it adapted a form under S. 96 to the provisions of S. 100 by altering the figures and also by drawing up the warrant in terms required by S. 100. This being so the warrant would

(1) [1907] 11 C. W. N. 836.

be perfectly legal. For this we find an authority in the case of *Gurameah* v. *Emperor* (2), where the form of a warrant under S. 98 was used with the necessary alterations for a warrant under S. 100. It is immaterial what form is used, provided that the substance of the warrant complies with the requirements of S. 100. That it certainly did in the case before us. It has been suggested that the warrant was altered after issue to meet the objections raised in this case. As to that there is no evidence whatever on the record; on the contrary, there is the evidence of P. W. No. 12, who states that he altered it with his own hand before the issue. We accordingly set aside the order of acquittal passed by the learned Sessions Judge and remand the case to the Sessions Court for a hearing of the appeal on the merits. The accused may remain on bail pending the hearing of the appeal.

V.B./R.K. *Acquittal order set aside.*

(2) [1912] 39 Cal. 403=13 I. C. 1002.

A. I. R. 1918 Culcutta 75

TEUNON AND NEWBOULD, JJ.

Bhudar Mal-Ram Chandra Marwari —Petitioners.

v.

Sew Narayan Marwari — Opposite Party.

Rule No. 716 of 1917, Decided on 8th February 1918 against an order of Small Cause Court Judge, Sealdah.

Contract Act (1872) Ss 69 and 70—Consolidated rate paid by owner of premises—Owner can recover half share from occupier —Calcutta Municipal Act (1899) Ss. 171 and 228.

In view of the provisions of S. 228, Municipal Act, which make the consolidated rate a first charge upon the building or land in respect of which it is payable, the owner of such building or land is a person interested in the payment of the rate within the meaning of S. 69, Contract Act, and having paid the share of the occupier he is entitled to recover it from the latter under Ss. 69 or 70, Contract Act [P 75 C 2, P 76 C 1]

Kali Prosonna Piplai —for Petitioners.

Biraj Mohan Majumdar and *Suresh Chandra Talukdar*—for Opposite Party.

Judgment.—This Rule is directed against an order of the Small Cause Court Judge of Sealdah, by which the Small Cause Court Judge dismissed the plaintiff's suit for recovery of a sum of Rupees 543.1.6. The plaintiff, it appears, is the owner of premises No. 35, Harish Mookerjee Road, and the defendant was his tenant and occupier of the said premises. The sum sued for represented payment of consolidated rate made by the plaintiff, and his case was that under the lease executed in favour of the defendant, defendant was liable to pay the whole rate. In the lease that was produced there was a stipulation to the effect that the consolidated rate should be paid in full by the tenant occupier. It has been found in a suit between the parties that that stipulation was fraudulently inserted. That being so, it is obvious that the plaintiff could not recover the sums he had paid, in full; but under S. 171, Calcutta Municipal Act, in the absence of any contract to the contrary, half of the consolidated rate is payable by the owner and the other half by the occupier. Falling back upon this provision of the law the plaintiff says that he should now be given a decree for half the amount he claimed. The case for the opposite party before us is that on removal of the clause fraudulently inserted, the contract between the parties was not that the defendant should pay the whole of the consolidated rate but that the plaintiff should do so. He further contends that inasmuch as no suit or any other action was brought or taken by the Municipal authorities in order to recover the sums paid, the payment by the plaintiff was a voluntary payment and he could not on that ground recover. From the contention he now puts forward it is quite clear that the defendant was determined not to pay either the whole or half of the consolidated rate.

It has been suggested that the plaintiff should have waited until a suit was brought against him, or that he should have left it open to the Municipal authorities to proceed against the defaulting occupier by way of distress and sale under the provisions of S. 213 and the following sections of the Municipal Act. In view however that such distress and sale would have the effect of removing the plaintiff's, the landlord's security for his rent and in view of the provisions of S. 228 of the Act which make the consolidated rate a first charge upon the building or land in question, it is clear the plaintiff is a person who under the provisions of S. 69, Contract Act, is interested in the payment of this money. The defendant has made it clear that he did not in fact intend to pay; if the plaintiff has paid it, he is clearly

entitled to be reimbursed. In other words, S. 69 or S. 70, Contract Act is applicable, the plaintiff not having made this payment with the intention of doing so gratuitously is entitled to recover from the defendant the payments actually made in so far as such payments should have been made by the defendant. Other defences are also put forward. It is suggested, for instance, that the plaintiff has not actually made the payments he alleges. It is further represented to us that for the period covered by these payments the defendant was not in occupation of the building. All these however are questions of fact into which we cannot enter here. We therefore set aside the order complained of and remand the case to the Court of Small Causes in order that after ascertaining the facts the learned Judge may proceed to pass a decree for such amount, if any, as may be justly recoverable from the defendant. Costs of this Rule will be costs in the suit. We assess the hearing fee at two gold mohurs.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 76

JENKINS, C. J. AND

CHATTERJEA AND WALMSLEY, JJ.

Rakhal Chandra Chatterjee—Plaintiff—Appellant.

v.

Bajisanthal and *others*—Respondents.

Letters Patent Appeal No. 97 of 1914, Decided on 13th May 1915, against judgment of Walmsley, J. D/- 7th July 1914.

(a) Chota Nagpur Tenancy Act (1908), Ss. 61 (2), (8) and 139 (2)—Suit to correct entry in Record of Rights—Suit to declare that rent is payable wholly in cash in civil Courts is barred.

A suit by a landlord in a civil Court for a declaration that rent in respect of certain land was payable wholly in cash and not partly in kind and partly in cash as entered in the finally published Record of Rights is barred under S. 139 (2), Chota Nagpur Tenancy Act, and does not oust the jurisdiction of the Revenue Officers to allow commutation of rent.

[P 77 C 2]

(b) Civil P. C. (1908), O. 41, R. 4—Appeal among by—Appeal on ground common to all—Decree can be reversed against all.

Order 41, R. 4. Civil P. C., gives power to appellate Court to reverse a decree in favour of all the defendants even though the appeal is preferred by some of them alone when the decree proceeds on a ground common to all of them.

[P 77 C 2]

Baidya Nath Dutta and *Bepin Behari Ghose*—for Appellants.

Brijmohan Mazumdar and *Dhirendra Krishna Ray*—for Respondents.

Walmsley, J.—This appeal is preferred by the plaintiff-landlord. He bought a village in Chota Nagpur in the year 1905. In 1907 Settlement proceedings were begun in the village and the Record of Rights was published finally in December 1909. The entry recorded therein is that "the rent is in kind with small cash payments in addition." Then the tenants applied for commutation of the rent in kind. On 18th March 1911, the plaintiff-appellant filed his plaint for a declaration that the rent was payable wholly in cash and not partly in cash and partly in kind. On 21th July 1911, he filed a petition for amendment of his plaint, because on 5th July the Revenue Officer had commuted the rent into a cash rent, and he asked that the order of commutation should be set aside as being illegal and made without jurisdiction. The Court of first instance decreed the suit, holding that the entry in the Record of Rights was wrong and the order of commutation was ultra vires. On appeal by the tenant-defendants the learned District Judge reversed the findings of the lower Court and dismissed the suit. The suit is governed by the provisions of the Chota Nagpur Tenancy Act. The learned vakil who appeared for the appellant after his pleader had read the judgments of the lower Courts with running comments, said that his contentions were as follows: (1) that the rent has been found in certain rent suits to be a cash rent, and therefore the Settlement Officer was not competent to enter in the Record of Rights that the rent was payable partly in cash and partly in kind; (2) that, for the same reason, the Revenue Officer was not competent to make an order of commutation; (3) that the Civil Court had ample jurisdiction to make an alteration in the Record of Rights; (4) that the lower appellate Court had erred in reversing the decision of the Court of first instance as regards those defendants who had not joined in preferring an appeal.

Of these points the first and third are disposed of by the learned Judge's findings that the entry in the Record of Rights is correct. The reasons for this conclusion are stated in detail.

and in addition there is the fact that the plaintiff's pleader admitted before the District Judge that the first Court's finding that the rent was not payable partly in kind was untenable. It is idle to discuss the contentions in view of this finding of fact.

As to the second point the learned Judge's finding that the entry in the Record of Rights was correct, renders the contention of no practical interest. The argument however is that at the time at which the order was passed, there was a dispute between the parties as to whether the rent was really payable in kind and that because of this dispute the Revenue Officer had no jurisdiction to make an order of commutation. It appears to me that S. 61 (8) provides for opposition of all kinds. The Record of Rights gave the tenants a right to apply under S. 61 (2). Under Cl. (8) the landlord was entitled to oppose the application and it was for the Revenue Officer to consider whether under all the circumstances, he should grant or refuse the application. That being so, I cannot see that the institution of a suit in the civil Court took away the Revenue Officer's jurisdiction. For the above reasons I hold that the first three contentions advanced on behalf of the appellant cannot be sustained. Before referring to the last point I ought to say that the learned vakil who appeared for the tenants-respondents supported the Judge's view that the suit was barred by S. 139 (2). I think that view is correct. The matter depends not so much upon the meaning of the words, "determine" as upon the words that follow it, and I regard the words "determination of the rent payable," as meaning the ascertainment of the existing rent. The view is borne out by comparing the use of the word determination in Ss. 40 and 158, Ben. Ten. Act.

The last contention is that the learned District Judge was wrong in reversing the decision of the Munsif as against all the defendants, when less than half of them joined in the appeal. O. 41, R. 4 however gives the appellate Court the power to reverse the decree in favour of all the defendants, even though the appeal is preferred by only some, when the decree proceeds on any ground common to all of them. It is not denied that the decree proceeds on grounds common to all the defendants, so the lower appellate Court was competent to reverse the decree in favour of all the defendants. No reason is assigned for holding that he erred in exercising his discretion under this rule. The appeal fails and it is dismissed with costs, hearing fee is assessed at two gold mohurs. (On Letters Patent appeal their Lordships delivered the following):

Judgment —We agree with the judgment of Walmsley, J., which we have read through. We must dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 77

FLETCHER AND WALMSLEY, JJ.

Abha Munshi—Petitioner.

v.

Kamu Molla—Opposite Party.

Civil Rule No. 568 of 1918, Decided on 23rd August 1918, against order of Addl. Sub-Judge, Noakhali, in Misc. Appeal No. 144 of 1917.

Limitation Act (1908), S. 18 and Ar. 166—Application under O. 21, R. 90 made more than thirty days after sale—No finding as to time when applicant came to know of sale—It is not competent for Court to come to conclusion that application falls under S. 18, Limitation Act—Civil P. C., O. 21, R 90.

It is not competent to a Court to come to the conclusion that an application to set aside a sale under O. 21, R 90, Civil P. C., made more than thirty days from the date of sale falls within the provisions of S 18, Lim. Act, without finding as a fact the date or time when the applicant came to know of the sale. [P 78 C 1]

A. S. M. Akram—for Petitioner.

Bepin Chandra Bose—for Opposite Party.

Fletcher, J.—This rule was issued at the instance of the petitioner, who is a purchaser at a sale in execution of a rent decree held on 27th November 1916, calling on the opposite party to show cause why the order of the learned Additional District Judge should not be set aside. The case is a perfectly simple one. As I have already stated, the present petitioner purchased in execution of a rent decree on 27th November 1916. The opposite party claims 1/3rd of the property to which the present application relates as being the purchaser at a sale in execution of a mortgage decree. The present case is this: on 2nd April 1917, the opposite party made an application to the Court under the provisions of O. 21, R. 90, Civil P. C. to set aside the rent sale on the ground of material irregularity and fraud. It is quite clear that that application could not

be heard, because the period for making such an application was thirty days from the date of the sale, unless the applicant could bring himself within the provisions of S. 18, Lim. Act. The learned Judge considered that he had brought himself within the purview of S. 18, Lim. Act, whether he has or has not, it is not for us to say. But on the facts found it is quite clear that the Judge was not entitled to come to the conclusion he has, because he has not found when the oppcsite party came to hear of the sale, and unless he finds as a fact when the opposite party came to know of the sale he cannot find whether the case comes within the provisions of S. 18, Lim. Act, or not. The case cannot stand on the findings of fact that have been made by the learned District Judge. We must, therefore, set aside the judgment of the learned Judge of the lower appellate Court and remit the case to him to re-hear it and to come to a proper finding on the facts in order to determine the matter that was pending before him. We make no order as to the costs of this Rule.

Walmsley,—**J**.—I agree.

V.B./R.K. *Case remitted.*

A. I. R. 1918 Calcutta 78

FLETCHER AND CHATTERJEA JJ.

Rammal (Das) Koch—Plaintiff—Appellant.

v.

Kakal Koli Kochini — Defendant — Respondent.

Appeal No. 384 of 1915, Decided on 15th August 1917, against original order of Dist. Judge, Assam Valley District, D/- 31st May 1915.

(a) Succession Act (1865), S. 50—S. 50 should not be confused with proof of formalities.

Section 50 merely lays down the formalities required by law to be observed in the execution and attestation of a will, and must not be confused with the question of the proof of the fact whether these formalities have been properly observed. [P 79 C 1]

(b) Evidence Act (1872), S. 68—Scope.

Under S. 68 attestation of a will can be proved by one of the attesting witnesses. [P 79 C 1]

(c) Probate—Grounds for refusal—Inofficiousness is no ground for refusing probate.

Probate of a will cannot be refused on the ground simply that it is what the lawyers in ancient times called "inofficious." That doctrine does not apply in Indian law. [P 79 C 2]

Prokash Chunder Majumdar—for Appellant.

U. N. Sen Gupta and *Lal Mohan Ghose* for *N. C. Burdalois*—for Respondent.

Fletcher, **J**.—This is an appeal from a decision of the learned District Judge of the Assam Valley District, dated 31st May 1915. The appeal is preferred by one Rammal Koch. This Rammal Koch propounded in the Court of the District Judge a document, dated 8th Aswin 1314, B. S., which is stated to be the last will of his uncle Sripal Koch. Probate of the will was opposed by the respondent, who is stated to be the wife of an inferior grade of the deceased person. Nobody seems to know what the position of the respondent was; but she was a person who had been married twice and having been widowed, she entered into bonds of matrimony for the third time with Sripal. Of course, the widow's marriage may not be in accord with the views of a good number of people of this country; but it is not uncommon amongst other communities in India. There is no doubt that the respondent was not a mistress or a kept woman of Sripal, but was his wife. Nobody seems to know what the qualification that is placed before the word "wife" in the evidence means. Whether it means that the marriage was not a regular one or otherwise, we do not know. It must be taken that the respondent was, in fact, the wife of the deceased. The alleged will was made on 25th September 1907, which corresponds with the vernacular date 8th Aswin 1314. On the same date, the document was registered. Sripal did not die before January 1915. Of course, that is a most material fact in the case that this document was executed and registered so long ago as 25th September 1907.

The learned Judge has laid no stress on a fact like this that, if this document was a forgery as he seems to have come to a definite conclusion that it was, then the propounder must have made up his mind with the assistance of others to forge a will of his uncle seven or eight years before his uncle died. Nothing in the evidence has been given to suggest why the will was executed. It is not suggested that at or about the time the will was executed, the deceased was ill or was considered likely to die. Another matter on which the learned Judge has misdirected himself completely is as to the method of the proof of the will. The learned Judge has got confused with regard to two separate and distinct matters. He has mixed up the question as

to the formalities required by the law under S. 50, Succession Act, namely that there must be two attesting witnesses with the proof of the fact as to whether those formalities were properly observed and the learned Judge has held that because the will was not proved before him by two attesting witnesses therefore the document could not be admitted to probate. I have already stated that the learned Judge has fallen into a manifest fallacy in treating the method on which the Court should be satisfied as to the observance of the formalities required by S. 50, Succession Act, and the formalities themselves. Under S. 68, Evidence Act, it is quite clear that a will can be proved by one of the attesting witnesses. The same view has obtained in England for many years. I quote from a most recent text book—Mortimer on Probate Law and Practice, p. 302, where the learned author observes:

"To prove the attestation of a will in the Court of Probate, it is not necessary to examine both attesting witnesses."

The learned Judge was clearly wrong when he rejected the will on the ground that only one of the attesting witnesses had proved the will. Then the question turns on whether, assuming that these two matters, the failure to consider the effect of registration—it not having been suggested in the course of the evidence that some person other than the deceased was taken before the Registrar—and a misdirection on the question of law as to the proof of the will do not vitiate the judgment, we should hold on the evidence that the will ought to be established. In a case like this the real question turns on which of the witnesses the Court is going to believe. It is quite true that the learned Judge has placed considerable stress on the evidence of two ex-mouzadars on the ground that they were respectable men who gave evidence for the respondent in the appeal.

He seems to have been unfavourably impressed—although on what grounds, it is not clear—with the man who must have been one of the principal witnesses for the appellant, namely Kulanand Pattak, and who certainly seeems to be a man in a superior walk in life to any other person in the case. He is a land-holder. He has got a brother who is a Sub-Deputy Collector and who has been a member of the Local Board. Whether he has ceased to be a member of the Local Board owing to adverse circumstances we do not know. But at one time he was a man who was well off to secure a seat on that important body. I am not sure that the reasons that the learned Judge has given for rejecting his evidence are altogether sound and I think both as regards his evidence and the other evidence, that the learned Judge went wrong at the outset by the way he approached the case. He approached it on the view that the will must be proved by two attesting witnesses and he overlooked the question of registration. It is quite true that, on the other hand, it may be difficult to understand why the husband, who was advanced in years as Sripal was, with a wife considerably his junior and with whom he seems to have been on excellent terms, so much so that she kept this husband in her own house and maintained him quite contrary to the usual condition of things that husbands always maintain the wives, should have disinherited the wife in the manner suggested. Of course the answer may be that one cannot tell what were the reasons in the dead man's mind. These sorts of cases happen where there is no explanation put forward as to what was the motive which led the deceased man to disinherit the wife.

That of course is a suggestion that must be taken into consideration along with the evidence when the Judge weighs the evidence; but it is not sufficient to show that the will is not a genuine one. Cases can be shown both in the books and in the newspapers where persons who were in very affectionate terms with their wives, have executed wills either wholly or practically disinheriting them. What was in the minds of these persons, of course, it is quite impossible to establish. But there is no reason to refuse to admit the will to probate simply because it is what the lawyers in the ancient time called inofficious. That doctrine does not apply in our system of law. I think the judgment of the learned Judge in this case cannot stand. There has not been a proper trial nor has the case been properly or sufficiently investigated into. If any question is going to be raised, for instance as to whether some other man was taken to the registry and put forward as Sripal, that case ought to be

made definitely and the identifier and other persons who are able to speak to the fact should be entitled to give evidence to show whether Sripal did in fact, go to the registry to register the will or whether some person representing Sripal registered that false document. I think we ought to set aside the judgment of the learned District Judge and remand the case to the lower Court in order to have the case tried afresh. Both parties will be entitled to adduce any further evidence they may think fit to adduce on the issues that arise in the case. Costs will abide the result of the rehearing before the learned Judge of the Court below. We assess the hearing fee at two gold mohurs. I do not mean to imply that the learned Judge may not draw hostile inferences from the fact that the other attesting witnesses have been kept away from the witness box. That is a matter of credibility of the witnesses just as much as any other matter.

Chatterjea, J.—I agree.

V.B./R.K. *Case sent back.*

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RICHARDSON AND BEACHCROFT, JJ.

Ribati Mohan Das and *another*—Defendants—Appellants.

v.

Nadiabashi De and *another*—Plaintiffs—Respondents.

Appeal No. 585 of 1915, Decided on 24th January 1918, from appellate decree of Dist. Judge, Tipperah, D/- 16th December 1914.

Civil P. C. (1908), O. 34, R. 1—Suit by mortgagee of raiyati holding—Application by purchaser of holding setting up paramount title rejected—Mortgagee obtaining decree and instituting suit to eject purchaser—Purchaser has right to redeem mortgage—Transfer of Property Act (1882), S. 91.

Plaintiff, mortgagee of a raiyati holding brought a suit on foot of his mortgagee. Defendant, who was the purchaser of the holding and had been recognized by the landlord, applied to be made a party to the suit. He did not claim to redeem the mortgage, but set up a title paramount to the mortgagee and also questioned the bona fides of the mortgage transaction. His application was rejected. The plaintiff obtained a decree and purchased the holding in execution thereof. He then brought a suit to eject the defendant;

Held: that the defendant had a right to redeem the mortgage. [P 82 C 1]

Sarat Chandra Bysack and *Bepin Chandra Bose*—for Appellants.

Jogesh Chandra Roy and *Sasadhar Roy*—for Respondents.

Richardson, J.—This second appeal is preferred by defendants 1 and 2 in a suit for recovery of possession of certain land. At the date of the suit defendant 2 was tenant of defendant 1. We are informed that there is reason to believe that defendant 2 has since purchased the rights of defendant 1. As to the facts found, it appears that on 31st March 1895, one Jamaraddi mortgaged the property in suit with other properties to the plaintiffs. The property in suit is a raiyati holding.

On 6th May 1896 Hara Chandra Das, the father of defendant 1, in execution of a money-decree obtained by him against the mortgagor purchased the property and subsequently in the same year obtained actual possession from the Court. In 1907 the plaintiff brought a suit upon the mortgage of 1895 against the heirs of the mortgagor and others. To that suit he did not make the father of defendant 1 a party. Accordingly on 29th May 1907 Hara Chandra Das applied by a petition to be joined as a party defendant. The plaintiff opposed the application, which was rejected by the Court. The mortgage suit proceeded and in the result the plaintiffs obtained a mortgage decree in the usual form and in execution purchased the property themselves on 9th September 1908. On 2nd March 1909 the plaintiffs obtained symbolical possession from Court. Their subsequent efforts to obtain actual possession led to a criminal proceeding under S. 145, Criminal P. C., which was decided on 24th February 1909 in favour of defendant 1. The plaintiffs then instituted the present suit on 18th June 1912. At this stage of the suit all that is claimed by the defendants-appellants is that the plaintiffs' title to eject them from the disputed land is subject to their right to redeem the plaintiffs—a right which the Courts below have by these decrees concurrently refused to recognize. In denying any right to redeem in the defendants appellants the Courts below have acted on two grounds. The first ground appears to be that they were under the impression that the defendants did not claim the right to redeem in this suit and were unwilling to redeem. The second ground which is

the more substantial ground is that the defendants, if they ever had any right to redeem are precluded from exercising, that right by reason of the application which Hara Chandra Das made in the mortgage of 1895. I will deal first with the second of the two grounds.

The petition which Hara Chandra Das presented to the Court in that suit has not been produced by either of the parties to the present suit. But we have the order of the Court on the petition passed on 30th May 1907. The order begins in this way:

"I have heard the pleader for the plaintiff and the pleader for the person who prays to be added as a defendant. The plaintiff's pleader objects to the third party being joined as a defendant."

Then it goes on to say:

"The plaintiffs sue on a mortgage of a raiyati. The third person who seeks to be made a defendant says he purchased the land at a money sale and got himself registered in the sherista of the landlord. He claims the land on the strength of such recognition also."

He concludes with these words:

"I do not think I should be justified in adding this person as a defendant against the will of the plaintiff, particularly when he claims a title which may be pleaded as defeating the plaintiff's right of mortgage."

Now upon the terms of that order it is clear that Hara Chandra Das's application to be made a party was rejected at the instance of the mortgagee plaintiffs. The grounds on which the Munsif based his order are not very clear. It may be that Hara Chandra Das indeed set up a title which was paramount to the mortgage title of the plaintiffs. His plea may have been of the same nature as the plea which was put forward by the purchaser of a part of the mortgaged property in the case of *Radha Kant Chakravarti* v. *Ramananda Shaha* (1). If that was the plea of Hara Chandra Das, it is possible that if he had been made a party and the plea had been tried it would have proved unsuccessful in the event as it did in the case cited. But, apart from that plea, it is not at all clear. Hara Chandra Das did not also set up the case on which defendant 1 now relies. The pleadings in the present suit lend some support to the view that Hara Chandra Das also put forward the contention that the plaintiffs' mortgage was not a bona fide transaction. If therefore Hara Chandra Das had been permitted at his own instance to become a party defendant in the suit, he might have filed a written statement putting forward both defences to the plaintiffs' claim. As a matter of fact, however, he was not made a party; he had no opportunity of filing a written statement or of stating his case in a formal way. In that state of things, in my opinion, the Courts below were wrong in holding, on the authority of such cases as *Nilkant Banerji* v *Suresh Chandra Mullick* (2) and *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (3), that the defendant-appellants are precluded in the present suit from asserting any right to redeem. In the case of *Nilkant Banerji* v. *Suresh Chandra Mullick* (2), decided by the Privy Council, the defendant who claimed the right to redeem had been made a party to the mortgagee's suit. In that suit he had set up the paramount title which he claimed and he had said nothing about his right to redeem. Having been a party to the suit and the suit having been dismissed as against him on the ground that as he claimed a paramount title he was not a proper party to the suit, it was held that in the subsequent suit brought by the mortgagee for possession of the property, it was too late for him then to set up a new title under which he would have the right of redemption. The present case is almost the converse of that case. Hara Chandra Das was not permitted to become a party to the mortgage suit; and, as I have said, he had no opportunity in that suit to put forward the case that even if he failed to establish a paramount title he had at least a right which would entitle him to redeem the plaintiffs. In my opinion therefore the Courts below are wrong in their conclusion that in the present suit the defendant-appellants are debarred from setting up a right of redemption. Coming next to the first ground I find it somewhat difficult to reconcile the statements in the judgment of the Courts below that the appellant claims no right to redeem with the fact that this question is discussed in both the Courts in connexion with issues 2 and 9 framed by the first Court. As regards the lower appellate Court, it appears that the right to redeem was expressly asserted and insisted upon in para. 4 of the grounds of appeal filed in that Court. As to the plaintiffs' pleadings, paras. 6 and 8 of the

(1) [1912] 39 Cal. 518=18 I. C. 698.

(2) [1886] 12 Cal. 414=12 I. A. 171 (P. C.).

(3) [1906] 33 Cal. 425.

plaint embody an admission of the right of the defendants to redeem, should they be able to prove that the decree under which Hara Chandra Das obtained possession was not a decree founded upon a collusive transaction. In para. 6 of the plaint the plaintiffs say:

"Particularly, even if defendant 1 or his predecessor Hara Chandra Das had any decree, still the plaintiffs' mortgage being preferential they had no right to retain the land of the schedule in their possession without redeeming the same."

In para. 8 the plaintiffs say again:

"If it is held that defendant 1 has any right to redeem any mortgage, then he may be given the opportunity to pay what is justly due to the plaintiffs on account of their mortgage; and if that opportunity be not availed, then a decree for possession may be awarded to the plaintiffs."

Each party was, as usual, disputing the validity of the transaction under which the other claimed title. The plaintiffs said that Hara Chandra Das's money-decree was based on a collusive deed without consideration. The defendants impugned the mortgage of the plaintiffs on very much the same ground. What the Courts below have found is that both the transactions were bona fide and real transactions. It would seem to follow from the admissions in paras. 6 and 8 of the plaint that the plaintiffs' right to eject the defendants must be subject to the defendants' right to redeem the plaintiffs. There is nothing, so far as I can see, in what happened in the previous suit or in the conduct of the present suit by the defendants to debar them from this right of redemption, to which on the facts found they are clearly entitled. In that view in my opinion the decree of the Court below must be modified and the right of the defendants to redeem the plaintiffs declared. The result therefore is that this appeal is allowed, the right of the defendants-appellants to redeem the plaintiffs in respect of the property in dispute is declared and the case remitted to the Court of first instance for that Court to take the proper accounts, determine the amount which the defendants should pay the plaintiffs for the purpose and make a decree accordingly. The appellants are entitled to their costs of this appeal. We make no order as to the costs in the Courts below. The costs of the further inquiry as to accounts now directed will be in the discretion of the Court of first instance.

Let the record be sent down as soon as possible.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal allowed.*

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CHATTERJEA AND RICHARDSON, JJ.

Aftabuddin Chowdhury—Appellant.

v.

Basanta Kumar Mukopadhyaya and *another*—Respondents.

Appeals Nos. 86, 268 and 269 of 1911, and Appeal No. 2918, of 1913, Decided on 7th July 1916, from original decrees of Sub-Judge, Noakhali, D/- 23rd December 1910, and from appellate decree of Dist. Judge, Noakhali, D/- 3rd February 1913.

Transfer of Property Act (1882), S. 53—Fraudulent transfer—Transferee not bona-fide—Payment of full consideration does not validate transfer.

The purchaser of a property, with full knowledge of the intention of the seller to defraud or defeat his creditor, is not a bona fide transferee and his purchase is invalid as against the creditors, even though full consideration was paid for the purchase and a portion of the purchase-money was paid in discharge of a debt which the seller owed to third persons. [P 86 C 1]

Dwarka Nath Chakraburty, Hari Bhushan Mukherjee, Manmotho Nath Ray, Dhirendra Lal Kastgir—for Appellants.

Jogish Chandra Ray, Gunada Charan Sen, Basanta Kumar Bosu, Khirode Narain Bhuiya and *Dhirendra Lal Kastgir*—for Respondents.

Appeal No. 86 *of* 1911

Judgment.—The facts of the cases which gave rise to these appeals may be stated shortly as follows. One Durga Charan Mukherjee died in 1898, leaving his son Madhu Sudhan an infant. Bistoo Charan, brother of Durga Charan, was appointed guardian under Act 8 of 1890 in respect of the properties of the minor on 20th February 1900., and one Sarat Chandra Ray and three others executed a security bond on 13th June 1900 as sureties for Bistoo Charan The order appointing Bistoo Charan as guardian was, however, set aside on appeal by the High Court on 28th January 1902, and on 23rd August 1904, one Rajani Kanta was appointed administrator of the estate. On 27th January 1905, he brought a suit for accounts for the period of Bistoo Charan's management claiming Rs. 12,000 odd. and the sureties Sarat Chandra Ray and others were made defendants along with Bistoo Charan. After filing thesuit ap-

plication was made for attachment before judgment of the properties of Sarat Chandra, and on 23th April 1905 a conditional order for attachment was passed and the order was served on 9th May 1905. On 19th May 1905, objection to attachment was made by Bistoo Charan and on the same day Sarat Chandra filed an affidavit stating that he was not going to alienate any property. On 22nd May 1905, the conditional order for attachment was withdrawn. On 12th January 1906, a fresh order for attachment before judgment was issued and served between 19th and 25th February 1906. A preliminary decree for accounts was passed on 9th February 1906. and a final decree was passed on 16th March 1909 for Rs. 10,837-8-4 in favour of Aftabuddin who had succeeded Rajani Kanta as administrator of the estate against Bistoo Charan and Sarat Chandra and the other sureties.

While the said suit was pending, Sarat Chandra executed six conveyances in favour of certain persons in respect of some of his properties. Two of these were executed in favour of Basanta Kumar Mukerjee, on dated 29th September 1905 and the other dated 25th December 1905. Two others were executed in favour of one Dewan Das, one of which dated 31st December 1905 was in his own name and the other dated 25th February 1906 in the name of his son Gour Das. Another kobala dated 14th February 1906 waa executed in favour of one Shamsere Ally, and lastly there was a kobala in favour of one Nanda Kumar on 25th February 1906. After the final decree was passed in the account suit, the decree holder applied for execution of the decree against Sarat Chandra and attached his properties. Thereupon Basant Kumar Mukerjee and other purchasers preferred claims to the properties attached on the strength of kobalas executed in their favour. The claims of Shamsere Ally, Gour Das and Nanda Kumar were disallowed, but the claims of Basanta Kumar and Dewan Das were allowed on 31st January 1910. The decree-holder thereupon brought a suit No. 160 of 1910 for a declaration that the purchase by Basanta Kumar was fraudulent, collusive and benami, and that no title passed to him under the kobalas. The suit was dismissed by the Court below and Appeal No. 86 of 1911 has been preferred in that suit. A similar suit brought against Dewan Das (Suit No. 161 of 1910) was also dismissed and Appeal No. 269 of 1911 is against the decision in that suit.

The suit (No. 53 of 1910) brought by Shamsere Ally was decreed, and Appeal No. 268 of 1911 arises out of that suit. The suit brought by Nanda Kumar was dismissed and no appeal has been preferred by him. The suit by Dewan Das upon the kobala in the name of Gour Das (Suit No. 53 of 1911) was also dismissed by the Court below and Second Appeal No. 2918 arises from that suit. We will first deal with Appeal No. 86 of 1911 which arises out of Suit No. 160 of 1910, in which Basant Kumar Mukerjee is the contesting defendant. It appears that the most valuable of the properties belonging to Sarat Chandra was a share in a big estate called Jugdia Estate, which was in the hands of one Hem Chandra Das as Sadar Malguzar, the proprietors getting their respective malikanas from him. Sarat Chandra had 13 gundas, 1 cowri, 2 kags share at the time of the transactions we are dealing with in that estate. Hem Chandra Das had a Katchari at Char Parbati in that estate and Sarat Chandra served as Naib (principal officer) in the Katchary under Hem Chandra Basanta Kumar as already stated purchased by two kobalas dated 29th September 1905 and 25th December 1905 respectively some shares of the Jugdia Estate from Sarat Chandra. By the first kobala he purchased a 1 gunda 2 karas 1 krant 1½ dantis share, and by the second a five gunda share. Basanta Kumar is a pleader practising at Feni. He acted as a pleader for Durga Charan Mukerjee so long as he was alive and afterwards for the administrator of his infant son's estate, i. e., the decree-holder. His lodging and that of Durga Charan were in the same compound with only a fencing between them. He was cited as a witness in the suit for accounts against Bistoo, Sarat and others, and the summons was served personally upon him on 3rd July 1905 and he was examined as a witness in that case.

In his deposition in the present case he at first stated that he could not say whether he knew about the account suit before the date of his conveyances. But when the bills of his travelling and other expenses, which he had sub-

mitted to the Court in the account suit, were shown to him he had to admit that he knew of the suit before the execution of the kobalas. It appears from the evidence of Hem Chandra that he, Sarat Chandra and Basanta Kumar gave evidence in the account suit at the same time and Rajani Mohan Ray, who was formerly the administrator of the estate of Durga Charan, swears that he told Basanta Kumar about the attachment before and after the first attachment and before and after the second attachment. The kobalas in favour of Basanta Kumar and the other purchasers were all executed at the Parbati Char Katchari of Hem Chandra, the Sadar Malguzar of the Jugdia Estate. The first attachment was served at Char Parbati on 18th May 1905, and the second on 19th January 1906. There can be no doubt that Hem Chandra was fully aware of the attachment. He denied knowledge of the attachment in his deposition in the present case, but in his deposition in the claim case on 11th December 1909 he stated that he heard of the first attachment and that it had been subsequently withdrawn on the objection of Sarat Chandra. Sarat Chandra was then serving under him as a Naib in the Jugdia Estate in the Char Parbatia Katchari. The Court below observes:

"It is quite clear from the deposition of Hem Chandra Das that he knew about the attachment and Basanta Kumar made inquiries from him. Hem Chandra and Basanta Kumar are friendly. It is highly improbable that he would conceal the fact of attachment from him. Moreover he is a pleader and was a witness in the suit on behalf of the administrator and appeared in Court on many dates. It is very probable that he should know it. Rajani Roy, the previous administrator, affirms that Basanta Kumar was told everything. He is no administrator now and has no concern with the estate or the present administrator or the owners and so I see no reason to disbelieve him. I therefore find that Basanta Kumar was aware of the attachment, and the attempt of Sarat to sell properties to avoid the liability."

We entirely agree with this finding of the Court below, and we have no doubt that Basanta Kumar was perfectly aware of the attachment and of Sarat's intention to dispose of his properties, to avoid liability under the decree which might be passed in the account suit, before he took the conveyances from Sarat. The next question is whether any consideration was paid by Basanta Kumar for the Kobalas. The first kobala was for Rs. 1,365, and the second for Rs. 4,520. Hem Chandra and the attesting witnesses have deposed to the passing of the consideration and Basanta Kumar also deposes to the payment of consideration of the second kobala. The attesting witnesses however are all the servants or relations of Hem Chandra. Basanta Kumar is a pleader, he has money-lending business and landed properties. He has accounts, but he says that he has no account books to show the payment of the consideration of the kobalas. Hem Chandra says that out of the consideration for the first kobala in favour of Basanta Kumar certain debts which Sarat Chandra owed to certain ladies of his (Hem Chandra's) family were paid off. These loans are said to have been advanced to Sarat Chandra on behalf of the ladies by Hem Chandra on bonds, but he cannot say whether the bonds were registered or were unregistered or whether they were mortgage bonds. Hem Chandra has produced certain accounts to show the repayment of the debts by Sarat Chandra.

They are loose sheets of paper stitched together, and having regard to the evidence we do not think that it has been satisfactorily proved that Sarat Chandra really owed any debts to the ladies of Hem Chandra's family or that they were paid off out of the consideration money of the first kobala. At the same time we are unable to hold that the kobalas were benami. Hem Chandra, under whom Sarat Chandra was serving as a Naib, was helping him as much as he could and Basanta Kumar was the friend and pleader of Hem Chandra, but we do not think it likely that he would act as the benamidar of Sarat Chandra or hold the property for him when he obtained no benefit from such a transaction. He had already purchased a share in the Jugdia Estate, which appears to be a very valuable one, and he would naturally be desirous of acquiring further shares in that estate. He had undoubtedly the means to purchase the share. There is evidence that since his purchase from Sarat Chandra he got his name registered in respect of the shares and received the malikana of the shares purchased from Hem Chandra, the Sadar Malguzar. We do not think, having regard to all the circumstances, that Basanta Kumar purchased the property from Sarat Chandra benami

or held it for his benefit. Basanta Kumar however is a pleader and a man of business and it is not likely that, with full knowledge of the suit which was pending at the time the attachments before judgments and the sure prospect of litigation which a purchaser from Sarat Chandra, would have to enter into in the event of a decree being passed against Sarat Chandra should have paid the full value of the property which the consideration stated in the kobala represents. But if the kobala were not benami and if Basanta Kumar paid some consideration it is idle to speculate how much he actually paid and we must hold that the kobalas were not without consideration. The transfers by Sarat Chandra however were made with intent to defeat or delay his creditor, the plaintiff, and the Court below has also come to the same conclusion. The only question therefore is whether Basanta Kumar was a transferee in good faith. The learned Subordinate Judge observes:

"It cannot however be conceived for a moment that Basanta Kumar intended to help Sarat in his fraudulent conduct. It appears from the evidence on the side of the administrator that Basanta Kumar was a well wisher of the estate of Durga Charan and had intimacy with him and his widow. Under such circumstances it is highly improbable that he should help Sarat. It seems that he purchased for his own benefit without any thought of helping or injuring any one. The question is whether under these circumstance he is to be held as acting mala fide. The law has been elaborately discussed in the decisions reported as *Hakim Lal* v. *Mooshahar Sahu* (1) and *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (2). Going carefully through these decisions I think the purchase of Basanta Kumar cannot be said to be mala fide merely because the result has been to defeat the creditor."

We are unable to agree with the Court below on the point. There is no doubt that the transfers made by Sarat were fraudulent. They were made with intent to defeat or delay the plaintiff in the event of his obtaining a decree against him. When the first order for attachment before judgment of his properties was served, Sarat Chandra on 19th May 1905 stated in his affidavit that he was not attempting to transfer any properties and the Court in rejecting the application for attachment on 22nd May 1905 to a certain extent relied upon the said affidavit. The transfer made by Sarat Chandra in favour of Basanta Kumar on 22nd September 1905 was certainly fraudulent and if the latter with full knowledge of the fraudulent intention obtained the conveyance we fail to see how he can be said to have acted bona fide. The mere fact that the transfer was not a cloak for the benefit of the debtor or that it was for adequate consideration does not necessarily show that it was made in good faith. A mere knowledge of an impending decree or execution against the transferor is not sufficient to make the transferee a transferee otherwise than in good faith when he does not share the intention of the transferor to defeat or delay his creditors. But as observed in the case of *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (2):

"Indeed it would almost be a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immovable property into money which can easily be concealed and thus to defeat or delay his creditors should nevertheless be treated as transferee in good faith, and the transfer to him should be upheld though S. 53 says that a transfer made with such intention is voidable at the option of the creditors. Where the transferee is a creditor of the transferor and accepts the transfer in satisfaction of the debt due to him though with the knowledge that his so doing has the effect of defeating other creditors of the transferor, the transfer may come within the last paragraph of S. 53, T. P. Act."

In *Cadogan* v. *Kennett* (3) Lord Mansfield said:

"If the transaction be not bona fide the circumstance of its being done for a valuable consideration, will not alone take it out of the Statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void."

The authorities on the point were elaborately discussed in the case of *Hakim Lal* v. *Mooshahar Sahu* (1) and we agree with the view taken by the learned Judges as to the result of the authorities. In that particular case, the transfer impeached as fraudulent was made in favour of a creditor and there was adequate consideration for the transfer, and it was accordingly held that the transfer was not invalid. The Judicial Committee in affirming the decision of this Court observed:

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for

1. (1907) 34 Cal 999.
2. (1897) 24 Cal 825.
3. (1776) 2 Cowper 432=98 E R 1171.

himself. He may pay one creditor and leave another unpaid."

Their Lordships were dealing with a case where the transfer was in favour of a creditor. In the present case, Basanta Kumar was not a creditor and he had full knowledge of the fraudulent intention of the transfer. Under the circumstances the transfer is void as against the plaintiff even if Basanta Kumar had paid full value for the property purchased by him. It is said that the first conveyance was executed in favour of Basanta Kumar for payment of certain debts which Sarat owed to certain ladies of Hem Chandra's family. We have referred to the evidence on the point, and have expressed our opinion that the existence of the debts or the payment thereof by Sarat out of the consideration of the said kobala was not satisfactorily proved. But assuming that there were some debts and that a portion of the consideration money paid by Basanta Kumar was applied in payment of such debts, we do not think that the transfer is for that reason valid. We fully agree with the observations quoted from *Lockrain* v. *Rastan* (4) in the case of *Hakim Lal* v. *Mooshahar Sahu* (1), referred to above and which runs as follows:

"A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve: he may, with perfect safety keep out of the transaction. Having no motive of intereet prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says he enters into it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness, he has an interest to serve: he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve and if he goes no further than is necessary to serve that purpose the law will not charge him with fraud by reason of such knowledge."

So far as the second conveyance is concerned, there is no evidence that any creditor was paid off with the consideration for the said conveyance. Hem Chandra says that Sarat sold his property in order to raise money for a business in rice. If that is so, he converted his immovable property into money, so that the creditor might be defeated. Under the circumstances we think the transfers in favour of Basanta Kumar are void against the plaintiff. It is contended however on behalf of Basanta Kumar that this is not a suit under S. 53, T. P. Act, on behalf of the creditors to set aside a fraudulent conveyance, that the issues which arise in such a suit were not raised and evidence was not gone into on such issues, and that the plaintiff having challenged the conveyances as benami and without consideration and having failed to prove the same, the suit should be dismissed. There is no evidence that there are any creditors of Sarat other than the plaintiff, the suit therefore is not open to the objection that it was not brought on behalf of all the creditors. It is true that the suit was based upon the grounds that the conveyances were benami and without consideration, and evidence was adduced in support of that case. The questions of benami and fraud appear to have been mixed up in the plaint and the evidence, but there are distinct allegations in the plaint that Sarat Chandra, with intent to frustrate the decree and with the help of Hem Chandra, created the false and fraudulent conveyances. Basanta Kumar in his defence set up that he was a bona fide purchaser for value without notice of the attachment. Issue 4 raised in the case was :

"Is defendant 1 a benamidar for defendant 2 and is the kobala set up by defendant 1 a fraudulent and collusive document ?"

And the learned Subordinate Judge discussed the question whether Basanta Kumar purchased in good faith. After referring to the authorities relating to fraudulent conveyances, he observes :

"Going carefully through these decisions I think the purchase of Basanta Kumar cannot be said to be mala fide merely because the result has been to defeat the creditor. In this connexion it is to be noted that in the plaint against Basanta Kumar the plaintiff did not want to avoid the sale because of the bad faith of Basanta Kumar. His purchase was impeached as benami. Had the plaintiff based her case on an intention to defraud, the defendant could have been able to prove that the property which Sarat had even after the sale to him was sufficient to meet any claim of the administrator "

It appears therefore that although there were allegations to the effect that the kobalas were fraudulent and were executed in order to defeat the claim of the plaintiff they were mixed up with question of benami, and the attention of the parties was not directed to the points arising in a suit under S. 53, T. P. Act,

4. (1899) 9 North Dakota 434=81 N W 60.

and evidence was not adduced on all such points. In these circumstances, we think that for the ends of justice the case should be remanded for an enquiry into the assets of Sarat Chandra at the time of the sales to Basanta Kumar, and whether they were sufficient to meet the claim of the administrator in the account suit then pending. If the Court finds that they were not sufficient, the conveyance in favour of Basanta Kumar will be declared void as against the plaintiff. If on the other hand, Sarat had sufficient properties at the time to meet the claim of the plaintiff, the suit will be dismissed. Costs will abide the result.

In Appeal No. 268 *of* 1911

This appeal arises out of the suit (No. 53 of 1910) brought by Shamsere Ally who was unsuccessful in the claim case. He purchased 2½ gandas of the Jugdia estate by a kobala dated 14th February 1906. The purchase, therefore was after the second attachment was applied for and before it was effected (between 19th to 25th February 1906). Shamsere was already the owner of another 2½ gandas shares, and appears to be a substantial landowner and shopkeeper. The consideration stated in the kobala is Rs. 2,160. There is evidence to show that the consideration passed and there are entries in his jama khurch book showing payment of Rs. 2,160 as consideration besides other expenses for stamp and registration, etc., of the kobala.

The Court in the claim case was of opinion that the jama khurch was not "above suspicion," but we do not see sufficient reason for rejecting the book as unreliable receipts have been produced to show that he received malikana for the years 1313 to 1316. The account book of 1312, which was produced to show payment of consideration, could not contain entries relating to receipts of malikana of that year, as the kobala was executed at almost the end of the year (Falgoon) although the fact that the books of the years 1313 to 1316 were not produced is open to comment. The only evidence to show that the kobala was benami is that of Aftabuddin and Basiruddin. The first merely says that he "heard" from many people that the kobalas were without consideration, and the statement of Basir-ud-din (who is also one of the sureties) that Sarat told him about the benami nature of the transaction cannot be relied upon. Shamsere, it is true, admits that he did not make any inquiry about the property but he was a cosharer in the property, though the facts that he did not inquire whether the property purchased by him was "under any debt or not" is suspicious Having regard, however, to the facts that he already had a share in the estate and had the means to purchase the 2½ gundas in question, the evidence as to payment of consideration may be accepted.

Shamsere holds jamas in the Jugdia Estate of which Hem Chandra is the Sadar Malguzar and is the "master of giving or refusing settlements," as the witness Abdul Majid says. The kobala was executed in Hem Chandra's Katchari where Sarat used to serve as Naib, and Shamsere resided at Char Chandia within the Jugdia estate. Basanta Kumar sometimes acted as his pleader. But there is no direct evidence to show that Shamsere was aware of the suit against Sarat, or of the attachments before judgment or that he purchased with knowledge of the fraudulent intention of Sarat in disposing of his properties, although all the circumstances raise a suspicion that he was aware of the facts. In the absence of the evidence however the Court cannot act upon mere suspicion, and under the circumstances we are unable to differ from the Court below or to hold that the purchase was not bona fide. This appeal accordingly will be dismissed, but in the circumstances we direct that each party do bear its own costs.

In Appeal No. 269 *of* 1911. This appeal arises out of the suit (No. 161) brought by Aftabuddin against Dewan Das, whose claim was allowed in the claim case. The suit relates to 1 gunda share of Jugdia Estate purchased from Sarat Chandra by Dewan Das on 31st December 1905, for Rs. 1,296. Dewan Das is said to be more than a hundred years old: his son Gour Das, looks after his properties. Gour Das and a witness, Nalini Kumar, have been examined to prove the payment of the consideration. No jama khurcha has been produced, but Gour Das says that they have no jama khurcha. The malikana receipts have however been produced [Exs. B 11 (1) to B 11 (4)]. The case bears a general resemblance to the case of Shamsere Ally. The kobala was executed at the

Katchari of Hem Chandra and the witnesses to it were the amlas of Hem Chandra. Dewan Das already had a 12½ gundas share in the estate. His son, Gour Das, admits that Sarat told him about his debts, but he did not inquire into the particulars. Dewan Das lives at Char Chandra within the Jugdia estate, and appears to be a substantial man. The only evidence as to the kobala being a benami transaction is that of Aftabuddin or Basiruddin and the observations we have made with respect to them in the case of Shamsere Ally apply to this case also. There is no direct evidence to show that Dewan Das or his son, Gour, was aware of the suit against Sarat or the attachments or that they had knowledge of the fraudulent intention of Sarat in disposing of his properties, although as in the case of Shamsere a suspicion arises that they were aware of the facts. Under the circumstances, we must dismiss this appeal also., each party to bear his own costs.

In Second Appeal No. 2918 *of* 1913. We now come to the second appeal preferred by Dewan Das which arises out of suit (No. 53 of 1911) brought by him for declaration of his right to 1-gunda 3 karas share of the Jugdia Estate which was purchased by him in the name of his son, Gour Das, by a kobala dated 26th February 1906, that being the last kobala by which Sarat Chandra sold away his share in the Jugdia Estate. The suit was tried by another Subordinate Judge and he came to the conclusion that the evidence regarding the passing of the consideration was very doubtful but that even supposing that the amount was actually paid to Sarat,

"there could be no doubt that the object of the bala was to convert the property out of the h of the decree expected to be passed in the account suit,"

and that the plaintiff had full knowledge of the fraudulent intention of Sarat. The suit accordingly was dismissed by the Court of first instance. On appeal, the learned District Judge affirmed the decree of the first Court. The learned Judge says:

"The evidence as to the passing of the consideration was held to be unsatisfactory by the lower Court. I do not differ from the lower Court on this point. It may or may not be true. But I cannot believe that the plaintiff or rather his son Gour had no knowledge of the proceedings against Sarat."

Then after making certain other observations he states his conclusion thus:

"But no unquestionable evidence is forthcoming to prove the passing of consideration and the Courts must presume the facts to be according to the common course of natural events and that Gour had knowledge of Sarat's motive in disposing of his property."

The finding that the consideration for the kobala was not proved by unimpeachable evidence is a finding of fact and is binding upon us in second appeal. It is true that we have in Appeal No. 269 upheld the first kobala of Dewan Das on the ground that there was no direct evidence that he had knowledge of the attachments or the fraudulent intention of Sarat. But that kobala was executed on 31st December 1905 and the kobala in the present case was executed on 26th February 1906. It was the last kobala by which Sarat disposed of his share in Jugdi Estate, and it is so recited in the kobala itself. It may at first sight seem anomalous that the same person (Gour Das) who obtained both the conveyances should be held to have had knowledge of the fraudulent intention of the transferor in the one case and not in the other, though the circumstances disclosed are somewhat similar in both cases. But he might have had no knowledge of such intention in December 1905 when the first kobala was taken, whereas he might have knowledge of it two months later. The suit relating to the second kobala, was instituted later. We do not know what evidence was adduced in this suit or what presumption of fact could be drawn therefrom. However that may be, it is unnecessary to examine the finding as to the knowledge of the fraudulent intention. There is the finding that consideration for kobala was not proved and Dewan Das is the plaintiff in the present case, while he was the defendant in the other case. It comes to us by way of second appeal and we are bound by the finding of fact arrived at by the lower appellate Court. We must accordingly dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

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TEUNON AND SHAMSUL HUDA, JJ.

Amiruddin Ahmed—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 377 of 1917, Decided on 30th July 1917.

(a) Criminal P. C. (1898), S. 164—Trial by jury—Admission of confessional statements not made strictly according to law—Magistrate allowed to depose to statements by accused not recorded in accordance with S 164—Trial held to be vitiated by misdirections—Criminal P. C., Ss. 298 and 299—Evidence Act (1872), S. 27.

It is a misdirection for a Judge to leave it to the Jury to decide whether certain statements or confessions made by the accused and how much thereof are admissible in evidence. It is for the Judge to admit or exclude evidence in accordance with the law on the subject and for the Jury to weigh and value the evidence admitted. [P 91 C 2]

(b) Criminal P. C. (1898), Ss. 298, 299—Trial by Jury—Treatment of confession by Judge, though one-sided is not necessarily misdirection.

Per *Teunon, J.*—In a trial by Jury the Judge's treatment of a confession, though one-sided to some extent, may not by itself be a sufficient misdirection to the Jury to necessitate a re-trial. [P 90 C 2]

(c) Criminal P C. (1898), Ss. 298, and 299—Statement by co-accused not self incriminating—Judge asking Jury to take into consideration statements as confessions is misdirection.

The Judge's instruction to the Jury to take into considertion against an accused statements of co-accused as their "confessions or confessional etatements or confessions of a sort," when as a matter of fact those statements were not self-incriminating, amounts to a misdirection. [P 90 C 2]

(d) Criminal P. C. (1898), Ss. 298 and 299—Jury left to decide whether confessions of accused and how much thereof are admissible in evidence amounts to misdirection—Criminal P. C., S. 164.

In a trial by Jury the Session Judge admitted as evidence confessional statements of the accused made to the police which were not strictly within the limits laid down by S. 27, Evidence Act, and also allowed the Committing Magistrate to depose to statements made by the accused in the course of a proceeding undertaken by him for verifying the confession—statements which were at no time recorded by the Magistrate in accordance with the provisions of S. 164, Criminal P. C:

Held: that the trial was vitiated by misdirections so that the conviction of the accused and the sentence passed upon him must be set aside and the case re-tried by the Sessions Court. [P 94 C 1,2]

(e) Criminal P. C. (1898) Ss 298 and 299—Charge to jury—Duty of Judge—Use of expressions.

A Judge in his charge to the Jury should avoid, as far as may be ,the use of expressions which assume the guilt of the accused and must not indulge in the use of slang or colloquial phrases. [P 92 C 1,2]

(f) Criminal P. C. (1898), S. 164—Verification proceedings to test truth of confessions are not wholly illegal—But verifying Magistrate cannot depose to statements in verification proceedings when they are not recorded by him according to S. 164—Evidence Act (1872), Ss. 26, and 27.

Verification proceedings undertaken by a Magistrate in the presence of the accused, with a view to testing the truth of his confession and to obtain evidence either corroborating the confession or indicating its falsity, are not wholly illegal: but the verifying Magistrate cannot be permitted to depose to statements said to have been made to him by the accused in the course of the verification proceedings, where such statements are not recorded by him in the manner provided by S. 164, Criminal P C. [P 91 C 1]

(g) Evidence Act (1872), Ss. 27, 24, 25 and 26—S. 27 qualifies S. 24 also—Confession excluded as whole—So much information as distinctly relates to relevant fact thereby discovered is admissible.

Section 27 qualifies not only Ss. 26 and 25 but also S. 24. Therefore when a confession as a whole is excluded, whether by reason of the provisions of S. 26 or of S. 25 or of S. 24, so much of the information given by the person making the confession when he was an accused and in custody as distinctly relates to a relevant fact thereby discovered becomes admissible. [P 92 C 1]

(h) Evidence Act (1872), S. 27—So much of information as set police in motion and led to "discovery" is admissible.

Under S. 27 so much of the information as set the police in motion and led to the "discovery" is admissible. It does not matter whether the accused himself produced the articles said to be discovered by his statement or confession. [P 92 C 1]

(i) Evidence Act (1872), Ss. 24 and 27—S. 24 does not control S. 27.

Per *Shamsul Huda, J.*—S. 24, Evidence Act, does not control S. 27. If a single statement made by the accused contains more information than what is contemplated in S. 24, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. [P 93 C 1,2]

(j) Evidence Act (1872), Ss. 27, 24, 25 and 26—Verification proceedings — Verification of confession by taking accused to places referred to in confession should be avoided.

Per *Shamsul Huda, J.*—The verification of a confession by taking the accused to various places referred to in the confession lends itself to great abuses and should be avoided. There is perhaps nothing objectionable if a verification is made independently of the confessing accused and unaided by him. [P 93 C 2; P 93 C 1,2]

(k) Evidence Act (1872), Ss. 27, 24, 25 and 26—Verification proceedings—Supplemental statements by accused are not necessarily voluntary although recorded according to Criminal P. C. (1898), S. 164.

Per *Shamsul Huda, J.*—It would be difficult to hold that the supplemental statements made by the confessing accused in the course of the verification proceedings were voluntary even where they are recorded by the Magistrate in the manner provided in S 164, Criminal P. C. [P 94 C 1]

Dasarathi Sanyal and *Jotindra Mohan Choudhury*—for Appellant.

Orr—for the Crown.

Teunon, J.—In this case the appellant before us has been convicted of dacoity and sentenced under S. 395, I. P C., to rigorous imprisonment for five years. The trial was by Jury in the Court of the Second Additional Sessions Judge of Mymensing and what has been urged before us is that the trial has been vitiated by the erroneous admission of evidence and by serious misdirections in the learned Judge's charge. It appears that on the night of 24th November 1916, at a village called Rajoi, a serious dacoity took place in the houses of two cousins Rajendra and Debendra Bhoumik. From the house of Debendra cash, currency notes, ornaments and other articles to an aggregate value of over Rs. 9,000 and from Rajendra's house cash and other property to the value of some Rs. 800 are said to have been removed. In connection with this decoity and with a dacoity that took place in village Baliapara about a month before, the appellant, it appears, came into touch with the police on the 26th November. On the 28th of that month two persons of the name of Zahir and Piru, and on the 29th a third man named Maniruddin were arrested. Thereafter also on the 29th, the appellant was himself arrested.

It is next said that all the four persons so arrested made confessions to certain police officers, and that the confessions so made led to certain discoveries. On the following day, 30th November, all four were produced before a Deputy Magistrate to whom appellant made a confession and Zahir and Piru made statements. On the 3rd December the Deputy Magistrate, who recorded the statements, next proceeded to verify the appellant's confession and in the course of these verification proceedings, which continued to the 5th December, appellant, it is said, made additional statements. Ultimately all four accused were placed on their trial, and all four have been convicted. We are however not concerned with Piru, Zahir and Maniruddin, whose cases are not before us. I shall now deal with the objections that have been taken before us to the trial as conducted by the learned Judge.

The 1st objection, or series of objections, refers to the confession made by the appellant himself on the 30th November. It is urged in the 1st place that the Sessions Judge has not sufficiently placed before the Jury the circumstances which militate against the value of the confession, such as (a) the interval between arrest and the making of the confession, in other words, the period spent in police custody, (b) facts indicating that the appellant had been led to believe that he would he made an approver, (c) the attempts made in portions of the confession to extenuate the appellant's own share in the crime and (d) the discrepancy between the sums or value stolen and the sums recovered. It has also been urged that the Judge should have excluded or directed the Jury to discard from their consideration the first portion of the confession in which the appellant speaks of the earlier dacoity at Balipara. In my judgment the Judge would have grievously erred had he excluded any portion of the confession, and the fact that he put the whole of the confession before the Jury detracts from the argument that he did not invite special attention to passages in which, for instance, he speaks of persuasion or of his rescue of a child from spoliation. Similarly the learned Judge has in fact dealt with the question of inducement. Thus, though it may be said with some reason that the Judge's treatment of the confession is to some extent one-sided, for instance in putting to the Jury such questions as these "is not the production . . . . . material corroboration" . . . . . "do they not afford sufficient corroboration," and in treating the use in the confession of English expressions (which is merely consistent with evidence previously obtained) as having the value of independent corroboration, yet such misdirections as there are in this connection would not, in my opinion, have been sufficient by themselves to necessitate a re-trial.

It is next urged that the Judge has erred in instructing the Jury to take into consideration as against the appellant the statements made by Zahir and Piru to the Magistate on the 30th November. He has throughout spoken of these statements as "confessions," "confessional statements" or "confessions of a sort," but when we examine them we find that they are not self-incriminating statements. In speaking of them as confessions and in saying that they "should" be taken into consideration as against the appellant, the Judge, it is clear, must have misled the Jury. In the third place it is contended that the so called verification

proceedings are illegal and that no evidence regarding them should have been admitted This contention is based largely on the observations to be found in the judgments in the case of *Emperor* v. *Radha Halwai* (1), but I do not understand that case or any other case to lay down that such proceedings are wholly illegal. They are undertaken, it would seem, with a view to testing the truth of a confession and to obtain evidence either corroborating the confession or indicating its falsity. In so far at least as such evidence may be obtained, for instance, in ascertaining that the prisoner is familiar with, or wholy ignorant of, localities of which he has spoken, or in furnishing clues to further enquiry, such proceeding may be useful. In connection with such proceedings the main concern of the Courts would seem to be to ensure that evidence not strictly admissible is not admitted. In the present case that precaution has not been taken for we find that the verifying Magistrate has been permitted to speak to statements said to have been made to him in the course of his proceedings. Such additional statements being statements made in the course of an investigation, when not recorded in the manner provided in S. 164, Criminal P. C., are, in my opinion, inadmissible. If further authority for this proposition is required it is to be found in the cases of *Queen Empress* v. *Bhairab Chunder Chuckerbutty* (2) (though I am not to be understood as agreeing in the distinction therein drawn between a statement and a confession); *Emperor* v. *Radha Halwai* (1) and *King Emperor* v. *Rajoni Kanto Koer* (3).

Lastly, very serious objection has been properly taken to the manner in which the Sessions Judge has dealt with the confessions said to have been made by the appellant and the co-accused to the Police in the course of the police investigation. It is unnecessary and it would be all but impossible to enumerate in detail the errors committed by the learned Judge in this connection. He has admitted in evidence and placed before the jury the whole history so to speak of the investigation. He has permitted the police officers and other witnesses, introducing inter alia much hearsay matter, to describe the steps and processes by which they obtained and worked up clues and finally succeeded, in the Judge's language, "in tracking and trapping the culprit" and finally in "bagging" the accused on their trial. The confessions having led, it is said, to discoveries, he has next admitted in evidence not merely so much as led directly to the discovery or related directly to the fact discovered but practically the whole of each such statement, including such matter as this:

> "Maniruddin named one Amiruddin (i. e. the appellant), while Zahir did not . . . . Maniruddin and Zahir were confronted and Zahir when thus confronted had to admit that Amiruddin was also in the gang,"

and again,

> "Amiruddin asked to be confronted with Piru, Zahir and Maniruddin, to tell them to their faces what articles they each had got in their shares."

He has next in effect directed the jury that the statements which he has thus erroneously admitted could and should be used not merely against the maker but against his co-accused. In another respect also the Sessions Judge has dealt erroneously with this part of the case. He has expounded to the jury the provisions of Ss. 24 to 30, Evidence Act, and has next left it to the jury to "scrutinize the confessions and the other evidence" in the light of that exposition. If in this portion of the charge he intended, as he apparently did, to leave it to the jury to decide, whether the statements or confessions made to the Magistrate and how much of the confessions said to have been made to the police officers were admissible, he has clearly thrown upon the jury the duty which the law lays on him. It is for the Judge to admit or exclude evidence in accordance with the law on that subject, and for the jury to weigh and value the evidence admitted. I have next to consider two criticisms which have been advanced in connection with this part of the case and do not appear to me to be well founded. It is said that the Sessions Judge is wrong in his view that S. 27, Evidence Act, applies to and qualifies S. 24 and S. 25, as well as S. 26, Whether as regards S. 24 the question strictly arises has not been made clear, inasmuch as it has not been shown to us that discoveries resulted or are said to have resulted from confessions other than confessions made to police officers, or when in the custody of police officers

1. (1908) 7 C W N 220.
2. (1898) 2 C W N 702.
3. (1904) 8 C W N 22.

and not in the immediate presence of a Magistrate If, however, the question does arise, in that case I am of opinion that S. 27 qualifies not only S. 26 and S. 25, but also S. 24. All three sections lay down general rules excluding confessions. It is, in my opinion, unnecessary to discuss the policy which had led to the enactment of these rules. It is sufficient to say that the same broad grounds or principles appear to underlie all three. In S. 27 follows an exception. The reason for making or providing this exception applies alike to each of the three preceding general rules. If the exception had been intended to apply only to S. 26 or only to Ss. 26 and 25, we should have expected to find this intention expressly stated or to find the exception embodied in those two sections or in S 26 alone. Further, the position of S. 28, which is also in the nature of an exception to S. 24, supports this view. I therefore hold that when a confession as a whole is excluded, whether by reason of the provisions of S. 26 or of S. 25 or of S. 24, so much of the information given by the person making the confession, when accused and in custody, as distinctly relates to a relevant fact thereby discovered becomes admissible.

It has next been contended that when an accused himself produces the articles said to be discovered, any anterior statement made by him is inadmissible. I am unable to assent to this contention. On the contrary I agree with the view taken in *Queen-Empress* v. *Nana* (4) and in *Legal Remembrancer* v. *Chema Nashya* (5) that in such cases so much of the information as "set the police in motion and led to the discovery" is admissible. Even so, that does not in the present case render admissible evidence to the effect that when a certain pot had been fished out, Amiruddin, when pouring out the ornaments said: "I got these ornaments in my share in the Rajoi dacoity." That statement obviously led to the discovery. In conclusion I have to point out to the Additional Sessions Judge that in his charge to the Jury he should avoid as far as may be the use of expressions which assume the guilt of the accused. I have already had occasion to deprecate his use of the interrogative method, and more particularly his addressing to the Jury questions couched in the form "is not this" or "does not that" and the like! Lastly, I cannot condemn too strongly his use of slang or colloquial phrases such as "tracking and trapping" or "bagging" culprits; more especially when applied to the persons then on their trial. For the reasons given in our several judgments we agree that we have no alternative but to set aside the conviction and sentence in the present case and direct that the appellant be re-tried. The re-trial will be in the Court of the Sessions Judge.

Shamsul Huda, J.—In this case three important questions of law have been argues before us. The first question is whether S. 24, Evidence Act, controls S. 27 or is controlled by it or in other words whether information given to a police officer by an accused person, which may have led to a discovery within the meaning of S. 27, can be used as evidence in case such information is proved to have been obtained by any inducement, threat or promise, such as under S. 24 would make a confession inadmissible. The question is res integra so far as this Court is concerned, but there is an important decision of the Full Bench of the Allahabad High Court in *Queen-Empress* v. *Babu Lal* (6), in which the question whether S. 27 controls S. 25, Evidence Act, was fully discussed and that decision has an important bearing on the decision, of the present question. It was held by the majority of the Full Bench that S. 27 controlled S. 25, while the opposite view viz., that it was a proviso to the next preceding section only was maintained in an equally exhaustive judgment by Mahmood, J. The reasons given for and against the view that S. 27 controls S. 25 also apply with equal force to the question whether that section likewise controls S. 24. Although at first sight it may appear somewhat anomalous that an accused person should be prejudiced by a statement made by him even against his own will, for it infringes one of the fundamental principles of law that an act done by a person against his own will is not his act, there is on the other hand the consideration that by whatever means obtained, the statement receives a guarantee of its authenticity by the corroboration which the discovery lends to it. The considerations for and against the admissibility of such statement may be said to be equally balanced. If the policy of ex-

4. (1890) 4 Bom 260 (F B).
5. (1898) 25 Cal 413.
6. (1884) 6 All 509.

clusion embodied in Ss. 25 and 26 is based on the unreliability of police officers deposing to incriminating statements made by accused persons, by reason of their being specially interested in the detection of crime and by reason of the corrupt practices that prevailed in those days the danger is largely removed by the confirmation afforded by the "discovery." If on the other hand the exclusion is based on a desire to remove all temptations in the way of police officers to obtain confessions by inducement, threat or torture the "discovery" does not remove the danger. That both these considerations had their share in determining the provisions of Ss. 25 and 26 cannot be doubted. The fact however that Ss. 25, 26 and 27 existed in the Criminal P.C., uncontrolled by any express provisions such as we now have in S. 24, Evidence Act, may suggest the inference that by transferring those three sections from the Code of Criminal Procedure to the Evidence Act, no change in the law was intended to be introduced. But this argument is clearly fallacious as S. 24, laid down no new principle but embodied a well established principle regulating the admissibility of confessions and even before it was formally enacted as a rule of law in this country the principle governed these provisions of the Criminal Procedure Code even before their transfer to the Evidence Act of 1872. It appears however that the general principle derived from the English law was even under that law modified ,so as to negative its application to confesssions leading to "discovery."* I think therefore we ought to be guided by the decision of the majority of the Full Bench of the Allahabad High Court and hold that S. 24 does not control S. 27.

The next question for consideration is the extent to which information falling under S. 27 can be given in evidence. The section itself is clear on that point and no discussion seems necessary. It lays down that only so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved. It is noticeable that the word used is not "statement" but "information" and this seems to suggest that even if a single statement contains more information than what is contemplated in S. 24, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. If, therefore an accused person were to state to a police officer that he killed *A* with a knife and concealed the dead body at a particular places all that is admisible is the information that he had concealed the dead body in that place but the further information that he himself had killed *A* is not admissible under S. 27. It was pointed out by Straight, J., in the case of *Queen-Empress* v. *Babu Lal* (6) that

" where a statement is being detailed by a constable as having been made by an accused in consequence of which he discovered a certain fact or certain facts the strictest precision should be enjoined on the witness so that there may be no room for mistake or misunderstanding."

This question was fully discussed by a Full Bench of the Bombay High Court in *Queen Empress* v. *Nana* (4). In the present case it is clear that the investigating police officer was allowed to disclose in his evidence a great deal more than is contemplated by S. 27.

The last question for consideration is the propriety of the procedure adopted by the Deputy Magistrate Maulvi Abu Ali Chowdhury for the purpose of verifying the confession of the accused Amiruddin. It appears that after recording confession of the accused in the regular manner this officer took the accused with him to various places referred to in the confession for purposes of verification, and in the course of such verification Amiruddin seems to have supplemented his former recorded confession by other statements of an incriminating nature, and the learned Deputy Magistrate was allowed at the trial to depose to these other statements of Amiruddin though they were never recorded at any time under S. 164. Criminal P.C. I am clearly of opinion that these additional statements could not be used as evidence against the accused. As authorities for this view, I may refer to the decisions of this Court in *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (2) and *King-Emperor* v. *Rajani Kanto Koer* (3) and of the Madras High Court in *Queen-Empress* v. *Viran* (7). Apart from the question of legality of the procedure I think I would not be going out of my way if I expressed my concurrence with the views expressed by Prinsep and Geidt, JJ.

*Taylor's Law of Evidence, S. 824.

7. (1886) 9 Mad 224.

in the case of *Emperor* v. *Radhe Halwai* (1) on the utility and, propriety of such a procedure.

It seems to me that such a procedure for purposes of verification, confined as such verification must be to facts already stated in a confession recorded in accordance with law would seldom require the presence of the accused. At any rate it was not required in the present case. The presence of the accused naturally leads to questioning, and to an effort to get out of him incriminating statements which under pressure of circumstances he finds himself compelled to make and as to which it cannot be said, that it is voluntary. Even therefore if the Deputy Magistrate had in this case tried to make these statements admissible in evidence by recording them under S. 164, Criminal P. C., after the verification had been completed, I would have found it difficult to hold that the confession was voluntary. I think "verification" under conditions such as these lends itself to very great abuses and should be avoided. There is perhaps nothing objectionable in a verification made independently of the confessing accused and unaided by him. An accused person should not be placed in a position which necessitates his making incriminating statements and which leads to the creation of evidence against himself. It is the privilege of an accused to say as little as he likes regarding the offence with which he is charged or to say nothing at all, if he is so minded, but it seems to me that the procedure adopted by the verifying officer is an infringement of the privilege. In this respect the Police are in a position materially different from that of a Magistrate, for whereas a statement made to a Police Officer, unless it falls within the provision of S. 27, Evidence Act, can never be used against an accused, a Magistrate may, if he chooses, record these statements in the manner required by law after the verification procedure is over, and thereby given such record an air of validity which in reality does not attach to it.

I think therefore that there was misdirection to the Jury in so far as the learned Judge admitted as evidence confessional statements made to the Police which were not strictly within the limits laid down by S. 27, Evidence Act and also in so far as he allowed the Deputy Magistrate Mr. Abu Ali Chowdhury to depose to statements made by the accused in the course of the procedure adopted by him for verifying the confession of the accused—statements which were at no time recorded by him in accordance with the provisions of S. 164, Criminal P. C. and it is highly likely that the admission of such evidence, not legally admissible, has prejudiced the accused in the trial. For these and for other reasons given in the judgment of my learned brother I agree with him in directing a re-trial.

V.B./R.K. *Retrial ordered.*

A. I. R. 1918 Calcutta 94

TEUNON AND NEWBOULD, JJ.

Sakhayat Ali Munshi—Petitioner.

v.

Alhadi Hazi and *others* — Opposite Parties.

Criminal Revn. No. 59 of 1917, Decided on 16th March 1917, against order of Sub-Divisional Magistrate, Naraingunge, D/- 9th November 1916.

Criminal P. C. (1898), S. 145—Order without opportunity to parties to adduce evidence is bad.

In proceedings under S. 145, both parties must be given an opportunity of adducing such evidence as they are advised to give in support of the possession which they claim. An order, under S. 145, made without giving opportunity to either party of adducing oral evidence in support of his claim of possession is bad and cannot stand. [P 95 C 1]

Khitish Chandra Neogy — for Petitioners.

Jogendra Kumar De for *Birendra Chandra Das*—for Opposite Parties.

Judgment.—In this Rule the District Magistrate of Dacca has been called upon to show cause why an order made under the provisions of S. 145, Criminal P. C., in favour of the first party in a proceeding taken under the said section should not be set aside practically on the ground that the trying Magistrate had not given the petitioners, or indeed either party, any opportunity of adducing oral evidence in support of the possession which they claimed. That this ground is well founded is apparent from the order-sheet of the case and also from the ill-advised explanation which the Sub-Divisional Magistrate has submitted. He says:

"I have learnt from painful experience that evidence as to possession of land is one of the most fruitful sources of perjury. I did my best to avoid examining witnesses intentionally, as I knew that I should not be able to rely on the statements of either party's supporters."

But it should be obvious to any Judicial Officer that proceedings in Court are not to be determined on such a priori grounds and preconceived notions. The cardinal principle is that in such proceedings both parties must be given an opportunity of adducing such evidence as they are advised to give. It follows that the order complained of must be set aside. We therefore make this Rule absolute. But we may remark that it will of course, be open to the District authorities to take such further action in the interest of the maintenance of the peace as to them may seem necessary.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 95

WALMSLEY AND GREAVES, JJ.

Pran Krishna Pan—Plaintiff—Appellant.

v.

Atul Krishna Mukherjee and *others*—Defendants—Respondents.

Appeal No. 1732 of 1914, Decided on 3rd August 1917, from appellate decree of Addl. Sub-Judge, Burdwan, D/- 8th March 1914.

(a) Bengal Tanancy Act (1885), Ss. 161 and 167—Mortgage of portion of non transferable occupancy holding is incumbrance—Execution purchaser can annul mortgage in mode provided by S. 167.

The sale in execution of a rent decree, of a nontransferable occupancy holding, a part of which is under a mortgage, is subject to the mortgage with the right in the execution-purchaser to annul the mortgage in the mode provided for in S. 167. Such a mortgage, being a transfer of a part only of the holding, is an incumbrance within the meaning of S. 161 and although liable to be annulled by a purchaser at a rent-sale, cannot be ignored by the landlord. A notice must be given under S. 167 of the Act for its annulment. [P 96 C 2]

(b) Civil P. C. (1908), O. 34, R. 1—Non-transferable occupancy holding—Suit to enforce mortgage—Landlord is not necessary party.

To a suit to enforce the mortgage of a portion of a nontransferable occupancy holding against the tenants-mortgagors and the purchaser of the holding at a rent-sale the landlord, though a proper party, is not a necessary party.

[P 96 C 2]

Jyoti Prosad Sarbadhicarry and *Harendra K. Sarbadhicarry*—for Appellant.

Dwarkanath Mitter and *Sarat Kumar Mitter*—for Respondents.

Walmsley, J.—The plaintiff is the appellant: in 1313 B. S. he lent Rs. 100 to the predecessor of defendants 1, 2 and 3 and the latter executed a mortgage bond hypothecating the jamai land now in suit and some other land. The present defendants sold the jamai lands to defendant 4, who paid the plaintiff Rs. 100 out of the amount due to him. The suit is for the balance due on the bond. After defendant 4's purchase the landlord sued the tenants for rent, and obtained a decree. In execution of that decree the jote was put up for sale and brought by defendant 5. The lower appellate Court finds that this purchase was on behalf of the landlord, and that the landlord afterwards settled the land with defendant 6. The first Court decreed the plaintiff's suit, but on appeal by defendant 6 that decision was reversed so far as it related to the jamai lands. It is to be noted that the mortgage covered about two-thirds of the jote, not the entire area. For the plaintiff it is urged that the sale for arrears of rent did not affect his rights as mortgagee, because the sale proclamation was issued under S. 163 (2) (a), that even if the proclamation be treated as one under Cl. (b) the sale was not followed by action under S. 167, that inasmuch as the mortgage was of a part only of the jote, the question of transferability does not arise, and that the lower appellate Court was wrong in abstaining from a decision as to whether defendant 6 is a benamidar for defendant 4, because the latter as purchaser from the successors of the original mortgagor cannot question the mortgagee's rights.

In view of the Munsif's finding on the last point, it is to be regretted that the appellate Court did not come to a conclusion, but I think that the appeal can be decided on the findings recorded. The first argument noticed above does not ssem to have any substance in it. A printed form was used for the sale proclamation, and it is headed S. 163 (2) (a). No one however suggests that the holding was either a tenure or the holding of a raiyat holding at fixed rates and it follows that the form ought to have been one under S. 163 (2) (b). In the circumstances of the case no one was misled by the wrong form being used, and I think no importance ought to be attached to the mistake. Even so, the appellant urges, action ought to have been taken under S. 167 by the purchaser, and as no action was taken under that section the plaintiff can enforce his mortgage lien

against the portion of the jote that was hypothecated. Here the respondent-defendant 6 raises the objection that his possession is by virtue of a settlement from the landlord, and his interest cannot be assailed without making the landlord a party. The appellant's answer to this objection is that he is not seeking any relief against the landlord. I think it is unfortunate that the plaintiff has not made the landlord a party, but I cannot hold that the suit cannot proceed without the landlord. The decree will not bind the landlord, and defendant 6 may at another stage have an opportunity of taking shelter under his settlement from the landlord. As for the decision of the lower appellate Court regarding the mortgage of a non-transferable holding, the learned Subordinate Judge's judgment was written before the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (1) and it is not necessary to discuss his reasoning.

I agree with my learned brother that the appeal should be allowed and the decree of the first Court restored with costs in all Courts.

Greaves, J.—This is an appeal by the plaintiff from a decision of the Subordinate Judge of Burdwan, reversing a decision in his fovour of the Munsif of Kalna. The material facts are shortly as follows:—One Juran Sheikh in the month of Sravan 1313 executed in favour of the plaintiff a mortgage bond to secure a sum of Rs. 2,100 and thereby mortgaged to the plaintiff to secure the principal and interest due on the bond a portion of his non-transferable occupancy holding, which he held under one Srimati Priyambada Debi. The plaintiff alleges in his plaint that the bond was registered, but there is no finding on this point or as to whether the incumbrance was notified to the landlord, but no point was made as to this. Juran Sheikh died leaving as his heirs defendants 1, 2 and 3, who sold (inter alia) the mortgaged premises to defendant 4. The landlord obtained a rent decree against defendant 4, and in execution thereof the lands were sold and purchased by the landlord in the benami name of defendant 5, and were settled with defendant 6. The real question that arises on this appeal is whether as a result of the sale the plaintiff's rights under his mortgage have been extinguished or are still subsisting. The Munsif, as already stated, decided in the plaintiff's favour and held that the incumbrance was not affected by the sale in execution of the rent decree but the Subordinate Judge held that the mortgage being a transfer was not binding on the landlord as the holding was an occupancy holding and not transferable. Three points are raised on appeal. First, it is said that the sale was under the provisions of S. 163 (2) (a), Ben. Ten. Act and that therefore the sale was subject to the mortgage, secondly, it is said that even if the sale was under the provisions of S. 163 (2) (b) of the Act, the mortgage is an incumbrance and is still subsisting as it has never been annulled under S. 167 and thirdly, it is said that there is no finding as to whether defendant 6 is a benamidar for defendant 4.

So far as the first point is concerned, it appears that the proclamation was upon a printed form headed S. 163. (2) (a) and it was stated therein that there was no incumbrance on the property to be sold. In the view I take of this appeal it is not necessary for us to decide if this ground of appeal is well founded, and I will for the purposes of this judgment assume in favour of the respondent that the sale was in fact, although not in name, a sale under S. 163 (2) (b). But assuming this point in the defendant's favour, I think that the appellant is entitled to succeed upon ground 2. The mortgage was a transfer of a part only of the holding and not by way of sale and did not entitle the landlord to possession [*Dayamoyi* v. *Ananda Mohan Roy* (1), proposition 2,] and the mortgage was therefore, an incumbrance within S, 161, Ben. Ten. Act, although liable to be annulled by a purchaser at a sale for arrears of rent [*Jog Narain Singh* v. *Badri Das* (2)], and it could not be ignored by the landlord. That a sale under S. 163 (2) (b) does not ipso facto cancel incumbrances and that a notice must be given under S. 167: see *Beni Prosad Sinha* v. *Rewat Lall* (3) and *Kalikanda Mukherjee* v. *Bipro Das Pal Choudhuri* (4), the procedure provided by S. 167 being the only mode of annulling an incumbrance [*Soshi Bhusan Guha* v. *Gogan Chunder*

1. (1915) 42 Cal 172=27 I C 61 (F B).

2. (1912) 13 I C 144.
3. (1897) 24 Cal 746.
4. (1915) 26 I C 436.

Shaha (5) and S. 166 (2), Ben. Ten. Act.] It follows, I think, from these authorities that the sale by the landlord in execution of his rent decree was subject to the mortgage, but with the right in the purchaser (in this case the landlord) to annul the mortgage within one year. This the landlord as purchaser has not done and consequently I think that defendant 6 took the land in settlement subject to the mortgage which is, I think still subsisting. It is not necessary for me to deal with ground 3 of appeal in view of what is stated above, but if I had been against the appellant on his ground 2 of appeal, I should, I think, have felt bound to send the case back for a finding on ground 2. I do not understand the reasons of the Subordinate Judge in not coming to a finding on issue 2; the fact that defendant 4 is not the original mortgagor makes no difference, for a purchaser of the mortgagor's share stands, so far as the land is concerned, exactly in the same position as if he was the original mortgagor, and if in fact he is, as is alleged, the real owner and defendant 6 only his benamdar, he could not, I think any more than the original mortgagor, have repudiated the mortgage, but I am not deciding this.

It is urged on behalf of the respondent that the landlord is a necessary party to the suit, and that the suit must fail on this account. I think it would have been better that he should have been made a party to avoid any possible future litigation as in his absence this decision cannot, of course, bind him; but I do not think that he was a necessary party to the suit as he is not a person having an interest in the mortgage security or in the right of redemption within O. 34, R.1, Civil P. C. Moreover, I do not think that qua landlord his interest is in any way affected. When the rent was in arrear he sold the holding subject to the mortgage, but with the power in the purchaser to annul the mortgage, that is to say, his position qua landlord was not affected by the mortgage, and if anyone other than himself had been the purchaser, I do not think, although I am not deciding this, that at any future rent sale his right qua landlord would have been affected by the mortgage. Whether the fact that he, qua purchaser, failed to annul the incumbrance has affected his rights qua landlord may have to be decided hereafter, if at the time of any future rent sale the encumbrance is still undischarged. All that this judgment decides is that as the present tenant derived title from him as purchaser at the rent sale and as he, as such purchaser did not annul the encumbrance, the encumbrance is still subsisting. In the result the appeal succeeds and must be decreed with costs in all Courts and the decree of the munsif is restored.

V.B./R.K. *Appeal accepted.*

5 (1895) 22 Cal 364.

A. I. R. 1918 Calcutta 97

TEUNON AND RICHARDSON, JJ.

Baldeo Das Tansuk Das—Petitioner.

v.

Mohamed Inamul Huq — Opposite Party.

Civil Revn. No 32 of 1917, Decided on 13th September 1917.

Criminal P C, (1898), S. 195 — Perjury — Statements not absolutely irreconcilable— Sanction for prosecution should not be granted—Pena i Code (1860), S. 193.

Sanction for prosecution for giving false evidence should not be granted where the statements complained of were made in the course of a lengthy cross-examination and are not absolutely irreconcilable and for which explanations, which go far to reconcile them, have been subsequently given. [P 97 C 2, P 98 C 1]

S. N. Banerjee and *Probodh Chandra Chatterjee*—for Petitioner.

M. A. K. Fuzlul Huq—for Opposite Party.

Judgment.—This Rule was directed against an order of the learned District Judge of Darjeeling, by which he revoked the sanction granted by the Subordinate Judge of that district for the prosecution of one Inamul Huq on a charge of giving false evidence. The sanction for the intended prosecution was based on a series of statements which, in the view of the Subordinate Judge who granted the sanction, were irreconcilable. We find that these statements were made in the course of a cross-examination which continued for more than a day before a Commissioner appointed by the Subordinate Judge. It does not appear to us that they are in fact absolutely irreconciable, and we further find that in his subsequent examination on the day following the day on which these statements were made the witness has supplied explanations which go far to reconcile them. That being so, we are of opinion that in revoking the sanction granted by the Subordinate

Judge the District Judge exercised a sound discretion and we accordingly discharge this Rule.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 98 (1)

TEUNON AND NEWBOULD, JJ.

Sukumari Debi—Appellant.

v

Kalipada Mukherjee and *others*—Respondents.

Appeals Nos. 1913 and 1957 of 1913, Decided on 25th January 1918, from Appellate Decrees of Third Addl. Dist. Judge, 24-Perganas, D/- 26th February 1913.

Evidence Act (1872), S. 92—S. 92 does not apply to party to suit when other party was not party to document.

The provisions of S. 92 excluding oral evidence in regard to the question whether a certain plot of land was or was not covered by a sale-deed executed by one of the parties to a suit, do not apply when the other party to the suit was not a party to the document. [P 98 C 1]

Siba Prasanna Bhattacharjee and *Amulya Chandra Chatterjee*—for Appellants.

Surendra Chandra Sen and *Trailokhyo Nath Ghose*—for Respondents.

Teunon, J.—These two appeals arise out of a partition, and No. 1913 being preferred by the plaintiff and No. 1957 by defendants 2 and 3. The question in the former is whether the appellant is entitled to her share (4th) in plot No. 1 of the schedule to the plaint, being a plot of bhadrason or homestead measuring some 1½ bighas in area; and the question in the latter appeal is whether she is entitled to the same share in the ancestral house of 3 rooms standing on the said plot.

The plot appertains to Taluk No. 2510 and the contention of defendants 2 and 3 is that by a kobala, dated 7th Asar 1316, the plaintiff sold to one Satish Chandra Bhattacharjee (the son of plaintiff's father-in-law's sister) her interest in this taluk and, therefore, in the plot now in question. The plaintiff on the other hand says that the bhadrason and the bhadrason bati were excluded from the sale which covered only the agricultural lands.

In the Court of first appeal the case proceeded on the assumption that the provisions of S. 92, excluding oral evidence, applied to the case. But that is not so; defendants 2 and 3 are no parties to the deed. Satish Chandra Bhattacharjee, the vendee, has in this Court been made a party to the suit and he has filed a written statement supporting the plaintiff and disclaiming all interest in the bhadrason and the house thereon. Defendants 2 and 3 are admittedly not entitled to the plaintiff's share in the property now in question and Satish being now a party it would be possible in the case to direct that the 1/4th share in question should be allotted to the plaintiff and Satish jointly. But this, in our opinion, is unnecessary; Satish's written statement, the improbability of a sale by the plaintiff of her house, and the documents, and other matters relied on by the Subordinate Judge justify us in holding that the property in question, being regarded as a separate parcel, was excluded from the sale to Satish. In this view No. 1957 is dismissed with cost. The decree of the first appellate Court in respect of the bhadrason is reversed and the decree of the Subordinate Judge restored. Appeal No. 1913 is therefore decreed with costs.

Newbould, J.—I agree.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1918 Calcutta 98 (2)

FLETCHER AND SHAMSUL HUDA, JJ.

Mathura Dass Karnani—Defendant—Appellant.

v.

Srikrissen Karnani and *others*—Respondents.

Appeal No. 386 of 1915, Decided on 14th December 1917, from original decree of Sub-Judge, Darjeeling, D/- 2nd March 1915.

*** Hindu Law—Adoption—Widow — Husband separated from brothers — Widow is entitled to adopt without consent of husband's kinsmen—Agreement by widow with reference to her maintenance cannot be set up as deeds of family arrangement as-barring rights of adopted son.**

After the death of *A*, a Mabeswari Hindu governed by the Mitakshara School, his business was carried on by the defendant, who was the son of a deceased separated brother of *A*. Disputes arose between the defendant and *A*.'s widow regarding the latter's maintenance, and the parties entered into an agreement that on the death of the widow the defendant would be entitled to the estate of *A*. The defendant in pursuance of the agreement deposited a sum with a Bank providing for the maintenance of the widow with interest thereon. Subsequently the plaintiff was adopted by the widow without the consent of her husband's relatives:

Held: that the deeds of agreement entered into by the widow only with reference to her main-

tenance could not be set up as deeds of family arrangement between the members of the family then in existence as barring the rights of the adopted son; that as *A.* was separated from his brothers, his widow was entitled to adopt of her own motion without the consent of her husband's kinsmen, although she had no authority from her husband to do so. [P 101 C 2 P 102 C 1]

S. N. Banerjee and *Probodh Kumar Dass*—for Appellant.

Hiralal Chakrabutty — for Respondents.

Fletcher, J.—This is an appeal by defendant 1 against the judgment of the learned Subordinate Judge of Darjeeling, dated 2nd March 1915, decreeing the plaintiff's suit. The plaintiff brought his suit on the allegation that he was the adopted son of a deceased Hindu of the Maheswari caste of Bikaneer—the name of the person who had adopted being Amar Chand Karnani—and he sought to recover from Mathora Das Karnani and others, who were the natural relations of the deceased Amar Chand Karnani, a certain property and for consequential relief by way of accounts and discovery. The case set up by the plaintiff was that there was a Hindu of the Maheswari caste called Swairam Karnani. He had three sons: Katchi Das who was the father of Mathuradas, defendant 1; Amar Chand Karnani, the adoptive father of the plaintiff: and Jaithrupa who was the husband of defendant 3. The plaint alleged that Amar Chand had been adopted by one Ganga Das and, therefore, according to the ordinary rules of the Hindu law, Amar Chand ceased on that adoption to be a member of the family of Swairam and passed into the family of Ganga Das. That allegation was made distinctly in the pedigree that formed a portion of the plaint and it was not traversed in the written statement nor in the course of the trial. It is, therefore, an admitted fact that Amar Chand passed out of the family of Swairam and passed into the family of Ganga Das. No evidence was offered as to who Ganga Das was. There has been a suggestion made in reply that Ganga Das was some sort of relation of Swairam and that, therefore, although Amar Chand in his adoption passed out of the family of Swairam, it does not follow that the other sons of Swairam, who remained joint with their father, ceased to be the reversionary heirs of Amar Chand on his death. That case was not made or suggested in the course of the proceeding and it is much too late in the course of the reply to put forward a case unsupported by any evidence or any statement made in the Court below.

Now, the facts are these—and these facts are not disputed. The three sons of Swairam had built up a business in the district of Darjeeling. Katchi Das, the eldest son, died in 1880 and his only son and heir is defendant 1. Jaithrupa died in 1888 leaving his widow, defendant 3. Amar Chand died in 1899 after having been adopted by Ganga Das, leaving him surviving his widow, defendant 2. The business after the death of Amar Chand was carried on by defendant 1. There were some disputes between defendant 1 and the widow of Amar Chand, defendant 2, in the year 1903 and apparently her remittances that she had been accustomed to get from the business in Darjeeling were stopped. She then went to Darjeeling and there the parties arrived at certain agreements which were reduced to writing, the agreements being dated 21st April 1903. Under the terms of those agreements a sum of Rs. 7,500 was deposited with certain Marwari bankers, the interest being payable to defendant 2 for her maintenance and the capital sum to go to defendant 1 on the death of defendant 2. The documents seem to me to have been quite clearly executed on the footing that defendant 1 would on the death of defendant 2 become entitled to the estate of the deceased Amar Chand Karnani. The agreements do not seem to have put an end to the disputes between the parties, and in 1908 defendant 2 is said to have adopted the plaintiff as the adopted son of her deceased husband Amar Chand Karnani.

The main controversy in this case has turned on the question as to whether the evidence establishes the case that the plaintiff was duly adopted. Both parties admitted that the parties were governed by the Mitakshara School of Hindu law. The learned counsel for the defendant-appellant in opening the appeal asserted that the admission meant that the rights of the parties were regulated by the Benares School of Hindu law. But after consideration of the evidence the learned counsel was bound to admit that the evidence established important variations applicable to the parties which were not in accordance with the opinion held by the Benares School of Hindu law. It is quite true that he did not admit that the rights

of adoption applicable to the parties were different to those laid down by the Benares School of Hindu law, but he was bound to admit that in certain particulars the rights of the parties in this case were shown to be different from those prevailing in the Benares School of Hindu law. It seems to me that that is an important fact, because you at once get rid of the suggestion put forward that the admission meant that the parties were governed by the Benares School of Hindu law simpliciter because it is admitted that there were variations from that.

The Mitakshara as varied from the Benares School applies in a large portion of India. It applies in Bombay, Western India and Southern India, and in all those different Schools of law there are variations of Mitakshara not consistent with the view adopted in the Benares School. It seems to me quite clear in the present case that the admission did not amount to a statement that the rights of the parties as to adoption could be ascertained from the principles held by the Benares School of Hindu law. If you get to that, you have got to look at the evidence. The evidence that has been given in this case as to what is requisite for a valid adoption is not the evidence of learned persons but the evidence of shop keepers, Marwaris being largely a trading caste. These shop-keepers, it may be said, do not know the principles of the Hindu law, but the evidence shows without doubt that these shop-keepers have undergone the process of adoption, as many as four times. The evidence also shows that the ceremonies required for a valid adoption by a person belonging to this class are not formal. The evidence is that on the adoption of a boy the guests and relations receive cocoanuts and sweets and the adopted son has got to have payjama placed on his head. These seem to be the only ceremonies that are requisite for a valid adoption. The adoption is not also limited, according to the evidence, to the case of children of tender age.

There may be an adoption, as in this case, of a person of full age and it does not matter whether that person is married or not. That is the evidence in this case and the learned Judge says that the custom seems to be the same as that obtaining in Bombay or in Western India. It has been suggested that the learned Judge of the Court below stated that the law as applicable in the Presidency of Bombay applied in the State of Bikaneer. I do not read the judgment of the learned Judge in that way. I think what he remarks is that the evidence shows that the law as to adoption is the same in Bikaneer as in Western India. Then, the question was whether the consent of the relatives was necessary. That seems to be the point that was debated not only in the Court below but also in the suit in the Bikaneer Court, and the view that was taken was this: That this was not the case of a widow adopting a son to introduce him into the family consisting of the defendants, but it was the case of a widow of a separated brother who, although she had no authority from her husband to adopt, had adopted of her own motion the plaintiff. That seems to have been the case put forward. Then the learned Judge came to the conclusion that that case had been established in accordance with the custom prevailing in Bombay and Western India. The evidence, it is quite true, is not all one way; there are statements made by the witnesses on both sides. But the learned Judge had the opportunity of seeing the witnesses in the witnesses-box and remarking who were the most intelligent and also the truthful witnesses amongst them, and he came to the conclusion that this custom had been satisfactorily established. There does not seem to be any reason to disagree with the conclusion arrived at by the learned Judge of the Court below. The next question that was raised was as to whether the adoption had or had not been made. That does not seem to have been seriously contested in the Court below. The widow, that is defendant 2 who adopted the plaintiff, states in her deposition that the child was given to her by his natural father and received by her in adoption and there do not seem, according to the evidence, to be any other ceremonies required beyond those observed in this particular case.

Then reference has been made to the proceedings of the Court at Bikaneer and it is said that the adoption cannot have taken place on the date alleged by the plaintiff. I do not read the proceedings of the Court at Bikaneer in the way that the learned counsel for the appellant has attempted to read them. The proceeding

originated out of an application by the widow for what is called a khola, that is a certificate of adoption. That is a certificate of the Court at Bikaneer that the widow has, in fact, adopted the plaintiff as a son to her deceased husband, Amar Chand. On that application being made for certificate, the present defendant 1, that is the plaintiff in the Bikaneer Court, brought a suit for an injunction to restrain the widow, that is the adoptive mother of the present plaintiff, from proceeding on the footing of the adoption, for the reason that by the deeds of 1903 the widow had precluded herself from making an adoption of any person, and the grounds, so far as I can gather from the judgment of the Judges of the Chief Court at Bikaneer, were these: That the deeds executed in 1903 operated as a release by the widow of Amar Chand of her interest in the property so as to accelerate the estate of defendant 1 Muthura Das, so that he having taken an absolute interest in the estate of Amar Chand, the widow was incapable of making an adoption so as to defeat him of the rights in the properties he had acquired. The case came on before one of the Munsifs in the State and he decided one of the issues against the present defendant 1. On appeal to the Sudder Nizamut of the State, the Judge of that Court held that the appropriate fee payable to the State on the plaint not having been paid the suit must fail. On appeal to the Chief Court, the learned Judges of that Court, disagreeing with the view of the Judge of the Sudder Nizamut, held that the plaint was properly stamped; but they came to the conclusion that there was nothing in the deeds to prevent the widow of Amar Chand from proceeding to adopt the present plaintiff. That, so far as I gather from the judgment of the Chief Court at Bikaneer, was the matter in dispute there. After the determination of that litigation, the khola, that is the certificate of adoption, was issued by the State to the widow of Amar Chand. This is the fact so far as it can be ascertained from the judgments of the Courts at Bikaneer.

It is said in this case that the plaintiff asked the Court to set aside the deeds of 1903 on the ground that they had been obtained by fraud or undue influence. The learned Judge of the primary Court came to the conclusion that there was no fraud or undue influence. That seems to be clearly correct because there is no evidence of either fraud or undue influence having been exercised by defendant 1 in obtaining the deeds. Then the learned Judge remarkes that the deeds would appear to show that the parties had entered into them on the footing of a common mistake, because they had been entered into by the widow of Amar Chand and the present appellant on the footing that the present appellant was the sole reversionary heir to the estate of his natural brother, Amar Chand. But the learned Judge says that it is an admitted fact that Amar Chand had passed out of the family on his adoption by Ganga Das and that, therefore, the deeds could not be by way of a family arrangment, as the appellant before us was not a member of the same family as the deceased Amar Chand. He, therefore, came to the conclusion that as against the plaintiff, the adopted son of Amar Chand, the deed could not be set up as a bar to his rights to Amar Chand's properties that he would acquire on his adoption. That I think is right. The evidence in this case, as we have it, shows quite clearly that it is an admitted fact that Amar Chand passed out of the family of which the present appellant is a member into the family of Ganga Dass. There is nothing on the record to suggest that Ganga Dass was a close or any relation of Swairam, the grandfather of the appellant, so that on the death of Amar Chand his reversionary heir would be his brother's son Mathura Das, the present defendant 1. That is the case that has been suggested in reply, but there is not a word to support such an allegation on the record. It seems to me quite clear in this case that these deeds entered into by the widow only with reference to her maintenance cannot be set upas deeds of family arrangment between the members of the family then in existence barring the rights of the adopted son, the plaintiff in the present suit.

If that is so, the plaintiff is entitled to recover the share of Amar Chand and the learned Judge of the Court below has decreed to the plaintiff relief in that form. No objection has been raised or urged that the form of the relief that the learned Subordinate Judge has given to the plaintiff is incorrect, nor is it suggested that the finding that the learned

Judge has arrived at, namely that the plaintiff is entitled on his adoption to 3rd of the properties is wrong. If that is so, I think there are no reasons to come to any conclusion different from that arrived at by the learned Judge of the Court below, namely that the plaintiff having proved that he was duly adopted by the widow of Amar Chand as a son to her deceased husband is not barred by the deeds of April 1903 from recovering the property of the deceased Amar Chand. A point has been made in this case that there is a decision *Gopi Kishen* v. *Gopi Kishen* (1), reported somewhere in some of the unauthorized reports of the Chief Court of the Punjab to the effect that an adoption of this sort amongst Maheswari Hindus is not permitted. The case does not establish anything of the sort. In that case, it was stated that one of the widows in a joint and unseparated Hindu family had attempted to adopt without the consent of the kinsmen a son into the joint family. That is a totally different case from the case of a window of a separated brother adopting of her own motion a son to her deceased husband as in the present case. I think the conclusion arrived at by the learned Subordinate Judge of Darjeeling was correct. The present appeal therefore fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1915) 27 I C 701.

A. I. R. 1918 Calcutta 102

FLETCHER AND SHAMSUL HUDA, JJ.

Harendra Chandra Lahiri—Defendant—Appellant.

v.

Basanta Kumar Maitra and *others*—Plaintiffs—Respondents.

Appeal No. 74 of 1915, Decided on 7th January 1918, against decree of Sub-Judge, Rungpur, D/- 23rd November 1914.

Will—Construction—Testator making bequest, that "on my death my brother's widow *B* and on her death her daughter *K* will get one-fourth share, etc."—Gift is of successive interest—Gift in favour of *B* is not gift of absolute interest but absolute interest cut down to life-estate—Succession Act (1865), Ss. 82 and 111.

Where a testator made a bequest in the following terms: "On my death my youngest brother's widow *B* and on her death her daughter *K*., that is, my niece, will get one-fourth share, etc:"

Held: (1) that the testator did not make a substitutional gift to niece in the event of her mother *B* predeceasing him, but that the gift which he made was a gift of successive interests, that is the interest was to go first to the brother's widow *B* and then on her death the property was to go to her daughter *K* [P 103 C 2]

(2) that notwithstanding S. 82, the gift in favour of the brother's widow *B*. was not a gift of an absolute interest, so that the gift over on her death to her daughter *K* was not void as being repugnant to the form of the gift to the mother, but that the apparently absolute nature of the gift in favour of the mother *B* was cut down to a life-estate by the direction that on her death the property would go over to her daughter *K*. [P 103 C 2]

B. Chuckerburtty, Surendra Chandra Sen and *Hemendra Chandra Sen*—for Appellant.

Mohendra Nath Roy and *Atul Chandra Gupta*—for Respondents.

Fletcher, J.—This is an appeal from the decision of the learned Subordinate Judge of Rungpur, dated 23rd November 1914. The suit was brought by the plaintiff to recover possession of certain properties mentioned in the schedule to the plaint on establishment of title and also for mesne profits. The learned Judge of the Court below decreed the suit as regards the recovery of possession on establishment of title but refused to award mesne profits. The main portion of the case turns on the construction to be placed upon the will of one Harish Chunder Lahiri, which was dated the 23rd Pous 1306 corresponding with 6th January 1900. Before proceeding to consider the terms of the will, it is necessary to state shortly the relationship that Harish Chander had with the parties to this suit. Harish Chander was the son of one Iswar Chander Lahiri. Iswar Chander had been dead many years apparently and we are not concerned with him at all. Besides Harish Chander, Iswar Chander had three other sons, namely Hari Prasanna, Hari Prasad and Ananda. Ananda was a step brother of Harish Chander and his two other brothers. Ananda died in the year 1884-85 leaving him surviving his widow Sukhoda Sundari, who is still alive. Hari Prasad died in the year 1300, corresponding with the year 1893-94, leaving behind him his widow Bama Sundari, who died on the 24th Agrahayan 1308 corresponding with 6th February 1902. Hari Prasanna died in the year 1301, leaving behind him his widow Bhageswari, who died in the year 1303 corresponding, with the year 1896-97. Harish Chander died on 12th Sra-

ban 1307 corresponding with 27th July 1900.

He left behind him his widow Magnamaya, who is still alive and is defendant 2 in the present proceedings. Defendant 1 is the adopted son of Harish Chander. Harish Chander, after the death of his brothers, by a kabala, dated the 20th Chaitra 1302, acquired from Bhageswari and Sukhoda Sundari their interests in certain properties, and the properties that were dealt with were set out in the schedule to the kabala. This document is referred to in the will of Harish Chander. For the purpose of preparing that document a list (Ex. 21) had been prepared and several properties that appear in Ex. 21 do not find a place in the kabala of 20th Chaitra 1302. Now, Harish Chander, in those circumstances, made his will, dated 23rd Pous 1306, corresponding with 6th January 1900. Subsequently, he executed a codicil on the 27th Assar 1307 corresponding with 27th July 1900. The terms of the codicil are not material in the present case. The will, so far as it is material, states as follows: First of all in Cl. 12 of the will, which is the material clause in the present suit, the testator states the fact as to the purchase of shares in the properties from Bhageswari and Shukhoda Sundari and he mentions there the properties referred to as "the aforesaid three classes of properties." Then he proceeds in the following terms: On my death my youngest brother's widow, the said Bama Sundari Debya, and when she is dead her daughter, my niece, Kusum Kumari Debi, will get one-fourth share of all the self-acquired immovable properties which I have other than my aforesaid immovable properties.

Now the first matter that has been chiefly in consideration in the present appeal is what is the correct translation of the words that I have referred to. The appellant wishes to translate the clause in this way:

"On my death, my youngest brother's widow the said Bama Sundari Debya; if she is dead, her daughter, that is, my niece Kusum Kumari Debi, will get one-fourth share of all the self-acquired immovable properties which I have other than my aforesaid immovable properties."

The literal translation is as follows:

"When I am absent, that is on my death, my youngest brother's widow the said Bama Sundari Debi, and when she is absent, that is on her death her dauhter, that is my niece Kusum Kumari; will get one-fourth share of all the self-acquired immovable properties which I have other than my aforesaid immovable properties."

It is quite clear that the translation that has been attempted to be put forward by the appellant is useful in support of the argument that the gift comes within the terms of S. 111, Succession Act, namely that this was a gift on an uncertain contingency and the uncertain contingency must take place, as in the present case, before the death of the testator so that the gift might take effect. There is a good deal to say before such a translation is accepted. But after hearing Mr. Chuckerburtty in support of the appeal and having had the benefit of the advice of Shamsul Huda, J., I have no doubt that the construction that has been attempted to be placed on this clause either on the words "in the event of her death" or "if she dies" is not the accurate one but that the accurate translation is, "when she dies or on her death." If that is so, it seems to me quite clear that the testator was not making a substitutional gift to Kusum Kumari in the event of her mother Bama Sundari predeceasing him. The gift that he was making was a gift of successive interests, that is, the interest was to go first to Bama Sundari and then, on her death, the property was to go to her daughter Kusum Kumari. I do not feel any doubt that the words that the testator intended to use were words implying a gift of successive interests.

Then a further point was raised and it was said that the gift in favour of Bama Sundari was a gift of an absolute interest and the gift over on her death to her daughter Kusum Kumari was repugnant to the form of gift to Bama Sundari and, therefore, could not take effect. S. 82, Succession Act, no doubt states that a gift would ordinarily pass the whole interest of the testator unless a contrary intention appears from the will. There are many cases in the books where a gift apparently absolute was cut down to a life-estate by a subsequent direction that on the death of the person to whom the estate was first given the property would go over to some one else. There are many cases in the books of such a gift, and that rule has been recognized. The cases are given in note (k) in Jarman on Wills, p. 566. I have no doubt myself that the effect of this will was to give to Bama Sundari an interest for life in the self-acquired properties of the testator with a gift over on her

death of an absolute interest to her daughter Kusum Kumari. The matter is of importance, because on the death of Kusum Kumari this interest in the self-acquired properties of the testator would under the gift in the will pass to the plaintiff who is her husband, whereas as regards the ancestral properties the plaintiff would not be entitled to the share which Bama Sundari or Kusum Kumari took on the death of Hari Prasad. But as regards the properties that passed under the terms of the will, I think it is quite clear that Kusum Kumari on the death of her mother Bama Sundari took an absolute interest and, on her death, it passed to the plaintiff as her heir.

The next point that has been urged in the appeal is this. It has not been shown that these properties were the self-acquired properties of the testator, although it is admitted that the case put forward by the appellant in the Court below was much too high and that the evidence does show that some of the properties, even if they were not in fact the self-acquired properties of the testator, were treated by him as being such. Now, as regards the will itself, it is quite clear that the testator with regard to his immovable properties distinguished them in this way, namely, the properties of three classes. These are the three classes that are mentioned in the kabala of 20th Chaitra 1302 executed by Bhageswari and Sukhoda Sundari in favour of the testator and they are the properties referred to in the will as the properties of three classes. In addition to that, the testator considered that he had certain other properties outside the three classes mentioned in the kabala, which he referred to as his self-acquired properties. The learned Judge in the Court below says that it may be difficult to show that all these properties were in fact the self-acquired properties of the deceased, but he says that the evidence shows that the testator treated and considered them as being such. I think that the evidence clearly shows that the testator did treat and consider these other properties as his self-acquired properties. The evidence shows first of all that before the kabala, that is Ex. 21, was executed a list of properties was drawn up and from the list of these properties, the schedules to the kabala, Ex. 21, were prepared and that list of properties contained many items that were not included in the terms of the kabala. It cannot be suggested that it was meant that the two ladies Bhageswari and Sukhoda intended to keep any interest in these properties, and it was subsequently conceded in this appeal that as against these two ladies Bhageswari and Sukhoda it would not be open to them after the kabala to set up the case that these other properties were joint properties and not the properties of the testator Harish Chander.

The evidence also shows that with regard to certain items the testator Harish Chander, in applying for registration under the Land Registration Act in his application, stated that those were his separate properties and that he had no cosharers. It is said that with regard to portions of properties there was no such petition and that the absence of the petition for registration shows that they were joint properties. I do not think that that is so. You cannot separate one portion of the property from the other in that way. These properties seem to stand more or less together and it appears, at any rate, from the terms of the kabala, Ex. 21, and from the terms of the will, that the testator was quite clearly treating the whole of the properties in which he held an interest other than those which he called the three classes of properties in his will as being properties which were his own and self-acquired. I feel no doubt in this case that the testator was in fact considering that these properties were in fact self-acquired, and if the testator considered that they were self-acquired, it is not denied that the testator had a sufficient interest in these properties to make a bequest of a four-annas share to Bama Sundari for life with remainder to her daughter Kusum Kumari absolutely. That being so, the testator had a sufficient interest to bequeath in that way without considering any question of election as to whether the defendant should be called upon to give effect to the bequest or not. No such question arises in the present case. These items seem to have been considered for a considerable time as the separate property of the testator. The only item that has occasioned any difficulty is, what has been claimed in the plaint as item 9 coming under the list of jote properties. That is the homestead land in Nilphamari; and the question arises in this way.

The testator Harish Chander bequeathed or purported to bequeath two houses which apparently he was not entitled to wholly to his adopted son, defendant 1, and this, it is said, was a part of the property held with the house in Nilphamari. This point was not raised in the Court below nor was it raised in the grounds of appeal here that this land, item 9 under the jote properties in the schedule to the plaint, was included in the devise of the house at Nilphamari to defendant 1. The plaintiff-respondent says that rather than having a remand to the lower Court to ascertain whether or not this property is held with and forms a portion of the house at Nilphamari he would give up his claim to such portion. Therefore as regards item 9 under the list of jote properties in the schedule to the plaint, the plaintiff-respondent not asserting any title and agreeing to give up his claim, the appeal will be allowed as regards that portion of the property. As regards the other items of property, the judgment of the Court below will be confirmed. Subject to this slight variation as regards item 9 of jote properties mentioned in the schedule to the plaint, the present appeal fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 105

HARINGTON AND NEWBOULD, JJ.

Jogeshwar Singh and *others*—Appellants.

v.

Ramoo Singh—Respondent.

Second Appeal No. 1131 of 1911, Decided on 17th April 1913.

Bengal Cess Act (1880), S. 20—Tenant's land entered in Road Cess Return as zerait—Suit for rent is not barred.

Where a landlord described a tenant's land as zerait in the Road Cess Return because at the time it was filed there was a dispute between the parties as to whether the land was malik's zerait or tenant's kasht:

Held: that as there was no wilful or dishonest misdescription and as the land was mentioned in the Road Cess Return, though not as kasht, S. 20 was no bar to a suit for rent in respect of the land which was ultimately proved to be kasht land. [P 106 C 1]

Lachmi Narain Singh—for Appellants.

Hem Chandra Mukerji—for Respondent.

Harington, J.—This is an appeal on behalf of the defendant in a rent suit. The plaintiff sued for rent of two holdings, one of 3 bighas odd at a rent of Rs. 11-11-0 and the other of 5 bighas odd at a rent payable in kind, 30 maunds 10 seers paddy. The Record of Rights was in favour of the defendants, but it has been held that the evidence as to the rate of rent produced by the plaintiff has met the presumption in the Record of Rights and established the rate as the plaintiff alleged. The points of law taken on behalf of the appellant are four in number. The first is that the plaintiff is precluded from suing and recovering the rent claimed by virtue of S. 20, Road Cess Act. Secondly, the appellant objects that the kabuliyat which was produced was not evidence. Thirdly, he says that the lands were not identified. Fourthly, he says that there was a plea of payment as to the rent for the year 1315, and that point has not been dealt with in the lower appellate Court. (The last three points deal with questions of fact and are not material for the report.) Then comes the last and most important point which has been raised on behalf of the appellant, and that is the effect of S. 20, Cess Act. Now the landlord had made an entry with regard to the lands in question, the Road Cess Return describing 10 bighas 19 dhurs as zerait and 1 bigha 7 cotthhas 1 dhur as also zerait but uncultivated, and then he gives the total 11 bighas 8 cotthhas at a value of Rs. 42. Then follows a very important entry. The landlord says:

"no part of the land of the touzi is kasht. A tenant has fraudulently got the khas zerait land entered as kasht in respect of which a separate regular suit will be brought that the land is zerait. Ramu Singh by his own pen."

Now this is the entry, and it has been conceded in the course of the argument that it has incorrectly described the land as zerait land; as a matter of fact it is kasht land. It is true that the landlord at the time of the entry was asserting that it was zerait and he has put in this note to show that there was a dispute between him and the tenant at the time as to whether it was zerait or kasht land. He entered as zerait as he claimed. The tenant was claiming it as kasht and the tenant appears to have been successful. Under these circumstances, is S. 20 a bar? S. 20 precludes the landlord from recovering any rent whatsoever for any land, holding or tenure forming

part of the estate or tenure to which such return relates but which has not been mentioned in such return, unless it be proved that the holding or tenure was created subsequently. It it impossible to say that the lands in question are not mentioned, because they are mentioned though they are inaccurately described as zerait. I think the fact that they are mentioned is sufficient because the object of the Act is to prevent people escaping payment of their road-cess by leaving out parts of their estate. In this case it is mentioned, and I do not think that the fact that it was incorrectly described debars the landlord from recovering rent under S. 20, unless it is shown that he wilfully and dishonestly misdescribed it. In this case certainly he has not because the landlord put in a note that there was a dispute whether it was kasht or zerait. For these reasons S. 20 is no bar. Therefore in my opinion the appeal must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 106 (1)

CHITTY AND SMITHER, JJ.

Kailash Chandra Chakrabarty— Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 1181 and 1232 of 1917, Decided on 7th December 1917.

Criminal P. C. (1898), S. 421—Complicated case—Appeal should not be disposed of under S. 421.

Though S. 421 gives an appellate Court power to summarily dismiss an appeal, that power must be exercised with judicial discretion; and appeals in cases which are complicated both in law and in fact should not be disposed of under this section. [P 106 C 1]

Atulya Charan Bose—for Petitioner.

Judgment.—Though S. 421, Criminal P. C., undoubtedly gives the appellate Court power to summarily dismiss an appeal, it is obvious that that power must be exercised with judicial discretion. These were not cases in which the appeals should have been summarily dismissed. They were cases complicated both in law and fact and the judgment of the Deputy Magistrate convers nine typewritten pages. We do not think that, in those circumstances, the cases ought to have been disposed of in this way. We accordingly set aside the order of summary dismissal and direct that the appeals be admitted and reheard by the Sessions Judge. The petitioners will remain out on bail pending the hearing of the appeals.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 106 (2)

CHITTY AND SMITHER, JJ.

Chandra Mohan Nanda—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1182 of 1917, Decided on 7th December 1917.

Criminal P. C. (1898), S. 195—Perjury—Discrepancy owing to inaccuracy of mind—Sanction to prosecute should not be granted—Penal Code (1860), S. 193.

Prosecution for perjury under S. 193, I. P. C., should not be ordered where the statements complained of are slightly discrepant owing to inaccuracies of mind and are not deliberately false. [P 107 C 1]

Jyotish Chandra Hazra— for Petitioner.

FACTS of the case will appear from the following extract from the petition to High Court: "That the petitioner was a witness for the prosecution in the Sessions Trial No. 5 of 1917 tried by the Additional District Judge of Midnapur. That in the said trial one Prem Paul was tried for cutting the forearm of his wife Putti Dassi. That the petitioner who is a medical practitioner was called in to dress the wound of Putti Dassi shortly after she got the cut and also on subsequent days. That as a result of this the petitioner was summoned by the prosecution as a witness before the committing Magistrate, and he deposed . . . that he learnt from Putti Dassi that her husband had cut her left arm with a kodali. That the petitioner had also to depose before the Additional Sessions Judge where he also stated the very same thing, but it appears that the petitioner made some confusion as to the exact day when he heard from Putti Dassi about the incident and also as to the house where your petitioner first visited Putti Dassi. That the petitioner's deposition as recorded by the committing Magistrate shows that the petitioner stated that he had come to know about the fact the next day after the occurrence, whereas his deposition, as taken down by the Additional Sessions Judge, shows that the petitioner stated before him that he came to know the fact from Putti Dassi the very day he went to dress her wound. That it further appears that the petitioner stated

before the committing Magistrate that he went to Putti's father's house, whereas he stated before the Court of Session that he went to her grandmother's house, the house of Putti Dassi's father and that of her grandfather being about 2 bighas off. That the petitioner never made any intentionally false statements". On the above facts the Additional Sessions Judge sanctioned the prosecution of the petitioner under S. 193, I. P. C., and being aggrieved by that order the petitioner moved the High Court.

Judgment.—We think that in this case the Rule should be made absolute. The statements made by the witness whose prosecution for perjury has been ordered do not appear to be deliberate false statements so much as statements slightly discrepant due to inaccuracy of mind. It does not appear from the witness's deposition that he was desirous of saving the accused. Indeed, it appears that he actually sent word to the thana through the chaukidar. The Rule is accordingly made absolute and the proceedings against the petitioner under S. 193, I. P. C., are quashed.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 107

TEUNON AND NEWBOULD, JJ.

Peari Lal Das and *others* — Petitioners.

v.

Bepin Behari Das and *others* — Opposite Parties.

Rules Nisi Nos. 708 and 709 of 1917, Decided on 3rd April 1918.

(a) Probate and Administration Act (5 of 1881), Ss. 8 and 9 — Probate granted to some executors without citation upon others — Remedy of others is to obtain probate unless debarred under S. 8.

Where probate has been granted to some of the executors appointed by a will without citation upon the others calling upon them to accept or renounce their executorships, S. 9, Probate and Administration Act becomes applicable to the case and the other executors can, on application for Probate, obtain it unless they are debarred under S. 8 of the Act. [P 107 C 2]

(b) Probate and Administration Act (5 of 1881), S 98—Executors not liable to render accounts under will are not exempt from exhibiting accounts to Court.

Provision in a will that the executors shall not be liable to render accounts does not exempt them from the obligation of exhibiting to the Court of probate the account of the estate required by S. 98, probate and Administration Act. But the Probate Court in such a case has no concern with the accounts of management by the executors. [P 107 C 2]

Mohendra Nath Roy and *Jotindra Nath Roy*—for Petitioners.

Bepin Chandra Mullick and *Bhupendra Chandra Guha*—for Opposite Parties.

Judgment.—In these two Rules it appears that one Kamini Sundari Dasi made a will by which she dedicated the bulk of her property to a certain deity, By the will she appointed six executors. of whom three, Pyari Lal, Nadiar Chand and Bepin Behari Saha, proved the will and obtained a grant of probate on the 12th August 1912. The remaining three, Koylash Chandra, Bepin Behari Das and Sarat Lal, have now applied that they should be joined in the grant, but of these the first named has since formally renounced his executorship. The applications of Bepin Behari Das and Sarat Lal are opposed by the three executors to whom probate was granted in the first instance. They alleged on the part of the applicants adverse interest, lack of business capacity and waiver; and their contention before us is that issues on these questions should have been framed.

We are unable to accede to this contention. It is not suggested that either of these present applicants renounced his executorship in the manner contemplated in S. 16, Probate and Administration Act, and in fact no citation calling upon them to accept or renounce their executorship was ever issued. This is therefore a case to which S. 9 is strictly applicable and the only question that can arise is whether the applicants are debarred by incapacity within the meaning of S. 8. The Rules are further directed against an order by which the District Judge has required the executors who obtained probate to furnish accounts. They take exception to this order, on the ground that the will provides that the executors shall not be liable to render accounts. But this does not exempt them from the obligation of exhibiting to the Court of probate the account of the estate required by S. 98, though we may point out that with their management as Shebaits and with the accounts of such management that theprobate Court has no concern. With these observations, we discharge both these Rules with costs to the opposite parties. We assess the hearing fee in each Rule at two gold mohurs.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 108

CHITTY AND SMITHER, JJ.

Jiban Krishna Chakravarti — Plaintiff—Appellant.

v.

Ramesh Chandra Das and *others*—Defendants—Respondents.

Appeal No. 3230 of 1915, Decided on 22nd November 1917, from appellate decree of Dist. Judge, Chittagong, D/- 3rd August 1915.

Specific Relief Act (1877), S. 24—Suit on agreement to grant lease embodied in solenamah — Solenamah set aside by Court—Contract cannot be enforced—Plaintiff cannot fall back on verbal agreement to grant lease—Contract Act (1872), S. 62.

Where a suit for specific performance of a contract to grant a lease was brought on the basis of an agreement embodied in a solenamah filed in Court which was subsequently set aside by the Court:

Held: that there was no contract subsisting which the plaintiff could put before the Court for enforcement. The plaintiff could not fall back upon some verbal agreement to grant the lease. [P 108 C 2]

B. C. Mitter and *Khitish Chandra Sen*—for Appellant.

Jogendra Nath Mukherjee and *Probodh Kumar Das*—for Respondents.

Chitty, J.—In my opinion this appeal should fail on the short ground that the contract on which the plaintiff sued was embodied in the solenamah filed on 14th July 1910, and that, that solenamah having been set aside by this Court there was no contract subsisting which the plaintiff could put before the Court. The learned counsel for the plaintiff-appellant conceded that if the Court held that the solenamah was the coutract between the parties he had no case. The plaintiff in seeking specific performance of an agreement to lease as against defendants 1 to 3 alleged in his plaint that there was an agreement with the plaintiff that defendants 1, 2 and 3 would grant a patta to him in his own name at a jama of Rs. 13 per annum from the date of the execution of the said solenamah. That appears to me to be an obvious device to get out of the difficulty, which arose, of the solenamah being no longer enforceable. It is to be noted that the Munsif, who decided in favour of the plaintiff, stated in his judgment that the solenamah, and the solenamah, alone, was the contract between the parties. He says:

"During the pendency of the appeal, the present plaintiff and the defendants came to terms and it was arranged that the plaintiff would hold the land as a kaimidar raiyat under the defendants on an annual rental of Rs. 13. The terms were embodied in a solenamah which was filed in Court and according to which the appeal was disposed of and the decree prepared."

Later in his judgment he says:

"There is no evidence worth the name that there was any other contract besides what was embodied in the solenamah."

The learned District Judge appears to have taken the same view. He says:

"This contract was embodied in a solenamah filed in Suit No. 467 of 1903, brought by defendants 1 to 3 for ejectment against Bankim and Pulin, sons and heirs of Sarbanund Barua, the former under-tenant-in-possession."

Later he says:

"Admittedly the contract is bound up in the solenamah. There is no contract existing independently of the solenamah. The solenamah has been set aside and the contract must, I think, go with it."

That being the case, it seems to me to follow as a matter of course that the solenamah having been set aside by the Court, the plaintiff could no longer enforce it as a subsisting contract. Nor do I think that he can fall back, as he now endeavours to fall back upon some verbal agreement between him and defendants 1 to 3 as to the lease which was to be given. In his plaint he says that the lease was to be in his own name but the contract in writing which he took and accepted was for a lease in the name of his minor clients Bankim and Pulin, who he now says were his benamidars. This, in my own opinion, is sufficient to dispose of the plaintiff's case. But the learned District Judge has given other reasons which would also prevent the Court from granting the plaintiff the relief which he claims, namely specific performance of the contract. I do not think that it is necessary for me to go into those matters but I think that I ought to say that in my opinion, the whole circumstances of the case are altogether discreditable to the plaintiff. He purported to buy the interest of his minor clients from their mother while the suit was going on. He allowed the suit to continue and prosecuted it nominally for them but really for himself. He then procured this solenamah also for his own interest.

It will be a matter for further consideration whether his conduct as a pleader should not be reported to the full Court for such action as the full Court may think fit to take against him. I need not to go into that at the present time. I am of opinion that the plaintiff

certainly cannot be allowed the equitable relief which he claims. It would indeed be unfortunate if the Court were bound in law to grant relief to a man who has behaved as the plaintiff has behaved. I would accordingly dismiss the appeal with costs.

Smither, J.—I agree that the appeal should be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 109 (1)

FLETCHER AND NEWBOULD, JJ.

Gour Mondal and *another*—Plaintiffs—Appellants.

v.

Peari Majhi and *others*—Defendants—Respondents.

Appeal No. 1963 of 1913, Decided on 23rd May 1917, against appellate decree of Offg. Sub-Judge, Jessore, D/- 19th March 1913.

Bengal Tenancy Act (8 of 1885), S. 85—under-raiyat holding under lease exceeding term which raiyat is entitled to grant can recover land on proof of possession.

An under-raiyat holding under a lease for a term in excess of what a raiyat is entitled to grant to an under-raiyat under the provisions of the Bengal Tenancy Act, has, if he was in possession of the property on the basis of the lease, sufficient interest in the property to recover the land. [P 109 C 1]

Surendra Chandra Sen and *Dwijendra Nath Mukerjee*—for Appellants.

Khettra Mohan Ghose—for Respondents.

Judgment.—This is an appeal by the plaintiff against the judgment of the learned Officiating Subordinate Judge of Jessore, dated 19th March 1913, reversing the decision of the Munsif of Narail. The case has already been before this Court once. On 29th November 1916 the case was remanded to the lower appellellate Court for a finding of fact as to whether the plaintiff had been in possession, the Court having decided the question of law in favour of the plaintiff that although the plaintiff's lease had been in excess of what a raiyat is entitled to grant to an under-raiyat under the provisions of the Bengal Tenancy Act, yet if the plaintiff had been in possession of the property on the basis of the kabuliyat, he had sufficient interest in the property to recover the land. The case comes back to this Court with a finding in favour of the plaintiff. We must, therefore, reverse the decision of the learned Officiating Subordinate Judge and restore the decree of the Munsif with costs in all Courts including the costs of the Court remanding the case.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 109 (2)

TEUNON AND NEWBOULD, JJ.

Jagat Durlav Mazumdar—Petitioner—Appellant.

v.

Indu Bhusan Mazumdar and *others*—Respondents.

Appeal No. 572 of 1914, Decided on 30th November 1917, against original order of Dist. Judge, Nadia, D/ 9th and 13th June 1914.

Probate and Administration Act (1881), S. 98 (1)—Account furnished.

An order directing an executor to furnish accounts annually is not in accordance with the provisions of S. 98 (1).

Bansari Lal Sarkar for *Harish Chandra Roy*—for Appellant.

Judgment.—No one appears in opposition to this appeal. The appeal is directed against an order of the District Judge of Nadia, namely the order of the 9th June modified by the order of the 13th June. By the order of the 9th as thus modified the petitioner who is the executor and has obtained probate of the will of his wife has been required to submit an account annually and he has also been required to give a bond with one surety in an amount representing the full value of the moveables dealt with by the will and three years' income of the immovable properties disposed of thereby. By the will the moveable properties are divided between three persons of whom the executor, the husband, is one, and the immovable properties are dedicated to an idol of whom the executor is appointed the shebait. Having regard to these provisions of the will we think that the amount of security required is somewhat excessive and we, therefore, fix it in the sum of five thousand rupees. As to the number of sureties the order will remain unmodified. The order, in so far as it directs the petitioner to furnish accounts annually, is clearly not in accordance with the provisions of S. 98 (1), Probate and Administration Act, and is accordingly set aside. We may remark that accounts under the Probate and Administration Act cannot be required from the petitioner as shebait, but only from the petitioner as executor; and so far as we have been able to appreciate the provi-

sions of the will there seems to be no reason why administration should not have been completed long ago and why, if not so completed, it should not be now completed within a very short period of time. This appeal is accordingly decreed in the terms set out above. We make no order as to costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 110 (1)

CHITTY AND RICHARDSON, JJ.

Gauranga Sundar Mandal — Petitioner.

v.

Satish Chandra Chowdhuri—Opposite Party.

Criminal Revn. No. 851 of 1917, Decided on 16th August 1917, against order of Dist. Magistrate, Burdwan.

Criminal P. C. (1898), Ss. 179, 181 (2) and 182--Jurisdiction—Criminal misappropriation of rents realised in one district—Charge of, can be tried in another district.

The accused was charged in the Magistrate's Court at Burdwan, with criminal misappropriation of moneys said to have been realised by him as the agent of a Zamindar, who lived in Burdwan, from a tenant in the District of Murshidabad. It was alleged by the prosecution in an affidavit that the accused was called to Burdwan after the alleged occurrence and was there asked to render his accounts. On his refusal to do so, the order of dismissal was served on him :

Held: that on the allegation of the prosecution in the affidavit, it might be reasonally said that the accused had retained the moneys, which were due from him, if they were due, in Burdwan, so that the Burdwan Court had jurisdiction to try the accused on a charge of criminal misappropriation by virtue of S. 181 (2), Criminal P. C. [P 110 C 2]

Brojendra Nath Chatterjee—for Petitioner.

Dasarathi Sanyal and *Debendra Narain Chatterji*—for Opposite Party.

Judgment.—This is a Rule issued at the instance of the accused Gouranga Sundar Mandal, calling on the District Magistrate and the complainant to show cause why a transfer of the case from Burdwan should not be directed or such other order made as to this Court may seem fit. It appears that the head Cutchery of the zamindars, of whom the accused is a servant, is at Burdwan. The accused was some time in 1322 stationed at Jiagange Cutchery in the Murshidabad District as a gomasta in charge of the Zamindar's estates there. He is now charged with criminal breach of trust in respect of a sum of Rs. 89. It is not expressly mentioned in the complaint where that sum was received by the accused or where he misappropriated it. The trial began in the Burdwan Court. On the evidence it would appear that the money was received by the accused in Calcutta. But the Magistrate held that he had no jurisdiction to try the case inasmuch as the offence had not been committed within the local area of the Burdwan Court. This order was set aside on revision by the Sessions Judge of Burdwan, who thought that Burdwan was the proper place where the complaint should be made, and directed a further inquiry by that Court. Against that order the present Rule has been obtained.

We think that it is uncertain in which of the several local areas the offence was actually committed, whether in Burdwan, Calcutta or Murshidabad. At the same time, the allegation, as appears from the counter-affidavit, is that the accused was called to Burdwan, that he received the order of dismissal there, and was there asked to render his accounts. That he declined to do, and it might be reasonably said that he had retained the moneys which were due from him, if they were due, in Burdwan. If that was so, the Burdwan Court would have jurisdiction by virtue of S. 181, Criminal P. C. We think, on the whole, that whether the case falls within S. 181 (2) or S. 182, the trial should proceed in the Burdwan Court and we accordingly discharge the Rule.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 110 (2)

FLETCHER AND SHAMSUL HUDA, JJ.

Bindu Basini Dassya and *another*—Decree-holders—Appellants.

v.

Srimanta Sil and *others* — Objector and Judgment debtors—Respondents.

Appeal No. 125 of 1916, Decided on 27th May 1918, from order of Sub-Judge First Court, Pabna, D/- 22nd February, 1916.

(a) Civil P. C. (1908), S. 47—Purchaser of portion of equity of redemption cannot under S. 47 object to sale in execution.

A purchaser of a portion of the mortgage property who is joined as a defendant in the mortgage suit cannot, under S. 47, Civil P. C., object to the sale of the mortgaged property under the final decree in the mortgage suit on the ground that he has acquired a new and independent interest in that portion of the property.

[P 111 C 1]

(b) Mortgage—Suit on—Right independent of mortgage must be enforced by separate proceedings.

Any right that he has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. [P 111 C 2]

Cwarkanath Chuckkerbutty, *Mohini Mohan Chuckerbutty* and *Madhab Govinda Roy*—for Appellants.

Bepin Behari Ghose and *Harish Chandra Roy*—for Respondents.

Fletcher, J.—This is an appeal by the decree-holders against an order of the learned First Subordinate Judge of Pabna, dated 23rd February 1916. The decree-holders obtained a mortgage decree in a simple mortgage. One of the properties that was apparently subject of the mortgage decree was a raiyati holding. Whether it is transferable or non-transferable is a matter we do not know and we are not concerned with in the present litigation. The present objector, who was defendant 8, was sued on the ground that he had purchased a portion of the mortgaged property from the mortgagor. The ordinary preliminary decree was made on 25th February 1914, and there being failure to pay the amount found due on the mortgage, the final decree was passed on 29th September 1915, and the property was then directed to be brought to sale. Defendant 8 then applied under the provisions of S. 47, Civil P. C., and objected that the property in question could not be brought to sale on the following grounds: Defendant 8 had purchased a portion of the mortgaged property originally from a lady named Kamini Sundari who had acquired it at a sale in execution of a money-decree; and as regards that interest, it is quite clear that defendant 8 was bound by the final decree in the mortgage suit directing that the property should be brought to sale. But defendant 8 also in these proceedings, which he purported to originate under S. 47, Civil P. C., set up a fresh and independent title, namely, that he had acquired from the landlord, who allaged that he was not bound by the transfer made by the mortgagor, a new and independent interest in this portion of the property.

That is the matter the decree-holders object to being inquired into in the present proceedings. I think that is right. That interest, if defendant 8 has in fact acquired it, is a matter wholly independent of the interest of the mortgagor that was comprised in and made subject to the mortgage which was being enforced in the present suit. Any right that defendant 8 has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the present suit. I think it is quite clear that that new and independent interest is not a matter relating to the execution, discharge or satisfaction of the decree passed in the mortgage suit. That being so the present appeal should be allowed. We make no order as to costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal allowed.*

✻ A. I. R. 1918 Calcutta 111

GREAVES, J.

Elias Joseph Solomon—Plaintiffs

v.

Jyotsna Ghoshal—Defendant.

Original Civil Suit No. 831 of 1916, Decided on 11th June 1917.

✻ Civil P. C., (1908), Ss. 132 and 133—Hindu lady of high family, although not observing pardah, cannot be compelled to appear in witness-box—S. 132 covers case of such lady.

An old Hindu lady belonging to a high family, who has abandoned entirely the protection of the purdah and who has no intention of resuming it, ought not to be compelled, having regard to her social position and the feelings of her class, to appear in the witness-box but should get the privilege of being examined on commission the cose of Auth Commission being costs in the cause. S. 132 is wide enough to cover the case of such lady. [P 112 C 2]

P. L. Buckland—for Plaintiffs.

B. L. Mitter—for Defendant.

Judgment.—This is an application to examine on commission the defendant in the suit and the mother of the defendant. So far as the defendant is concerned, it appears on the evidence that he probably cannot get leave to come to Calcutta, and that he is not likely to come to Calcutta for the period of one year. He is at present serving in the Bombay Presidency. The plaintiffs undertake not to bring on this case before February next, and under these circumstances the defendant at the same time undertakes that in the event of his coming to Calcutta before February next he will apply to be examined in Court de bene esse. Under these circumstances it seems to me that the best course is that this application should stand over, so far as the defendant is concerned, until the reopening of the Courts after the Xmas vacation, and if before that time

the defendant comes to Calcutta he will in accordance with his undertaking apply to be examined de bene esse, but if up to that time he is unable to come to Calcutta and still satisfies the Court that he will be unable to come before the trial of the action takes place then, I think, the commission should issue. Under these circumstances the only order that I propose to make now is that so far as the defendant is concerned, the mutual undertakings being given, that I have already mentioned, this application is to stand over until the re-opening of the Court after the Xmas vacation. So far as the defendant's mother is concerned, it appears on the evidence that she is a lady who appears in public. The evidence that I have before me on her behalf consists of an affidavit of Jogendranath Banerjee a clerk in the employ of the defendant's solicitors. He states

"that the lady is an old Hindu lady belonging to a high family, and according to the practices prevailing in the community a lady of her station in life does not appear in any Court of law, and the defendant apprehends that unless a commission issued to examine her it will not be possible to have her evidence."

The evidence on behalf of the plaintiff is contained in an affidavit of Sassoon Jacob Cohen, Manager of the estate of Mrs. Azeeza Joseph Solomon Joseph deceased, which estate is represented by the plaintiffs in this suit. He states in para. 6 that he is well acquainted with the lady and that she is not a pardanashin lady, on the other hand she is a cultured and educated lady of various accomplishments and freely appears in public and goes about in society and talks freely to Europeans and others face to face according to the manners and customs of European ladies. In para. 8 he states, that in October 1915 she came in an open carriage to their office at No. 6, Bentinck Street, and in para. 9 he states

"that in December 1916 she personally called at the house of Mr. Satyendra Nath Sen, an Attorney, in Indian Mirror Street, and met the deponent and one of the plaintiffs, and talked to them in Mr. Sen's presence."

Under these circumstances I have got to decide whether I shall compel the lady to appear in Court to give her evidence. She does not fall within the provisions of S. 133, Civil P. C., which counsel for the plaintiffs admits for the purposes of this application, extends as well to the wives of the persons named therein as to the persons themselves. Accordingly the only section which is applicable is S. 132, which provides that women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. On behalf of the plaintiffs it is said that as the lady has taken advantage of such privileges as attach to the abandonment of the parda system, she is not now entitled to claim the privilege of exemption from appearing in the witness-box which is provided by S. 132, and it is suggested that S. 132 applies exclusively to pardanashin or quasi-pardanashin ladies, and that it was designed for persons who observe the perda system.

On behalf of the defendant it is said that although she does appear in public to a considerable extent yet according to the custom and manners of the class and community to which she belongs she could not appear to give her evidence in the witness-box in Court. I do not think the lady, who, I am satisfied on the evidence, has abandoned entirely the protection of the parda, and who, upon the evidence before me, I cannot see, has any intention of resuming it, ought to be compelled, having regard to the feelings of her class, to appear in the witness-box and I am not prepared to force her to do so, because I think, that the Indian point of view, which I think should be respected, would be that although the lady has abandoned the parda for the purposes to which I have already referred, it would be something in the nature of an outrage if I were to compel her, having regard to her social position, to appear in the witness-box to give evidence in Court. Under these circumstances I think it would be unfortunate if I am forced, which I do not think I am, by the words of the section to compel her to come to Court to give her evidence, as I think that S. 132, is wide enough to cover her case. I feel some considerable doubt whether, having regard to the position she has adopted, I ought not to make her pay the costs of the privilege which she claims. On the whole I think I ought not to do so, having regard to the terms of the section and the reasons which I have already stated and which have induced me not to force her to come into the witness-box. The result will be that so far as she is concerned, I grant the commission asked for and the costs of this commission will

be costs in the cause. Mr. H. K. Mitra, Barrister-at-law, will be the Commisioner. The commission to be returnable a month after the issue of the writ.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 113 (1)

CHITTY AND SMITHER, JJ.

Brojendra Nath Bakshi—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1107 of 1917, Decided on 8th March 1918, from order of Sub. Divl. Officer, Goalando.

Stamp Act (1899), S. 64—To make person liable to prosecution proof of fraudulent intention is necessary.

Mere non-payment of a proper stamp duty does not make a person liable to prosecution under S. 64, unless it is proved that he had an intention to defraud the Government of its stamp revenue. [P 113 C 1]

Manmatha Nath Mukherjee—for Petitioner.

Orr—for the Crown.

Judgment.—In this case we do not think that any prima facie case of an intention to defraud on the part of Brojendra Nath Bakshi has been made out which would justify his prosecution under S. 64, Stamp Act. The fact that a sum of money had been advanced by his father for the marriage expenses of the grantees of the kabuliyat was fully set out in the kabuliyat. The only thing that was not set out was the precise amount advanced and the rate of interest which it was intended to carry. The petitioner should have been asked to specify those amounts in order that the stamp duty might be assessed. Instead of giving him that chance the authorities at once proceeded against him under S. 64. The stamp duty, so far as we can judge, would not have been more than Rs. 18 for the whole amount of principal and interest. We are not satisfied that there was any intention on the part of the petitioner to defraud the Government of that trifling sum. The Rule is accordingly made absolute and the proceedings against the petitioner are quashed.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 113 (2)

FLETCHER AND SHAMSUL HUDA, JJ.

Abdul Majid and *others*—Defendants—Appellants.

v.

Khalil Rahaman—Plaintiff—Respondent.

Appeal No. 741 of 1916, Decided on 3rd April 1918, against appellate decree of Sub Judge, 1st Court, Chittagong, D/- 22nd January 1916.

Mahomedan Law—Gift — Inadequacy of consideration does not affect deed in consideration of dower-debt.

A release obtained by a Mahomedan husband regarding the payment of dower due to his wife, is a sufficient consideration for a deed of conveyance passed by the husband in favour of the wife by which certain properties are handed over to her. Inadequacy of the consideration does not affect such a deed. [P 114 C 1]

Dhirendralal Kastgir and *Tarakeswar Nath Mitter*—for Appellants.

Charu Chunder Sen—for Respondent.

Judgment.—This is an appeal by defendants 2, 4 and 5 against the judgment and decree of the learned Subordinate Judge of Chittagong, dated 22nd January 1916 modifying the decision of the Munsif of Hathazari. The suit was instituted by the plaintiff for possession on declaration of title, the plaintiff claiming an interest in the property as one of the heirs of his deceased wife. It appears that the original owner of the property was one Ashad Ali. He died leaving a widow, two daughters and a grandson by a predeceased son. One of these two daughters was the wife of the plaintiff. She survived her father and the plaintiff claims through her. The defence raised was that Ashad Ali had given away the property by five kobalas, that is, deeds of sale. The first Court found that the kobalas were gift up to the extent of 1/3rd. The lower appellate Court reduced the share to which the first Court found the plaintiff was entitled to 2⅔ annas of the whole. It is quite clear that the learned Judge of the lower appellate Court has no regard to the fact that the shares that the mother of the deceased wife of the plaintiff and the sister of the deceased wife of the plaintiff would take under the Mahomedan law could exceed unity and that, according to a rule laid down under the Mahomedan law, it was necessary to reduce the fractions that the parties would take. The learned Judge found that the plaintiff inherited from his wife ½ of 1/3rd. That is not so. What

he inherited from his wife was $\frac{1}{8}$th, and on that footing he will get 2 annas instead of $2\frac{3}{4}$ annas as decreed by the lower appellate Court.

Then the next point raised was as regards one of the kobalas which was given by Ashad Ali to his wife in satisfaction of her dower. It is not denied that there was a dower deed in favour of Ashad Ali's wife. Apparently something was due on that. Inadequacy of the consideration that was given does not seem to have affected the matter. If, in fact, the husband obtained a release from payment of the dower money by handing over certain properties to the wife, then there was sufficient consideration for the deed. The other matter raised in the appeal is as to what have been called the Schs. 2 and 3 properties; that is, the properties mentioned in Schs. 2 and 3 of the plaint. The case set up by the appellant as regards this is this. Those properties were purchased by the son of Ashad Ali, who predeceased him, in execution. It is said that the purchase was in the name of the son of Ashad Ali who predeceased him as the benamidar for his father. It is, therefore, contended that S. 66, Civil P. C., prevents the plaintiff from raising any claim to these lands. This matter was not a matter that was gone into in the lower appellate Court, and it is impossible for us to tell what are the facts relating to this matter unless it is gone into by the Courts below. We are not disposed to allow this matter to be re-opened at this stage. As regards this matter, the appeal will be dismissed. In the result, the plaintiff will be held entitled to a 2 anna share of the properties, except the properties comprised in the kobala to the widow of Ashad Ali which were given to her in lieu of her dower and also the properties in respect of which the plaintiff has obtained leave to withdraw the suit. We make no order as to the costs of this appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 114

RICHARDSON AND WALMSLEY, JJ.

Mina Kumari Saheba—Plaintiff—Appellant.

v.

Ichamoyee Chowdhurani and *others*—Defendants—Respondents.

Appeals Nos. 2651, and 2884 to 2897 of 1915, Decided on 13th March 1918.

(a) Landlord and Tenant—Occupancy holding—Custom of transferability of holding subject to payment of Nazar—To establish custom evidence must show that landlord must recognise transfer on tender of nazar.

In order to establish a custom of transferability of an occupancy holding subject to the payment of a customary nazar, the evidence must show that the landlord is bound to recognize the transfer when nazar of the amount or at the rate determined by custom is tendered to him. [P 115 C 1]

(b) Landlord and Tenant—Occupancy holding—Custom as to transferability of holding on payment of nazar, leaving rate of nazar indefinite, is void for uncertainty—Contract (1872), S. 29.

An alleged custom of transferability of an occupancy holding on payment of a nazar which leaves the amount or rate of the nazar indefinite is void for uncertainty, for no one knows what the tenant has to pay by way of nazar and the landlord can demand what he pleases and refuse his consent unless he is satisfied. [P 115 C 2]

(c) Landlord and Tenant—Occupancy holding—Custom of transferability of holding on payment of nazar—Tranferee has no title until fixed nazar has been tendered.

Where there is a custom of transferability of an occupancy holding on payment of a customary rate of nazar, which the landlord is bound to accept, the transferee has no title under the custom until he has paid or tendered nazar at that rate. [P 115 C 2]

Bipin Behari Ghose and *Urukramdas Chakrabarty*—for Appellant.

Ram Chandra and *Mojumdar Gauranga Nath Banerjee*—for Respondents.

Judgment. — The appellant is the plaintiff in a suit brought to recover actual possession of an occupancy holding in the village of Basanta of which he is the proprietor. His case is that the holding is non-transferable and that the defendants, who are in possession as purchasers from the original tenant, are mere trespassers. Of the defences raised we are now concerned only with the defence that occupancy holdings in the village are transferable by custom without the landlord's consent. The written statement says nothing about the payment of nazar, customary or otherwise. There is no plea that nazar has in fact been paid. Nor is there any reference to nazar in the issue framed upon this question. The issue is merely: "Are the disputed holdings transferable by local custom or usage?" At the trial however evidence relating to the payment of nazar has been given and both the Courts below have found in favour of a custom of transferability involving in some way, which is not clearly defined, the payment of nazar. The question is whether the finding can be supported in law.

The cases on the subject of customary nazar will be found collected in Mr. Sen's work on the Bengal Tenancy Act (3rd Edn, pp. 136, 137). The principle of the cases is clearly this, that in order to establish a a custom of transferability subject to the payment of a customary nazar the evidence must show that the landlord is bound to recognize the transfer when nazar of the amount or at the rate determined by custom is tended to him. There is all the difference between a fixed nazar, which the landlord is obliged to accept whether he likes it or not, and a nazar which is bargained for and paid as the price of a consent which he may give or withhold as he pleases. A practice or course of business in a zamindary office according to which a transferee is recognized, provided that the amount of the nazar is satisfactory to the landlord, is not sufficient. Tried by this standard the finding of the learned Munsif is not a good finding of a custom. It is not enough to say

"that there are constant transfers and the transferees pay nazar to the landlord to be recognized."

The two statements that "occupancy jotes are transferable" and that "landlords recognize such on payment of nazar" are, as they stand, inconsistent. The payment of nazar without more is an indication that the jotes are not transferable without the landlord's consent, given on receipt of the nazar. The finding of the learned District Judge is more artificial, but as it rests on the same materials it is perhaps not surprising to find that it is also open to objection. He holds

"that a custom or usage existed in the plaintiffs' estate at Basanta by which occupancy holdings are transferred with the knowledge but without the consent of the landlord and are recognized by the landlord upon payment of a nazar fixed by custom."

It may be presumed that the Judge means that the transfers are or must be recognized by the landlord. Apart, however, from any question of grammar, the substantial objection to the finding is that it does not state the amount of the customary nazar. As to that there is no definite conclusion arrived at in the judgment. The Judge says that

"the landlords recognize all the transfers of occupancy holdings, provided a fixed nazar, generally four annas in the rupee on the purchase of the property, is paid."

But though he adds that "the nazar varies in different estates" he does not determine the rate payable in Basanta. Now obviously custom which leaves the amount or rate of nazar indefinite must be void for uncertainty. The position is no whit better than when the nazar is determined by agreement. No one knows what he has to pay and the landlord can demand what he pleases and refuse his consent unless he is satisfied. Further there is another vice in the judgment. It is not found that the defendants paid or tendered any nazar. As I have said the written statement contains no such plea, and even if it be assumed that there is a customary rate of nazar which the landlord is obliged to accept, the defendants have no title under the custom until they have paid or tendered nazar at that rate: *Maharaja Radha Kishore Manikya* v. *Srimutty Ananda Pria* (1), *Sreemutty Sibo Sundari Ghose* v. *Raj Mohun Guho* (2). For these reasons the judgments and decrees of the Courts below should, in my opinion, be set aside and a decree made in favour of the plaintiff awarding her khas possession in accordance with the first prayer of the plaint with costs throughout. There will be a remand of the suit to the Court of first instance in order that the claim for mesne profits may be tried. This judgment governs the consolidated appeals other than appeals Nos. 2892, 2893, 2894, 2895 and 2896, which fail on other grounds and are dismissed with costs. I may add that we allowed the parties at their request, time to settle the matter but they have not found it possible to arrive at an agreement.

V.B./R.K. *Decrees set aside.*

1. (1901) 8 C W N 235.
2. (1901) 8 C W N 214.

A. I. R. 1918 Calcutta 115

TEUNON AND NEWBOULD, JJ.

Dharani Kanta Lahiri Chaudhuri and *others*—Appellants.

v.

Amir Sheikh and *others*—Respondents.

Appeals Nos. 176, 436, 574, 906 to 914 and 2403 to 2410 of 1913, Decided on 7th December 1917, against decrees of Special Judge, Mymensingh.

Bengal Tenancy Act (1885), Ss. 105 and 109A—Appeal against decision of Settlement Officer—Order directing schedule to be prepared—Limitation runs from date on which schedule is signed by Officer.

A Settlement Officer, in an order on an application for settlement of fair rents under S. 105

arrived at certain findings and laid down certain principles, in accordance with which fair rents were to be ascertained and entered in a schedule directed to be prepared by the order:

Held: that limitation for appeal against the decision of the Settlement Officer began to run from the date on which the schedule was signed by the Settlement Officer, and not from the date on which the order was made, inasmuch as the schedule settling the rents was clearly a part of the decision and, in fact, read with the order, was the decision. [P 116 C 2; P 117 C 1]

Jogesh Chandra Roy, *Bepin Behary Ghose* for *Rash Behary Ghose* and *Dwarka Nath Chakravarty*, *Sasanka Jiban Roy* and *Ramani Mohan Chatterjee*—for Appellants.

Charu Chandra Bhattacharjee, *Naresh Chandra Sen Gupta*, *Mukunda Nath Roy* and *Madhub Gobinda Roy*—for Respondents.

Biraj Mohan Mazumdar—for Dy. Registrar.

Judgment.—*In S. A. No.* 176 *of* 1913. In this case it appears that the landlord appellant made an application under S. 105, Ben. Ten. Act, for the settlement of fair rents in the case of each of a large number of tenants. The application came on for hearing before the Settlement Officer and judgment was delivered on 23rd August 1912. At the close of the judgment the Settlement Officer says this:

"It is now necessary to prepare schedules on the basis of the findings and in accordance with the directions given above for all the tenancies of those cases except the tenancies regarding which the claim was withdrawn. Office to prepare the schedules and to put them up. The schedules will show the fair rent settled."

In accordance with that order a schedule was prepared, approved and signed by the Settlement Officer on 14th September 1912. Then followed the civil Court vacation. On the reopening day, 12th November 1912, the plaintiff-landlord presented an appeal against the fair rents settled in the cases of 148 of the tenants whose tenancies were included in the schedule to which reference has been made. The learned Special Judge dismissed that appeal on the ground that it was barred by limitation. It is not contested before us in this appeal that if time is to be taken as running from 23rd August 1912, the date of the judgment, the appeal to the District Judge was barred; but it is contended that in taking that date as the starting point and not 14th September 1912, the date on which the schedules were prepared and signed, the learned Judge has fallen into error. On behalf of the respondents it is not suggested that if 14th September be taken the appeal to the District Judge is within time. Thus the one question for our determination is whether time should be taken as running from the 23rd August, the date of the judgment, or from the 14th of September, the date of the schedule.

The learned District Judge says that the 23rd August must be taken because by S. 109-A of the Act the appeal lies not against a decree or a schedule but against a decision of the Revenue Officer and the schedule in his opinion forms no part of that decision. Now when we turn to S. 105 we find that what the Revenue Officer is required to do is to settle fair rent in respect of the land held by the tenant, that is to say, by each tenant. No doubt in his judgment of 23rd August 1912 the Revenue Officer did arrive at certain findings and did lay down certain principles in accordance with which fair rents were to be ascertained, but it is clear that until the fair rent to be thus calculated had been ascertained there was in fact no decision in the case of any one of the tenants and no settlement of the rent which he had to pay. The schedule settling the rents is clearly a part of the decision and in fact read with the judgment is the decision. If any doubt can possibly remain on this point it would be removed by a reference to the statutory rules framed by the Bengal Government under the provisions of Ss. 39, 61, 134 and 189, Ben. Ten. Act. R. 63 of those rules to be found in part 3, which deals with the settlement of fair rents, says in its sub-R. (9):

"It shall not be necessary for the Revenue Officer to draw up a separate decree with regard to fair rent settled but the entry in his decision or schedule attached thereto with regard to the fair rent settled shall be held to be a decree."

That rule reproduces R. 62 (9), Ch. 6, of the Rules framed by the Government of Eastern Bengal and Assam under the provisions of the sections already referred to on 24th August 1909, which in the years 1912 to 1914 were in force in the District of Mymensingh. When we next turn to Sch. 3, Ben. Ten. Act, Part 2, we find that for appeals to the Court of the District Judge or Special Judge the period of limitation is 30 days from the decree or order under the Act.

From this also it would appear that the schedule is in effect the decree. Whether, however, the schedule be or be not a decree, it is clear that without the schedule the decision remains incomplete and uncertain in the case of each tenant and the schedule is thus an essential part of the decision. For these reasons we set aside the order of the Special Judge in this case and return the appeal to be presented to him in order that it may be heard and disposed of on the merits in accordance with law.

In S. A. Nos. 436, 574 *and* 2403 *to* 2410 *of* 1913.

The appeals are governed by the judgment just delivered in S. A. No. 176 of 1913. The order of the Special Judge in each of those cases is set aside and the appeals returned to him in order that they may be heard and disposed of on the merits in accordance with law.

In S. A. No. 906 *to* 914 *of* 1913.

These appeals are also governed by the judgment just delivered in S. A. No. 176 of 1913. True it is that the dates are somewhat different; but when due allowance is made for the time requisite for taking copies and for the days in which the Courts were closed, those appeals were well within time, taking time as running from the date on which the schedules were prepared and signed. The order of the Special Judge in each of these cases is set aside and the appeals returned to him in order that they may be heard and determined on the merits. The applications connected with these Appeals Nos. 176, 436, 574, 2403 to 2410 and 906 to 914 of 1913, are all rejected. Costs in all the above appeals will abide the result. We assess the hearing fee in each of the appeals valued at sums not exceeding Rs. 200 at one gold mohur, and in each of the other appeals at two gold mohurs.

V.B./R.K. *Orders set aside.*

A. I. R. 1918 Calcutta 117

CHITTY AND SMITHER, JJ.

Radhamohan Rai and *others*—Petitioners.

v.

Naimuddi Molla and *others*—Opposite Parties.

Criminal Revn. No. 183 of 1918, Decided on 18th March 1918.

Criminal P. C. (5 of 1898), S. 145, Cls. (5) and (6)—Magistrate has no jurisdiction to deal with lands not subject-matter of dispute—Order under Cl. (6) in favour of persons who are not parties but who are directed to come under Cl. (5) is not valid.

In a proceeding under S. 145 the Magistrate has no jurisdiction to deal with land which is not in dispute between the parties and to declare the same to be in the possession of persons who are not parties to the proceedings. [P 118 C 1]

In such a proceeding the Magistrate exceeds his jurisdiction if he makes an order under S. 145, Cl. (6), in favour of persons who are not parties to the proceeding and who have not filed any written statement or taken any part in the proceedings except to address the Court through their pleader, and who were directed by the Magistrate to come in for a limited purpose, viz. under S. 145, Cl. 5. [P 118 C 2]

Norton, Manmatha Nath Mukerjee and *Probodh Chandra Chatterji*—for Petitioners.

Atulya Charan Bose, Satish Chandra Chowdhury and *Rupendra Kumar Mitra*—for Opposite Parties.

Judgment.—This Rule was issued at the instance of some of the first party to a proceeding under S. 145, Criminal P.C. The leader of this branch of the first party appears to be Baikuntha Chandra Roy. The Rule was issued on two grounds (1): that the Magistrete had no jurisdiction to declare plots I and J to be in possession of Sadar Ali's tenants, they being no parties to the proceeding and having made no application to be made parties; and (2) that the Magistrate had no jurisdiction to declare plots E and F to be in the possession of Baser Pramanik and his tenants, those persons being parties to the proceedings only for the purpose of S. 145 (5). The proceedings were commenced on 1st September 1917 owing to a dispute between, and a likelihood of a breach of the peace by the present petitioners (part of the first party) and Naimuddi Molla, the second party. It appears from the order sheet that on 8th October 1917 two sets of persons, one claiming to be tenants of Naimuddi Molla and the other to be tenants of one Bhola Molla, applied to be made parties. The order was: "They may proceed as under S. 145 (5), Criminal P. C." It does not appear that these persons ever came in any capacity. On 17th October 1917 Baser Pramanik and others, who have been described as the third party, put in a petition claiming to be in possession of the disputed land, denying any likelihood of a brach of the peace and applying to be added as the third party under S. 145 (5). They conclude: "The case can be decided

by accepting written statements and evidence from us." The order on that petition was: "They are to proceed under S. 145 (5), Criminal P. C." At the hearing the contest was entirely between the present petitioners and Vaimuddi Molla. Kanchan Mondal and other members of the first party took no part in it. Baser Pramanik and his tenants (third party) filed no written statements, nor did they adduce any evidence, either in support of their alleged possession or under S. 145 (5), to show that no dispute existed. The Amin, however, in his local investigation found the houses and homesteads of the third party on plots E and F. Plots E, F, I and J are all within the boundaries of the disputed land, the subject of these proceedings. As regards I and J, which the Magistrate finds to be in the possession of Sadar Ali's tenants, no orders have been passed under S. 145 (6), but the Magistrate has apparently released them from attachment. As to these two plots the effect of his order seems to be to exclude them from the present proceedings. The petitioners cannot in any way be prejudiced, so far as these proceedings are concerned, by the Magistrate's finding that these plots I and J are in the possession of persons who are not parties; at the same time the more correct mode of expression would be to say that he finds these plots not to be in the possession of any or either of the parties, and that in these circumstances they should be excluded from the present proceedings.

He certainly had no jurisdiction to deal with these plots as if they were in dispute between the parties. The case as to E and F is rather different, since with regard to them the Magistrate has passed an order under S. 145 (6) in favour of the third party. It is not disputed that the Magistrate might have added these persons, Baser Pramanik and others, as parties, but he does not appear to have done so. From the order sheet it appears that he let them come in for a limited purpose, namely under S. 145 (5). It does not appear that they availed themselves even of that permission. They took no part in the proceedings except to address the Court through their pleader. Though they alleged possession in their petition of 17th October 1917 they filed no written statement and adduced no evidence in support of it. We are not prepared to say that it was absolutely necessary for them to do either of these things. Their object might be gained by the admission of or the evidence adduced by another party. But in the circumstances of this particular case we are of opinion that they cannot be regarded as parties in whose favour an order could be passed under S. 145 (6). In this view of the case we must hold that the Magistrate exceeded his jurisdiction in passing such an order. We make the Rule absolute and set aside so much of the Magistrate's order as finds the possession of plots E and F and I and J in Baser Pramanik's tenants and Sadar Ali's tenants respectively, and also so much of his order as declares the third party entitled to retain their possession until evicted in due course of law, and forbidding all disturbance of such possession until eviction. The result will be that these four plots E, F, I and J, are excluded from the purview of the present proceedings.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 118

TEUNON AND NEWBOULD, JJ.

Alok Chand Pal and *others*—Plaintiffs—Appellants.

v.

Jaluram Namasut and *others*—Defendants—Respondents.

Appeal No. 91 of 1917 and Rule No. 343 of 1917, Decided on 21st January 1918, from order of Dist. Judge, Sylhet, D/- 12th December 1916.

Bengal Landlords and Tenant Procedure Act (1869), Ss. 59, 64 and 65—Non-transferable holding cannot be sold in execution of rent decree in district of Sylhet.

In execution of a decree for rent in a case in the district of Sylhet governed by the provisions of Bengal Act 8 of 1869, whether the decree is a decree for the cosharer landlord's share of rent or a decree for the whole rent due on the holding which is non-transferable, the holding cannot be sold under the provisions of S. 59 or S. 64 or 65 of the Act. [P 119 C 2]

Birendra Chandra Das—for Appellants.

Birendra Kumar Dey—for Respondents.

Judgment.—This appeal arises out of an application for execution of a rent decree by attachment and sale of the holding. In the Courts below the case was treated practically as one falling under the provisions of the Bengal Tenancy Act, and the learned District Judge held that the holding not being transferable and the decree in his view being one not for

rent but for money, neither the whole of the holding nor the 8 annas share therein, that is to say the share corresponding with the share of the executing decree-holder, could be sold. But the case comes from tne District of Sylhet and is therefore governed by the provisions of Bengal Act 8 of 1869.

Whether it is, as the District Judge supposed, a decree merely for the cosharer landlord's share of the rent, or a decree for the whole rent due on the holding, it must be dealt with under the provisions of the Act which we have just cited. In the suit brought by the cosharer landlord to which all his cosharers, it appears where parties, there was no prayer and therefore no order for ejectment. The holding is admittedly not transferable and it would therefore seem that it cannot be sold under the provisions of either S. 59 or S. 64 of the Act. S. 65 of the Act requires that in the first instance execution should be taken out against the person or moveable property of the debtor and thereafter against his immoveable property, if any. If satisfaction cannot be obtained in the manner indicated in S. 65 the unexecuted decree may, it appears become the basis of a suit for ejectment under the provisions of S. 52. Whatever may be the proper course open to the decree-holder landlord it is clear that he cannot in the present proceeding at least obtain satisfaction of his decree by attachment and sale of this non-transferable holding. For these reasons we dismiss this appeal with costs. We assess the hearing fee at one gold mohur.

The connected Rule. 343 of 1917, is discharged. We make no order as to costs in the rule.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 119

RICHARDSON AND BEACHCROFT, JJ.

Brindaban Chandra Das, In the matter of

Criminal Ref. No. 6 of 1917, Decided on 2nd January 1918.

Legal Practitioners Act (1879), S. 14—Rules relating to acceptance of Vakalatnamas and Mukhtearnamas must be scrupulously and punctiliously observed.

The rules relating to the acceptance of Vakalatnamas and Mukhtearnamas must be scrupulously and punctiliously observed. In a suit in which one *J* was a pro forma defendant a Mukhtear received a Mukhtearnama purporting to have been signed by *J* from an agent of the plaintiff who had no authority from *J* to deliver the Mukhtearnama to the Mukhtear, and endorsed upon it a statement that he had received it from another person. The Mukhtear was not influenced by any dishonest or corrupt motive, and after having accepted and filed the Mukhtearnama put himself in communication with *J* and on being told by the latter that he had given no instruction to file a Mukhtearnama, and that he knew nothing about the the suit, placed the matter before the Court:

Held: that the conduct of the Mukhtear called for something more than a censure as gentlemen of his profession should set a high standard of honour and integrity to the people about them. The Mukhtear was suspended from practising for a period of three months. [P 120 C 1]

Ram Charan Mitter—for the Crown.

Judgment.—This is a reference under S. 14, Legal Practitioners Act, received from the District Judge of Noakhali. The reference concerns a Mukhtear, named Brindaban Chandra Das, who has undoubtedly been guilty of unprofessional conduct in connexion with the receipt of a Mukhtearnama from an unauthorized party. It has been repeatedly laid down by this Court that the rules relating to the acceptance of Vakalatnamas and Mukhtearnamas must be scrupulously and punctiliously observed. In this case it appears that there was a suit in which there was a plaintiff and a pro forma defendant named Jaladhar Das. It was a suit on a mortgage and the plaintiff alleged that Jaladhar Das was his servant and that his name had been used in the mortgage transaction as that of a benamidar. The Mukhtear received a Mukhtearnama purporting to have been signed by Jaladhar Das from a Karamachary or agent of the plaintiff who had no authority from Jaladhar Das to deliver the Mukhtearnama to the Mukhtear. Not only did the Mukhtear receive the Mukhtearnama in this irregular way, but he endorsed upon it a statement that he had received it from another person named Kali Mohan from whom he had not received it. Such a breach of the rules calls for something more than a mere censure. It is perfectly true that no dishonest or corrupt motive is attributed to the Mukhtear. It appears that after having accepted and filed the Mukhtearnama, it occurred to him that he ought to make further enquiry and he put himself in communication with Jaladhar Das and was told by the latter that he had given no instruction to file a Mukhtearnama and that he knew nothing about the suit. Having obtained that information from Jaladhar Das the Mukhtear

did take the course which was at that time the proper course and placed the matter before the Court. We cannot, however pass over this matter with a mere censure. What strikes us as particularly serious misconduct on the part of the Mukhtear is that he endorsed on the back of the Mukhtearnama the false statement to which we have referred. It is most important that learned and professional gentlemen should set a high standard of honour and integrity to the people about them. On the other hand, we are not disposed in the circumstances to inflict a severe punishment. We think that it will meet the case if, following the recommendation on the District Judge, we suspend the Mukhtear (Babu Brindaban Chandra Das) from practising for a period of three months.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 120

CHITTY AND SMITHER, JJ.

Prem Chand Gorai—Petitioner.

v.

Sonatan Saha—Opposite Party.

Civil Revn. No. 11 of 1918, Decided on 11th March 1918.

Criminal P. C. (1898), S. 195—Sanction for prosecution granted by successor of Judge who heard case after long delay held unjustified — Order for sanction was set aside.

On the application of the defendant in act Small Cause Court suit, the successor-in-office of the Judge, who had decreed the suit, granted, after an inordinate delay, sanction for the prosecution of the plaintiff for perjury in respect of a false statement in his deposition. This sanction was affirmed on appeal to the District Judge :

Held : that as the Court record of the deposition was not read over to the plaintiff and he was not cross-examined on the statement, and as the sanction was granted after a long delay by a Judge who did not try the case, the sanction should be revoked, especially as this sanction, if not revoked, would be used by the defendant in terrorem both as regards execution under the decree passed against him and as regards the suit which he had brought for setting aside that decree and which was pending.

[P 121 C 1]

Per *Smither, J.*—When a person wants to prosecute criminally, he must not be dilatory.

[P 121 C 1]

B. C. Mitter and *Monmatha Nath Mukherjee*—for Petitioner.

Norton and *Taradas Chatterjee*—for Opposite Party.

Chitty, J.—On 18th December 1916 the petitioner, Prem Chand Gorai, filed a suit in the Small Cause Court at Midnapore against Sonatan Shaha alias Sonaulla Saha to recover a sum of Rs. 497 for the price of goods sold and money advanced on an account between the parties. The suit was heard by the Subordinate Judge, Babu S. C. Chakravarti. From the record it appears that the plaintiff stated in examination-in-chief that he paid an income tax of Rs. 250. The Subordinate Judge in his judgment remarked that it was unlikely that the plaintiff as a Mahajan of standing would prefer a false claim for so small an amount as Rs. 497. There is nothing to indicate that this remark had a direct reference to the statement of the plaintiff regarding income tax, though of course that may have been the case. The Subordinate Judge passed a decree in favour of the plaintiff on 28th March 1917. On 30th March 1917 the plaintiff decree-holder applied for execution, but the judgment-debtor's property was not attached and that execution case was dismissed in default of the decree-holder taking further action. Babu S. C. Chakravarti was then transferred, and on 15th May 1917 the defendant applied to his successor, Babu H. K. Bose, for sanction to prosecute the plaintiff for perjury for stating that he paid an income tax of Rs. 250 whereas in fact he paid nothing at all. It is conceded that at the time in question the plaintiff was paying no income tax. The plaintiff, in reply, stated that his answer must have been incorrectly recorded and that what he said or intended to say was that his income was Rs. 250 a month and not that he paid an income tax on that amount. The proceedings being in a Small Cause Court the deposition of the witness was not read over to him, nor was he at all cross-examined in regard to this answer or his credit generally. The question of sanction was before the Subordinate Judge, Babu H. K. Bose, for close upon 7 months when on 11th December 1917, after this inordinate delay, sanction was granted. An application to the District Judge to revoke it was rejected and the petitioner has now applied to us to exercise our revisional powers and set it aside.

For several reasons I think that the Rule should be made absolute. In the first place, I think that there is reason to doubt whether the statement was made as recorded. The only evidence of its having been so made that could be at

all relied upon is the Court record. It is obvious that oral statements of the opposite party such as appear in the affidavit now filed before us are of little value. The accuracy of the Court record is open to this comment that the deposition was not read over to the witness (it is true that the law does not require it), and that the statement did not attract the attention of the cross-examining pleader, and so the plaintiff had no opportunity of correcting it, if it was inaccurate. Secondly, it was not the trying Judge who thought that the plaintiff should be prosecuted. The matter was brought before his successor by the defendant, the unsuccessful party in the suit, and Babu H. K. Bose, after allowing the matter to drag on for nearly 7 months, has granted the sanction because the statement is false, without any consideration of the surrounding circumstances, which indeed he was not in a position to Judge. Thirdly, we find that in July 1917, the defendant filed a suit to set aside this decree. It appears to me obvious that this sanction, if granted, will be used by the defendant in terrorem both as regards execution under the existing decree, and as regards the suit now pending. This appears to me to be a case in which the personal element bulks largely, and I do not think that the Courts should assist the defendant by putting this weapon into his hands. In any view of the case I think that criminal proceedings should not be allowed to commence until the decision of the defendant's suit. But I think that the interests of justice do not require the prosecution of the petitioner at all and I would, therefore, make the Rule absolute and revoke the sanction.

Smither, J.—I think we should, at this stage, rely upon the presumption that the record is correct; but as it is now about a year since the evidence was given, and as I find, on examining the record, that the applicant for sanction was himself responsible for much of the delay that occurred before sanction was granted, I agree in the order passed. When a person wants to prosecute criminally he must not be dilatory.

V.B./R.K. *Rule made aboslute.*

A. I. R. 1918 Calcutta 121

RICHARDSON AND BEACHCROFT, JJ.

Probodh Chandra Mitra—Plaintiff—Appellant.

v.

Indra Chandra Chaule—Defendant—Respondent.

Appeal No. 3185 of 1915, Decided on 31st January 1918, from appellate decree of Sub-Judge Hooghly, D./-11th September 1915.

Landlord and tenant— Consent decree limiting remedy of landlord to eject tenant in case of refusal to cultivate—Landlord can still sue for arrears of rent.

According to the terms of a consent decree, in the event of the defendant-tenant refusing to cultivate the land, and to render the plaintiff landlord his share of the produce, the only remedy which the plaintiff would have was to eject the defendant:

Held: that the clause relating to ejectment was in the nature of a clause for re-entry and had not the effect of depriving the landlord of his ordinary right to sue for the arrears of rent due by the tenant. [P 121 C 1]

Shib Chandra Palit—for Appellant.

Rupendra Kumar Mitter—for Respondent.

FACTS material to the report as found by the Subordinate Judge in appeal wereas follows:

"As to the appeal I think it should succeed. The auction-purchase by the admitted superior landlords took place on 14th August 1911, as Ex. F, the sale-certificate, shows. The rent decree in execution whereof that sale took place was obtained in Rent Suit No. 496 of 1907. The rent decrees, Exs. 6 and 7, in which the present plaintiff was impleaded as a defendant, were obtained for the arrears of rents due for the years 1914 to 1917. It is easy to see therefore that the rent suit, No. 496 of 1907, was for a period prior to that of suits in which the decree Exs. 6 and 7 were passed. I therefore cannot agree with the learned Munsif that the decrees, Exs. 6 and 7, go to show that after their aforesaid purchase the superior landlords did not take actual possession, inasmuch as the decree, Ex. 6, was passed on first August 1911 and the decree Ex. 7 was passed on 28th August 1911, while the aforesaid purchase of the landlords was confirmed on 18th September 1911. Now in his objection under R. 100, O. 21, Civil P. C., as per Ex. A, the plaintiff admitted his dispossession on the landlords' taking possession in pursuance of their purchase as per sale-certificate Ex. F. This clearly took

place subsequent to the passing of the rent decrees Exs. 6 and 7 aforesaid. The learned Munsif observed that although the plaintiff alleged dispossession still the Court had found that there was no dispossession. I do not think that on the face of the plaintiff's admission as per Ex. A, viz. his objection under R. 100, O. 21, Civil P. C., that finding of the Court should be acted upon. In reality the superior landlords took formal possession after their purchase and subsequently exercised their right by letting out the lands to another person no matter if that person happened to be a brother of the present defendant. This man is separate in mess from the defendant and was proved to have been in possession of the lands during the disputed period by virtue of his lease from the superior landlords. This was tantamount to the plaintiff's ouster, and being out of possession the plaintiff was not at all competent to recover the bhag crops for the year in suit. The decree of the Court below should, therefore, be set aside and the plaintiff's suit should be dismissed."

Richardson, J.—On the facts as found by the learned Subordinate Judge in the Court of appeal below it does not appear that the defendant respondent was evicted from the land which he held under the plaintiff by title paramount. The Subordinate Judge seems to be in error in holding that the rent claimed by the plaintiff is not due and payable by the defendant. We have been referred to a consent decree. It is argued that according to the terms of that decree in the event of the defendant refusing to cultivate the land and to render the plaintiff his share of the produce, the only remedy which the plaintiff has is to eject the defendant. As I understand the decree, however, the clause relating to ejectment is in the nature of a clause for re-entry and the document has not the effect of depriving the plaintiff as landlord of his ordinary right as such to sue for the arrears of rent due by the tenant. In this view the appeal should be allowed, the judgment and decree of the lower appellate Court set aside and the decree of the trial Court restored with costs throughout.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 122

RICHARDSON AND WALMSLEY, JJ.

Darpanarain Sarkar and *others*—Plaintiffs—Appellants.

v.

Girish Chandra Das and *others* — Defendants—Respondents.

Appeal No. 752 of 1916, Decided on 20th Maach 1918, against appellate decree of Dist. Judge, Rangpur, D/- 8th December 1915.

Civil P. C. (1908), S. 100—Finding as to status of tenant is one of fact and cannot be challenged—Mistake as to area of tenancy is not error of law.

A finding as to the status of a tenant arrived at by the Court of first appeal is a finding of fact, with which the High Court in second appeal ought not to interfere except on the ground of some clear mistake of law. [P 122 C 2]

A mistake as to the area of the tenancy can hardly be described as a mistake of law, even where the finding regarding the status of the tenant is based to some extent upon the mistake as to the area. [P 123 C 1,2]

Surendra Chandra Sen and *Hemendra Chandra Sen*—for Appellants.

Atul Chandra Gupta—for Respondents.

Judgment.—This appeal arises out of a suit for arrears of rent. The sole question which arises is whether the plaintiffs are tenure-holders or raiyats. The plaintiffs claim to be raiyats and the important point is this: that if they are raiyats and the defendants are under-raiyats then the plaintiffs are entitled under the provisions of S. 66, Ben. Ten. Act, to a decree for ejectment subject to the provisions of the section in addition to a decree for arrears of rent. The case for the defendants is that the plaintiffs are tenure-holders. Both the Courts below have found that the plaintiffs are in fact tenure-holders, and this is a finding with which, in second appeal, we ought not to interfere except on the ground of some clear mistake on apoint of law. The trial Court, having first found that the plaintiffs were tenure-holders, dismissed the suit on the footing that the land in respect of which the rent is claimed was not the subject of a separate tenancy but formed part of a larger area, all included in one tenancy, and that the plaintiffs were not entitled to split up the rent. Upon that question, however, the learned District Judge in the lower appellate Court has taken a different view. He has found that there are two tenancies held by the defendants under the plaintiffs: one at a rent of Rs. 65-14-0, that is the tenancy to which the present suit relates;

and the other at a rent of Rs. 70-2-0, that these two tenancies have not been consolidated and that the plaintiffs are entitled to sue for rent in respect of the tenancy in suit as a separate holding. His finding on the question whether the plaintiffs are tenure-holders is in these words:

"The facts and circumstances of the case are, in my opinion, quite clear to show that the status of the plaintiffs is that of a tenure-holder. To begin with there, is the presumption that they are tenure-holders, the area of their jote being more than 100 bighas. The only two documents which have been filed to rebut this presumption are Ex. 4 and Ex. 2—a kobala and a kabuliyat. These documents are of the years 1275 and 1274 B. S. respectively, long before the Ben. Ten. Act came into force and of a time when the word "raiyat" was very loosely used in documents. On the other hand the plaintiffs in a rent suit brought by them in the year 1902 described themselves as tenure-holders: vide Ex. E. Plaintiff adduced some oral evidence also to show that Ashmatulla, the original holder of the jama, himself cultivated the lands. But this evidence comes from a witness who deposed to facts which according to him had taken place when he was a mere boy. I hold therefore that the presumption that the plaintiffs are tenure-holders and not occupancy raiyats has not been rebutted and my finding therefore is that they are tenure-holders."

The first contention of the learned pleader for the appellants is that the presumption to which the District Judge refers does not apply because the area of the holding is not in fact more than 100 bighas. It appears that the District Judge, in stating the area to be more than 100 bighas, had in mind the plaint Ex. E by which the plaintiffs claimed rent from the defendants for an area of 136 bighas. It is said that that statement referred to the area of the two tenancies taken together. If so, that point ought to have been threshed out in the lower appellate Court, which is the final Court of fact. A mistake as to the area can hardly be described as a mistake of law. Moreover if the plaint referred to the total area of the two tenancies that obviously bore on the other question whether or not the two tenancies have been consolidated. Again, the learned District Judge does not proceed entirely on the basis of the area of the holding. He refers to the description which the plaintiffs themselves applied to it in the plaint referred to, and it cannot be said that there was no evidence on the record to support the conclusion arrived at. The learned pleader has invited our attention to the two documents of 1274 and 1275 which the learned District Judge mentions. The defendants were not parties to those documents.

They are merely evidence in the case which the Judge has considered; whether he has weighed them rightly or wrongly, he was entitled to form his own opinion. It may be that the plaintiffs are in possession of two holdings each of which comprises an area of less than 100 bighas. There is no doubt, however, that the area of the two holdings taken together is more than 100 bighas. The kabuliyat executed by the predecessor of the defendants is dated 29th Chaitra 1297. There is nothing in that document conclusive to show that the defendants are under-raiyats and not raiyats. In fact the use of the word "chukani" rather supports the view which has been taken in the Court below. The effect of the word has not been discussed by the District Judge and it is not desirable that we should attempt in this case to define its meaning. But we may refer to the decision of this Court in the case of *Jogendra Nath Goswami* v. *Chandra Kumar Mazumdar* (1). In all the circumstances I am not satisfied that we should be justified in disturbing the decree which has been made in the Court below. In my opinion this appeal should be dismissed with costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. A I R 1914 Cal 661=24 I C 193=42 Cal 28.

A. I. R. 1918 Calcutta 123

SANDERSON, C. J. AND BEACHCROFT, J.

Narendra Nath Mitra—Petitioner.

v.

E. Studd—Opposite Party.

Criminal Revn. No. 226 of 1918, Decided on 29th May 1918, against order of Chief Presy. Magistrate, Calcutta.

Criminal P. C. (1898), S. 517—Debentures stolen and pledged—Magistrate cannot restore them to owner—Rights of owner and pledgee must be determined by civil suit.

Three debentures, the property of *S*, were stolen and were sold by the thief to *F*, who pledged them to *N*. In a prosecution of *F* under S. 411, I. P. C., which ended in his acquittal, *N* having been called upon to produce the debentures made them over to the Magistrate. Subsequently on the application of *N* for the return of the debentures, the Magistrate ordered that they should be made over to S:

Held: (1) that the Magistrate should not have made the order, as they were questions between *N* and *S* as to which of them was the rightful owner which could only be determined in a civil suit; (2) that in order to prevent the possibility of *N's* dealing with the debentures until the decision of the civil Court *N* should be directed

to deposit them with an officer of the Court for three months, within which S must be directed to bring a civil suit to determine the ownership of the debentures. [P 124C 2; P 125 C 1]

Manmatha Nath Mookerjee and *Panna Lal Chatterjee*—for Petitioner.

James and *G. B. McNair*—for Opposite Party.

Sanderson, C. J. — This is a rule which was obtained by Narendra Nath Mitter calling upon the Chief Presidency Magistrate and the opposite party to show cause why the order of the Chief Presidency Magistrate dated 23rd January 1918 (directing that the three debentures referred to therein should be returned to the opposite party) should not be to set aside or why such further order should not be made as to this Court might seem fit.

It appears from the judgment, which was delivered by the learned Magistrate on 13th August 1917, that certain debentures were stolen from the office of Messrs. Thomson and Co. in April or May 1916; that the police were informed of this matter and the loss of the notes was advertised in the papers. It also appears that on 23rd June 1916 one Nagendra Nath Ghose, who has been since convicted of being unlawfully in possession of a large number of these debentures, sold three of them, which are the debentures now in question to one Fani Bhusan Manna for the sum of Rs. 2,550 and it was alleged that Nagendra Nath Ghose gave to Nani Bhusan Manna a receipt for the money paid in respect of this transaction. It was further alleged that on the 30th June Fani Bhusan Manna pledged one of the debentures, namely No. 1852, with Mr. Narendra Nath Mitter, the petitioner in this case, for Rs. 650 and, on 12th July Nani Bhusan Manna pledged the two other debentures, namely Nos. 1851 and 1856, with Mr. Mitter. A prosecution was instituted against Fani Bhusan Manna under S. 411, I. P. C., for being in possession of the three debentures knowing or having reason to believe that they were stolen property. The learned Magistrate in that case gave his judgment on 13th August 1917 and he acquitted Nani Bhusan Manna. In the course of that proceeding Mr. Mitter was called upon to produce the three debentures in question and, during the course of his judgment, the learned Magistrate said "these debenturs are payable to bearer and are negotiable by delivery." He then says, "the evidence does not, in my opinion, bring home guilty knowledge to the accused" (who was Fani Bhusan Manna) and therefore he was acquitted. On 23rd January 1918 the learned Magistrate made an order upon an application which had been made on 5th August 1917 by Mr. Mitter, that these debentures which were in the custody of the Court should be returned to the petitioner Mr. Mitter, from whom they were taken. The order which the learned Magistrate made was as follows :

> "It appears that the debentures in this application were either stolen or misapproprlated from the complainant Studd from his office at Mission Row. They were sometime afterwards pledged to the petitioner by one Fani Bhusan Manna who undoubtedly had no right to them. I am therefore of opinion that the petitioner has no more right to them than his vendor. I therefore direct that they be made over to the complainant Studd to whom they belong"

and it is in respect of this order that the rule to which I have referred was granted, I desire to make it plain that we express no opinion as to the rights of Mr. Mitter or of Mr. Studd in respect of those three debentures. The only question we have to decide is as to whether the learned Magistrate was right in ordering on 23rd Janury 1918 that the three debentures should be handed over to Mr. Studd. In our opinion that order should not have been made. The facts set out in the judgment of the learned Magistrate do show that there are questions between these parties, as to which of them, Mr. Mitter or Mr. Studd, is the rightful owner of these debentures. Both the learned counsel and the learned vakil who appeared before us to-day have said that in their opinion a civil suit must be brought to determine that question ; and we are of opinion that a civil suit is the proper procedure to determine such a question ; and, that being so, we do not think, having regard to the facts of this case, that the Magistrate ought to have in terfered with the possession of the debentures and we think he should not have ordered them to be handed over to Mr. Studd. In our judgment therefore the order should be set aside and the rule made absolute. But we think that precautions should be taken to see that Mr. Mitter does not deal with these debentures until the rights of the parties have been determined: and Mr. Mukerjee wh o

appeared for him has told us that he has no objection to the order which we now propose to make, and which is, that the three debentures should be deposited with the Registrar of the Original Side, and that they should remain with him for the space of three months, so that if Mr. Studd is advised to bring a suit for the recovery of these debentures he will be able so to do. If such suit is not instituted within three months from to-day then the Registrar is to hand over the three debentures to Mr. Narendra Nath Mitter, and if the suit is brought the debentures will be subject to any order which the Judge on the Original Side may think fit to make on the application of the parties.

We therefore give a direction to the Chief Presidency Magistrate in accordance with our judgment to have the debentures deposited with the Registrar of the Original Side of this Court.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 125 (1)

HOLMWOOD AND TEUNON, JJ.

Dwarika Nath Dey Chowdhury—Decree-holder—Appellant.

v.

Sailaja Kanta Mallick—Judgment-debtor—Respondent.

Civil Ref. No. 11 of 1915, and Rule Nisi No. 104 of 1916, Decided on 3rd March 1916, made by Addl. Munsif, Ranaghat, in Rent Ex. Case No. 91 of 1915.

Court-fees Act (1870), Sch. 2, Art. 6—Art. 6 does not apply to security bonds for stay of execution and they require stamp under Stamp Act (1899), Art. 15.

Security bonds taken on an order for stay of execution are not bonds made by order of the Court within the meaning of Sch. 2, Art. 6, Court-fees Act, and, therefore, the Court-fees Act, does not apply to them. They are bonds which enure to the benefit of the Secretary of State or of the parties in the case, and must be stamped in accordance with the Stamp Act, and cannot be written on plain paper bearing only a court-fee of eight annas. [P 125 C 2]

Ram Charan Mitra—for the Government.

Holmwood, J.—This is a reference made by the learned Munsif, Additional Court of Ranaghat, with regard to certain questions arising upon an execution which has been stayed by the District Judge of Nadia on the judgment-debtor furnishing sufficient security to the satisfaction of the lower Court, and we are asked to decide what duty is payable on such bonds. It is suggested by the learned Munsif that no duty is payable under the Stamp Act, and that the court-fee of eight annas is sufficient. But it is obvious that these bonds enuring to the benefit of the Secretary of State or of the parties in the case must be stamped in accordance with the Stamp Act. They are not made by order of the Court within the meaning of Sch. 2, Art. 6, Court-fees Act, and that Act, does not appear to apply. They are bonds taken on an order for stay of execution and the parties can furnish them or not as they please. If they do furnish them the stay of execution becomes a matter of indulgence, and the bonds must be stamped according to law. The answer to the first question, therefore, is that stamp duty is necessary, not necessarily according to Art. 15, Sch. 1, Stamp Act, but to any Article of the Stamp Act, which may apply to the particular bond in question; and the answer to the second question is that such bonds cannot be written on plain paper bearing only court-fee of eight annas; and the answer to the third question is the same as the first, namely, that it depends upon what duty is leviable under the provisions of the Stamp Act.

Teunon, J.—I agree.

V.B./R.K. *Reference answered.*

A. I. R. 1918 Calcutta 125 (2)

CHITTY AND SMITHER, JJ.

Chandra Kumar Roy Chowdhury and *others*—Defendants—Appellants.

v.

Aswini Kumar Das and *others*—Respondents.

Appeal No. 2908 of 1915, Decided on 14th March 1918, from appellate decree of Offg. Addl. Sub-Judge, Backerganj, D/- 16th August 1915.

(a) Decree — Condition imposed upon mode of execution is not valid.

A Court decreeing a suit for arrears of rent has no right to impose a condition as to the mode of execution of the decree by making the decree executable only against the defaulting jama. [P 126 C 2]

(b) Civil P. C. (1908), S. 11 and O. 9, R. 13—Res judicata—Suit to set aside decree obtained by fraud—Question of fraud already considered in proceedings to set aside ex parte decree will operate as res judicata.

The decision on the question of fraud in a proceeding under O. 9, R. 13, for setting aside an ex parte decree will operate as res judicata on the question of fraud raised in a subsequent

suit between the same parties for setting aside the ex parte decree in only so far as that fraud consisted in the suppression of service of summons. [P 126 C 2]

Gunada Charan Sen—for Appellants.

Kali Prosunno Pal plai and *Suresh Chunder Talukdar*—for Respondents.

Chitty, J.—This is an appeal by defendants 1 to 3, really on behalf of themselves and defendants 4 to 11 who are their cosharers. Aswini Kumar Das, plaintiff 1, brought the suit to set aside an ex parte decree passed against him and Kashish Chandra Das, defendant 12, on the ground of fraud. That decree was passed in Rent Suit No. 1502 of 1910. Aswini Kumar Das alleged that there was fraud, not only because he was not served with summons, but also because the suit against him was bad ab initio on the ground that there was no relationship of landlord and tenant subsisting between him and defendants 1 to 11. Defendant 12, Kashish Chandra Das, was made a pro forma defendant to the present suit and in his written statement he alleged that the return of service against him also was fraudulent and collusive. At the same time, while raising no objection to relief being granted to Aswini Kumar Das, he did not ask for any relief for himself. On the other hand he objected to having been made a party to the suit with which he said he had nothing to do. On 12th September 1913 Kashish Chandra Das was transferred on his own petition from the category of defendants to that of the plaintiffs. Both the Courts have agreed in their findings of fact. They have set aside the ex parte decree in the rent suit as regards Aswini Kumar Das, but have held that it must stand against Kashish Chandra Das, with this reservation that the rent lands only are to be liable for the decretal amount.

Two points have been raised before us by the appellants. First of all they say that the decree against Kashish Chandra Das must be executed in the ordinary way and that the Courts deciding this suit had no right to impose a condition as to the mode of execution of that decree. In this contention the appellants are clearly right and the decree of the lower appellate Court cannot be supported in this respect. It is not seriously argued for Kashish Chandra Das that it can be supported on that ground. The learned pleader for Kashish Chandra Das has endeavoured to raise questions as to the findings of fact of the lower Court regarding his client and the service of summons upon him, but we do not think that in second appeal we can go into those questions. The second point raised by the appellants was that the question of fraud raised by the plaintiff 1, Aswini Kumar Das, was res judicata inasmuch as he had brought an application under O. 9, R. 13, Civil P. C, to set aside the ex parte decree against him on the ground that service of the summons had been fraudulently suppressed, and that application had been dismissed. This might be a good ground if the allegations of the plaintiff with regard to fraud were confined to the service of summons against him. They were not, however, confined to that, but were directed to the whole suit as being bad, Aswini Kumar Das alleging that there was no relationship of landlord and tenant as between him and defendants 1 to 11. The question was considered in the case of *Khirode Chandra Roy* v. *Ashtulla Bee* (2), to the judgment in which case I was a party. There it was pointed out that if the fraud was confined to the non-appearance of the defendant in a suit it might be res judicata under S. 108 of the Code of 1882, i.e., O. 9, R. 13 of the present Code, but not so when the question was whether the whole suit was bad ab initio.

I would accordingly allow the appeal on ground 1 and set aside so much of the decree of the lower appellate Court as directs the execution of the rent decree to be confined to the jama. The decree must stand against Kashish Chandra Das as a personal decree. The appeal against Aswini Kumar Das fails. Defendants-appellants must have their costs of this appeal against plaintiff 2, Kashish Chandra Das, but they must pay the costs of plaintiff 1, Aswini Kumar Das.

Smither, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 126

GREAVES, J.

A. F. C. Seehase, In re.

Insolvency Case No. 112 of 1916, Decided on 27th August 1917.

(a) Presidency Towns Insolvency Act (1909), S. 36—Fraudulent transfer—Appli-

cation by Official Assignee—Insolvency Court has power to inquire into and pass suitable order.

An insolvency Court has jurisdiction, having regard to the terms and provisions of S. 36 to enquire, on the application of the Official Assignee, as to whether a transfer made by the insolvent is fraudulent and void as against the Official Assignee, and to pass proper orders as the result of such enquiry, subject to the right of the party affected thereby to bring a regular suit, if so advised. [P 128 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 36—Examination of insolvent cannot be used as evidence against transferee.

The examination of the insolvent cannot be used as evidence against the person against whom an order is sought under S. 36, Presidency Towns Insolvency Act. [P 128 C 1]

(c) Presidency Towns Insolvency Act (1909), S. 36— Transfer by insolvent just before insolvency—Onus is on person claiming that transfer can stand.

The burden of proof of supporting a purchase from the insolvent of the whole of his assets just prior to the insolvency falls upon the person claiming that the purchase can stand. An assignment by an insolvent on the eve of his insolvency can only stand if it can be shown that it was made for the purpose of helping him with funds to carry on the business and that the transaction was genuine. Transactions of this kind will stand good where the properties of the insolvent have been transferred to creditors to secure an existing debt and also advances made to enable the insolvent to carry on the business. An insolvent, a few days before his adjudication in insolvency on his own petition, admitted another person as a partner in his business and shortly afterwards sold away his interest in that business to that person:

Held: that the transaction was not one in good faith and for valuable consideration and was, therefore, void against the Official Assignee. [P 132 C 1]

A. A. Avetoom—for Official Assignee.

P. L. Buckland and *R. C. Bannerjee*—for Mr. Mackertich John.

Judgment.—This is an application by the Official Assignee in the insolvency of one A. F. C. Seehase under S. 36, Presidency Towns Insolvency Act, for an enquiry to be held as to whether the sale to Mackertich John of the business property, furniture, stock and effects of the insolvent in the business known as the Continental Hotel is fraudulent and void as against the Official Assignee, and it also asks that orders be passed by the Court as the result of such enquiry. Before I come to deal with the facts of the case, there are three matters in connexion with the insolvency jurisdiction to which I think I should refer. When this matter came before me, an objection was taken that it was a matter that could not be dealt with under S. 36, Presidency Towns Insolvency Act, and I was referred in support of it to the judgment of Chitty, J., in *In re J. M. Lucas* (1), where Chitty, J., has expressed his opinion that matters like the present cannot be decided under S. 36, Insolvency Act, but should be dealt with under R. 5 (d) of the Insolvency Rules. The opinion which Chitty, J , expressed in *In re J., M. Lucas* (1) he followed in *Re Kali Dass Biswas* (2). Now if Chitty, J., had decided that where questions of title are involved such as arise in this case, the proper procedure to follow is by suit, rather than by an application under S. 36, I should have been bound by this decision but I have considerable difficulty in understanding what he has decided by *In re Lucas* (1) and *In re Kali Dass Biswas* (2). The jurisdiction of the insolvency Court is derived not under the rules of the Insolvency Act but under S. 36, and, therefore, I do not think that I am in any way bound by any decision of this Court that S. 36, Insolvency Act, is not the proper procedure for dealing with a matter of this kind.

I have not been able to find any decision of this Court actually upon this question, but the matter has arisen once or twice before and the same question has arisen under the Provincial Insolvency Act and, therefore, I think that it is desirable that I should make some reference to the question of procedure. Now under the old Act of 1848, S. 26, it has never been questioned that the Insolvency Court had jurisdiction to decide questions of this nature under the insolvency Act. If authority for that is sought, it will be found in an unreported case to which I was referred, *In re Upendra Chandra Singh* (3), where Harington J., decided similar questions under the provisions of S. 26 of the Act of 1848. That matter went to the appeal Court in Appeal No. 13 of 1911 and the question of jurisdiction was raised before Sir Lawrence Jenkins and Woodroffe, J. They overruled the objections that had been taken to the jurisdiction of the insolvency Court and Sir Lawrence Jenkins said in his judgment that there was jurisdiction for Harington, J., in the insolvency jurisdiction to have made the order that he did. But he added that the lady against whom the order was sought, could, if so she desired

1. (1915) 42 Cal 109=28 I C 469.
2. No. 161 of 1913.
3. No. 281 of 1909.

vindicate her title by regular suit; and a further authority for the proposition is *Kalagurla Suryanarayana* v. *Yarlagadda Naidoo* (4). That case was decided under S. 26, Insolvency Act of 1848. Jenkins., J. as he then was, framed issues such as have been in this case. The matter went to the appeal Court and eventually went to the Privy Council, and no question was raised as to the jurisdiction of the insolvency Court; and I may add that if you look at the English cases, where the provisions of the English bankruptcy Acts are very similar to our present Act, you find that the usual procedure is by motion in the bankruptcy or by some form of application in the bankruptcy. If authority is required for that, reference can be made of the case of *Hirth, In re. Trustee, Ex parte* (5) and also to the case of *Slobodinsky, In re, Moore, Ex parte* (6).

Therefore I think that the Court has ample jurisdiction, having regard to the terms and provisions of S. 36, to deal with questions of this kind in the insolvency, subject to the right of the party affected to bring a suit if so advised. Then the second question that I should like to refer to is, as to whether the examination of the insolvent can be used as evidence against the person against whom an order is sought under S. 36. Counsel, who urged that it was admissible, admitted this morning that he was wrong and perhaps it will be well to distinctly state here that that question is governed by the authority so far as English law is concerned, and it has been held that the examination of an insolvent is not admissible in evidence against persons against whom an order of the nature of the present is sought, and I think that the same principles as are laid down in the English cases are applicable here to this question.

The third point is as to the question of the burden of proof. I felt some doubt at the time I heard this application and I still feel some doubt as to upon whom the burden of proof lies in a transaction of this nature, but it seems to me that a case of the nature such as is before me falls within the principles of *Tate, Ex parte Tate*, In re (7) and that in a case of this nature, as I held, the burden of proof of supporting a purchase from the insolvent of the whole of his assets just prior to the insolvency falls upon the person claiming that the purchase can stand.

I now come to the facts of this case so far as they are material. In February 1912 it appears that the insolvent Seehase purchased the Continental Hotel, for, I think, a sum of one lac and 85 thousand rupees, ten thousand rupees being paid on the execution of the agreement and 40 thousand being payable in instalments of 8 thousand, and there was a further provision that the insolvent should pay to the vendor a sum of one thousand a month during the continuance of the lease of the hotel premises. On 18th May 1916 a deed of partnership was entered into between insolvent and Mr. John. By the provisions of that deed it was provided by Cl. 1, that in consideration of a sum of Rs. 20,000 to be paid by Mr. John to Seehase, Seehase should admit John as a partner in the business carried on at the Continental Hotel and that they should be and remain partners in the business during the term or until sooner determination of the lease of the premises No. 12, Chowringhee, where the business was carried on. Cl. 4 provides that the net profits of the business should be divided equally between the parties and that they should in like proportion bear all losses and Cl. 5 provides for the capital of the partnership, and the clause provides that John should pay to Seehase a sum of Rs. 20,000 for his half share in the furniture and fittings and he should be debited in account with the sum of Rs. 2,250 as his half share of the price of the stock of wines and stores then held by Seehase, and that he should be debited in the account with the sum of Rs. 5,000 which should be spent by the partners in improving the hotel premises; Cl. 6 provides for drawings, etc., Cl. 7 provides for the taking of the accounts and the next material clause is Cl. 14, which provides that John should be entitled, at any time after 12 months from the date thereof, to purchase from Seehase and that Seehase would sell his remaining half share in the business and in the good will and assets thereof upon payment of Seehase of Rs. 15,000 in cash and upon entering into a covenant to pay the balance then

4. (1902) 6 C W N 513 (P. C.)
5. (1899) 1 Q B 612.
6. (1903) 2 K B 517.
7. (1877) 35 L T 531.

due to Boscolo in terms of an indenture therein mentioned, and a further covenant to pay to Seehase monthly a sum of Rs. 500 for the remainder of the term of the lease of the premises No. 12, Chowringhee.

The partnership deed provides that the partnership was to commence as from 1st April 1916. On 28th June 1916 Mr. John and the insolvent purported to enter into an agreement for sale of the half share of the insolvent in the partnership business, not under the terms of the partnership deed, but, as I understand, apart therefrom. The agreement is said to have been as follows: That John should pay to Boscolo a sum of Rs. 8,000 on account of the amount due to Boscolo from Seehase, that he should give the insolvent and his wife and family food during the continuation of the lease, that he should pay Rs. 1,000 a month to Boscolo in accordance with the insolvent's covenant with Boscolo, and lastly that he should pay certain debts which are not exactly ascertainable. This agreement was never reduced to writing, but a draft was prepared which is in evidence before me, and it is said that this agreement was in fact entered into and carried out verbally. On 11th July 1916, 13 days after the sale by the insolvent of the whole of his property to John, he was adjudicated insolvent on his own petition, the unsecured debts amounting to Rs. 31,632 and the assets being, I understand, very small. The issues that were settled in this case are as follows: (1) Was the purchase, if any, by John of the Continental Hotel in June 1916 in good faith and for valuable consideration? (2) At the date of the said alleged purchase was the insolvent unable to pay his debts from his own money? (3) Was the said alleged purchase in fraud of the creditor of the insolvent? (4) Was the alleged partnership of 1st April 1916 a genuine transaction and for valuable consideration, or was it in fraud of the creditors?

I allowed the parties before me to adduce such evidence as they were advised upon these issues and I must now refer shortly to their evidence. Mr. John stated that in March 1916 he approached Seehase and came to an agreement with him: he says that he paid on 15th March a cheque for Rs. 3,000, and he says that in all he as paid a sum of Rs. 22,000 which was agreed for the purchase of the half-share in the partnership business; he says:

"on 21st March I paid Rs. 2,000, on 7th April I paid Rs. 4,200 to Boscolo in respect of one instalment due from Seehase to Boscolo,"

and that on 7th April he paid Rs. 1,000 and on 11th April he paid Seehase Rs. 4,000, and he says that the balance was paid by Seehase's drawing from the till of the hotel and he says that these appear in the cash book. He states

"that he signed the partnership deed on the 18th May and that the Hotel was not doing well at that time: business was getting worse due to the fact of Seehase's nationality,"

Then he says soon after he had purchased the half share he negotiated with Seehase for the rest of his interest; he says:

"I eventually came to terms and I told Mr. Leslie to prepare an agreement; that was in the month of June; we agreed for Rs. 20,000 in cash and food for himself, his wife and children up to the expiry of the lease."

Then he says with regard to the second sum of rupees twenty or twenty-two thousand:

"I paid him in two lots in cash and by discharging certain bills: on 21st June I paid Rs. 1,000 by cheque, on 24th June I paid Rs. 1,000 by cheque, on the 23rd June I paid Rs. 219-6-0 for insurance premium due on his life, on the 23rd June Rs. 969 and on 27th June Rs. 500 to Narain Mitter on his account."

Then he stated that he has paid the following further sums to Messrs. Sen Law and Co. Rs. 963; to Boscolo Rupees 8,260; to Messrs. Kellner and Co Rupees 3,414-8-9 to Gora Chand Law; Rs. 1,650 to Nahapiet and Co; Rs. 726 to Framjee; Rs. 1,594-7-0 and to Patel Rs. 300: he says:

"I agreed to take these debts over before we made the second agreement and I paid on the dates the receipts were given;"

and then he says, on or about the 28th June he got two receipts from Seehase for Rs. 22,000 each; these are Ex. L and the bills to which I have referred are contained in a bundle which is Ex. K; then he repeats the terms of the agreement and says that Rs. 2,000 of the money was paid from the hotel cash and he states that when

"I made the agreement I did not know that Seehase could not pay his debts; he became insolvent in July and I first knew that he was insolvent;"

he says. "when he filed his schedule I had no idea before that he was an insolvent." Then in cross-examination he stated that up to 11th July 1916 the bank account stood in the joint names of

Seehase and himself and it was a paltry sum of about Rs. 300, then he says that during June Seehase only used to come for an hour in the evening and took no interest in the management of the hotel but he remained a partner up to the 28th June and entitled up to that date to a half-share of the profits. Then he says:

"From the 29th June I became the sole proprietor of the hotel. I did not notify this, I had a full page advertisement in the Empire newspaper:"

he says that up to 28th June he conversed as usual with Seehase and he denied that in April 1916 Seehase had deceived him as to his creditors and said that he did not know of Seehase's financial condition: he says "about the beginning of April I did not know he could not pay his debts;" and the witness stated that he did not believe he went to Lucknow to evaide his creditors, but that in April hs was away from Calcutta. Then in further cross-examination he stated that he agreed to pay Rs. 22,000 in cash for the second part of the business apart from what was due to Boscolo. Then he says there was evidence in writing, namely, a letter which he produced, from Boscolo to Mr. Leslie saying that Boscolo would accept John as a tenant if he paid Rs. 1,000 a month until the expiry of the lease. He says:

"I did not look into the books before I agreed to buy; I did not look into Seehase's financial position; I had no idea of the financial condition of the hotel; and I did not ascertain the stock or furniture before the 15th March."

He says that:

"I was on business terms with Seehase and knew on the 6th or 7th April that he had debts."

He says:

"It was about the 6th or 7th April that I did to a certain extent believe that he was trying to evade his creditors",

and he goes on to say that:

" bills came in but payment was not made and on the 6th or 7th April I did believe that he was going away to evade his creditors. I knew he had bills although I do not know the extent, I should say it was about Rs. 20,000 in all, and I do not know if he had any source of income except the Hotel but I cannot say what other income he had,"

he says, during the whole of April creditors of Seehase were calling for payment and the same happened in May or June. He said:

"The books were not audited and I cannot say if there was any profit between April and 18th May and I cannot say if the Hotel made any profits during those months";

and he stated that the months of April, May and June were slack months for the Hotel, then he states that at the end of May Seehase was not hopelessly insolvent but owed money to the public to the extent of about Rs. 20,000 worth bills and that he was not apprehensive that he was insolvent. I think that exhausts all the evidence that I need refer to given by John. Mr. Leslie was called and he produced his Day Books showing entries of the interviews he had both with Seehase and with John and I need only refer to two entries, one of the 11th May when Mr. Leslie says:

"that the greater part of the 20,000 was paid in his presence and that he drafted some receipts."

There is another entry with regard to the 21st June which is as follows:

"Attending John and Seehase when they called and said that in supersession of all prior arrangements it had been agreed that John was to buy Seehase out of the business altogether for Rs. 22,000",

and he states:

"on the 24th June I had the document prepared to carry out the arrangement",

and in cross-examination he said that:

"I first heard of Seehase being in debt two or three days before he filed his schedule from a Marwari who told me about this and which I did not believe."

Mr. Hinds gave evidence with regard to the preparation of the draft, which is before me. That exhausts the evidence I think I need refer. The real question before me divides itself into two parts. Firstly, there is the partnership entered into on 18th May and I have got to consider whether that was a genuine transaction and whether that can stand, and I have also got to consider the 2nd question as to whether the sale of the 28th June was a bona fide transaction and can stand against the Official Assignee. So far as the partnership is concerned, I think on the evidence that I am bound to hold that this was a genuine transaction. There are some grounds of suspicion that arise in the case, and I can hardly believe that Mr. John went into the business, without enquiring as to the earnings and liabilities and so on and as to the value of the stock of furniture, butI am satisfied upon the evidence that Mr. John did in fact pay a sum of Rs. 14,000 in cash to Seehase for the purchase of the half share of the business. With regard to the balance of Rs. 8,000 different considerations arise and I shall have to direct an enquiry with regard to this. Mr. John's story is that this was paid out of the Hotel and that there was no profit during

this period; that is to say, it must have been paid out of the capital of the Hotel, half of which belonged to Seehase and if this is so, John must pay the Official Assignee half of this Rs. 8,000. Therefore, it seems to me that I must direct an enquiry to ascertain, first of all, whether there were any and, if so, what profits made by Hotel during the continuance of the partnership from the 1st April to the 28th May, and I also direct a second enquiry as to what sums out of the Hotel cash or out of the till were received by the insolvent in respect of the sum of Rs. 22,000.

I now come to the 2nd transaction which presents more difficulty, and I should have been glad to have had an opportunity to put my judgment in writing which I should have done but for the imminence of the vacation. On behalf of the Official Assignee, it is, I understand, urged that this transaction is bad as being a voluntary conveyance within the meaning of S. 55, Insolvency Act, but personally I think myself that the transaction does not fall within that section but falls within another principle. S. 9, Insolvency Act, provides (b) that an insolvent commits an act of insolvency if he makes a transfer of his property or any part thereof with intent to defeat or delay his creditors and then S. 17 provides that on the making of an order of adjudication the property of the insolvent vests in the Official Assignee and S. 51 provides that the title to the Official Assignee as trustee shall be deemed to have relation back and that (b) if the insolvent is proved to have committed more acts of insolvency than one, then it relates back to the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. I think therefore that Seehase committed an act of insolvency on 28th June 1916. He was adjudicated on his own petition and therefore I think that the assignment of 28th or 29th June was an assignment by Seehase with intent to defeat or delay his creditors but if I am wrong in this then I think that the transaction is also bad and liable to become under the well-known principles, which I think apply in this country of 13 Eliz., C. 5. That statute provides that grants alienations, conveyances, bonds suits, judgments and executions which have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and the operative part of the statute provides for setting aside every conveyance made "to or for any intent or purpose before declared and expressed." Therefore I think that the transaction was bad for the reasons that I have already stated and also that it falls within the principles to be found in 13 Eliz., C. 5.

I think there is no doubt that it is well settled in bankruptcy that an assignment by an insolvent on the verge of his insolvency can only stand if it can be shown that it was done for the purpose of helping him with funds to carry on the business and that the transaction is genuine. Reference to the authorities will show that transactions of this kind will stand good where the properties of the insolvent have been transferred to creditors to secure an existing debt and also advances made to enable the insolvent to carry on his business. What to my mind makes this second transaction bad is I think the fact that although John apparently agreed to pay certain creditors and had in fact paid certain creditors, this was in the nature of voluntary payments which the creditors could not enforce and this in itself makes the transaction bad for it takes the properties of the insolvent outside the insolvency jurisdiction of this Court and secondly, this is clearly a fraud upon the creditors that whereas the terms of the purchase contemplated by the partnership deed provides for payment of Rs. 500 a month to the insolvent that is given the go-by in this transaction and instead there is a provision for food for the insolvent and his family which must have been done solely and only for the purpose of defrauding the creditors of the insolvent and with intent to defeat and delay them. Reference can usefully be made to *In re Chaplin Ex parte Sinclair* (8) and to the principles there laid down. I do not think that I need refer to that case in detail but there was a transfer of an antecedent debt, the assignee undertaking to pay certain creditors of the insolvent and that transaction was held for the reasons stated by Cotton, L. J., there to be a fraud upon the

8. (1884) 26 Ch. D. 319.

creditors which could not stand; as Cotton, L. J., says at p. 330:

"The effect of the transaction was to withdraw by a deed, which was kept secret, all the property of the debtor as far as it could possibly be done, from the reach of his creditors so as to prevent them from enforcing their legal rights and remedies by execution and to protect it in the event of bankruptcy by taking it out of the hands of the debtor and assigning it to someone else. What did the debtor get in exchange? It is true that a certain sum of money was paid by Messrs. Chaplin to some of the creditors but still the debtor obtained nothing which could be a substitute or equivalent to the creditors"

At p. 331 he says:

"I do not mean to say indeed I do not think that the creditors would not have been paid and I cannot say that this would not have been a good way of paying them. Still in my opinion, if persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law,"

and Lord Justice Bowen, at p. 334, says:

"The debtor gave up all his property; he got the payment of past debts to a certain extent, and besides that he got a promise, a verbal promise made to himself, without any record of it in any paper or in any deed to the effect that the persons to whom he was assigning his property would, when occasion should arise, come forward and pay his debts."

I now come to deal with the issues that arise in the case. With regard to issue 1 I hold that the purchase by John of the Continental Hotel in June 1916 was not in good faith and for valuable consideration. So far as issue 2 is concerned I hold that at the date of the alleged purchase, the insolvent was unable to pay his debts from his own money. As regards issue 3 I hold that the purchase was in fraud of the creditors of the insolvent. With regard to issue 4 I hold that the alleged partnership of 1st April 1916 was a genuine transaction and for valuable consideration and not in fraud of the creditors. The result is that I set aside the alleged assignment of the 28th June and John will hand over to the Official Assignee the half share in the business of the Continental Hotel, but he will be entitled to prove in the insolvency, as was provided in *Chaplin, Ex parte*; *Sinchair, In re* (8), for such sums as he satisfies the Official Assignee that he has paid in respect of the debts of the insolvent. So far as costs are concerned I make no order as to costs, except that the Official Assignee do retain his costs out of the assets. I direct the enquiries to be taken by the Registrar in Insolvency.

V.B./R.K. *Assignment set aside.*

A. I R. 1918 Calcutta 132

TEUNON AND NEWBOULD, JJ.

Brojendra Nath Mitra—Petitioner.

v.

Arman Sheikh—Opposite Party.

Civil Rule No. 878 of 1917, Decided on 11th February 1918, from order of Munsif, 1st Court, Khulna in Suit No 1160/780 of 1917.

Bengal Tenancy Act (1885), S. 66—Payment of decree against non-occupancy raiyat by under-raiyat to protect his own interest cannot prevent ejectment.

Section 66 (2) clearly contemplates that the payment of the amount decreed against a non-occupancy raiyat, in order to be a good payment, must be made by or on behalf of the judgment-debtor.

Where the under-raiyat of a non-occupancy raiyat, against whom a decree for arrears of rent was obtained by the landlord under S. 66, paid the decretal amount expressly to protect his own interest and on the allegation that the judgment-debtor was in collusion with the decree-holder landlord:

Held that the payment not having been made on behalf of the judgment-debtor, was not a good payment under S. 66 (2), so as to prevent the execution of the decree for ejectment. [P 133 C 1]

Sarat Chandra Roy Chowdhury and *Satya Charan Sinha*—for Petitioner.

Jadu Nath Kanjilal—for Opposite Party.

Judgment.—In this case it appears that the petitioner before us brought a suit for rent against his tenant, a non-occupancy raiyat, and obtained a decree for a sum amounting to some Rs. 80 odd with an order providing under the provisions of S. 66 (2), Ben. Ten. Act, that on failure of payment of that amount within 15 days from the date of the decree the decree for ejectment should be executed Thereafter the opposite party, one Arman Sheikh, claiming to be an under-raiyat under the non-occupancy raiyat, the judgment-debtor, tendered the amount due in order to prevent the execution of the decree for the ejectment of the non-occupancy raiyat. Having found the opposite party Arman Sheikh to be an under-raiyat the Munsif accepted the deposit, proceeding apparently on the analogy afforded by sub S. (3), S. 170, Ben. Ten. Act. It is contended before us that the provisions of S. 170 and subsequent sections of the Bengal Tenancy Act apply only in cases of sale and have no application in cases of decree for ejectment

under the provisions of S. 66 (2). On behalf of the under-raiyat opposite party it is not contested that S. 170 and the following sections have no direct application in the present case. But it is contended that under S. 66 (2), it is not specifically provided that the payment must be made by the judgment-debtor. It is suggested that the payment may be made by any third party and that such payment must be accepted by the landlord as good payment preventing the execution of his decree for ejectment. In support of that contention we have been referred to the provisions of S. 114, T. P. Act. But these provisions have no direct application here, and we cannot but hold that S. 66 (2) clearly contemplates that the payment made, to be a good payment, must be a payment by or on behalf of the judgment debtor. Now in the present case the payment was not made on behalf of the judgment-debtor. On the contrary the deposit was offered by the opposite party Arman Sheikh expressly to protect his own interest and on the allegation that the judgment-debtor was in collusion with the landlord, the decree-holder.

That being so, we are of opinion that the Munsif should not have accepted the tender by the under-raiyat opposite party. In coming to that conclusion we are not to be understood as deciding any question which may hereafter arise as to the recognition by the landlord of the opposite party as his tenant, or any question that may arise under S. 85, Ben. Ten. Act, as to the validity of the sub-lease against the landlord Those questions may be raised in appropriate proceedings. For these reasons we make this rule absolute, set aside the order of the Munsif complained of and direct repayment to the opposite party of the amount which has been deposited or paid by him into Court. Under the circumstances we make no order as to cost in this Rule.

V.B /R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 133

TEUNON AND NEWBOULD, JJ.

Bepin Behari Sen—Appellant.

v.

Krishna Behari Sen—Respondent.

Appeal No. 408 of 1915, Decided on 19th February 1918, from order of Offg. Sub-Judge, 2nd Court, 24-Pergannahs, D/-17th May 1915.

(a) Decree—Appellate decree supersedes original decree which it affirms.

When an appeal has been decided, the orginal decree becomes merged in the appellate decree and for purposes of execution as for purposes of amendment the appellate decree, even when it merely affirms the orginal decree, is to be taken as embodying and superseding that decree. [P 134 C 1]

(b) Civil P. C. (1908), S. 151, O. 21 Rr. 18 19—Execution of decree for smaller sum cannot be issued against party to whom larger sum is payable.

By a decree in a partition suit *A* became entitled to recover the sum of Rs. 2,130 from *B*. *A* preferred an appeal against that decree, which was dismissed and he became liable to pay to *B* Rs. 506 by way of costs of the appeal. Thereafter *A* applied for leave to appeal to His Majesty in Council but this application was rejected and he was directed to pay to *B* further costs to the extent of Rs. 80.

Held: that on the principles embodied in O. 21, Rr. 18 and 19, and in S. 151, *B* was not entitled to take out execution for the smaller sums of Rs 506 and Rs. 80 payable to him by *A* when a larger sum payable by him to *A* against whom he sought execution was due and remained unpaid. [P 134 C 1]

Sarat Chandra Rai Chowdhury and *Kshitish Chandra Chakrabarty*—for Appellant.

Shib Chandra Palit and *Biswanath Bose*—for Respondent.

Judgment.—This appeal arises out of execution proceedings. It appears that in a suit for partition brought by the present respondent under a decree made on an arbitration award on 12th March 1906, the present appellant Bepin Behari Sen and his mother Thakurani Dasi Debi each became entitled to recover a sum of Rs. 2,130 from the present respondent Krishna Behari Sen. Against this decree Bepin Behari and Thakurani Dasi appealed and under the decree of this Court dismissing their appeal on 8th July 1908 they became liable jointly and severally in a sum of Rs. 506 by way of costs to Krishna Behari. Thereafter they applied for leave to appeal to His Majesty in Council, and by the order dismissing that application on 6th April 1909 they were directed to pay further costs to the extent of Rs. 80. In 1913 they next brought a suit to have the decree on the award on which it was based set aside; that suit was finally dismissed in April 1915. Meanwhile the respondent Krishna Behari had twice applied in execution in order to realize the sums awarded to him by way of costs. The first application was dismissed for non-prosecution on 13th September 1911. The second was

instituted on 25th July 1914. To this application Bepin Behari took two objections namely: (1) that it was barred by limitation, (2) that it should be held in abeyance pending the disposal of the suit of 1913. Both these objections were overruled on 22nd February 1915.

The suit of 1913 having been dismissed in April on 8th May 1915, the judgment-debtor-appellant next objected that the sum of Rs. 586 due to the respondent by way of costs should be set off against the sum of Rs. 2,130 due to the appellant under the original decree and that the application for execution should be dismissed. This objection was overruled on 17th May 1915. It is against this order of the Subordinate Judge and subsequent orders bringing the property of the appellant to sale and confirming the sale thereof to the decree-holder-respondent that the present appeal is directed. It is not disputed that the sums to which the appellant became entitled under the decree of 12th March 1906 remains due and unpaid, but on behalf of the respondent it is contended that his application is for execution of the appellate decree, that the appellate decree does not specify the sum due to the present appellant Bepin Behari and that in any case the costs (Rs. 80) awarded to the present respondent by the order dismissing the application for leave to appeal to His Majesty in Council cannot be set off in the way proposed. Now it is no doubt the case that notwithstanding the pendency of an appeal the decree of the Court of first instance may be executed. But when the appeal has been decided then the original decree is merged in the appellate decree and for purposes of execution as for purposes of amendment the appellate decree, even when it merely affirms the original decree, is to be taken as embodying and superseding that decree. The respondent, therefore, cannot be allowed to take advantage of the fact that the decree as drawn up does not recite in so many words that under that decree a sum of Rs. 2,000 is payable by the plaintiff-decree-holder to the defendant-appellant. In this view O. 21, R. 19, is applicable in terms and the respondent before us should not have been permitted to take out execution for the smaller sum due to him under the appellate decree.

By S. 36 of the Code the provisions relating to the execution of the decrees are made applicable to the execution of orders. The order by which the appellant before us is made liable in the sum of Rs. 80 by way of costs to the respondent was made in the course of the same litigation as the decree of which the respondent sought execution. That decree placed before the Court by the applicant for execution showed that the sum of Rs. 2,000 was payable by the applicant to the person against whom he sought execution. It is admittedly due and unpaid. Thus whether O. 21, R. 19, be or be not applicable in terms, yet on the principles embodied in O. 21. Rs. 18 and 19, and in S. 151 of the Code execution in respect of this smaller sum also should have been refused. For these reasons we set aside the orders complained of and the sale of the appellant's property. The appeal is accordingly decreed with costs. We assess the hearing fee at five gold mohurs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 134

TEUNON AND SHAMSUL HUDA, JJ.

Syed Ali Sarkar ond *others*—Plaintiffs—Appellants.

v.

Manikjan Bibi and *others*—Defendants—Respondents.

Appeal No. 70 of 1916, and Rule No. 361 of 1916, Decided on 15th August 1917, against order of District Judge, Tipperah, D/- 11th December 1915.

Civil P. C. (1908), O. 32, R. 3 (4)—Appointment of guardian ad litem—Notice to minors is necessary — Minor respondent not made party to appeal — No order can be made against him.

Two minors (described as adults) were substituted as defendants on the death of their father. Their mother, who was also a defendant in the suit, appeared and filed her written statement, in which she stated that her two sons, improperly described as majors, were in fact minors. Thereupon the original Court, without notice to the minors or to the mother, made an order appointing the mother as guardian and decreed the suit:

Held: Per *Teunon, J.* (*Huda, J.*, dissenting) that as the provisions of O, 32, R. 3 (4), which imperatively require that notice should be served upon the minors, had not complied with, the minors were not represented in and were, properly speaking, no parties to the suit. [P 135 C1, 2]

Per *Huda, J.*—That further notice on the minors was not necessary as the mother by appearing in the suit for herself and for her minor sons consented to act as guardian of the minors and the order appointing her as such guardian was quite correct. [P 135 C 2]

Per *Curiam*.—That as the minors were not made parties to the appeal against the appellate decree no order against them could be made in the appeal. [P 135 C 2]

Jogesh Chandra Roy and *Jatindra Mohan Ghose*—for Appellants.

Sarat Chandra Basak, *Biraj Mohan Mazumdar* and *Bepin Chandra Bose*—for Respondents.

Teunon, J.—This is an appeal against an order of the District Judge of Tipperah by which he has set aside an order of the Subordinate Judge of Tipperah, and proceeding under O. 41, R. 23, has directed the trial Court to re-admit the suit and proceed to determine it on the merits. There were two minor defendants in the case, they having been substituted as defendants on the death of their father. The point taken before the learned District Judge was that in the trial in the first Court the minors had not been properly represented. It appears that on the death of the father, when they were substituted as defendants, they were represented by the plaintiffs to be persons of full age. Thereupon the mother, who has now appeared as defendant Ka, appeared and filed a written statement in which she sets on her defence to the suit and at the same time intimates that the two defendants to whom I have referred have been improperly described as majors and were in fact minors. She further represented that the suit could not proceed against them without service of proper notice upon them and without appointing a proper guardian. Of this apparently at the moment no notice was taken, but eventually on 30th November the Subordinate Judge, it being then admitted by the plaintiffs that these two defendants were minors, made an order appointing the mother their guardian.

This he did without notice to the minors and without further notice to the mother and the suit thereupon proceeded notwithstanding the fact that the learned pleader who appeared for the mother definitely intimated to the Court that his client did not accept the position of guardian for her two minor sons and that he was not prepared to conduct the case on their behalf. From these facts it is clearly apparent that the provisions of O. 32, R. 3 (4), which imperatively require that notice should be served upon the minors have not been complied with. Further, in face of the representation made by the pleader that he did not accept this appointment on behalf of his client, the mother, it appears to me that the Judge was clearly right in holding that the minors had not been represented and were, properly speaking, no parties to the suit. Moreover, at the hearing of this appeal a further difficulty has been disclosed. By his order the learned District Judge set aside the decree which had been made by the Subordinate Judge against the minor defendant. In this appeal the plaintiffs-appellants have not made those minors parties, that is to say, they in effect apply to this Court to have the decree against the two minors restored without making those minors parties to the appeal. Such a defect as this cannot be overlooked, and on both these grounds in my opinion this appeal fails and must be dismissed with costs. We assess the hearing fee at three gold mohurs. The appeal being disposed of, Rule No. 361 of 1916 is discharged without costs.

Shamsul Huda, J.—I agree in dismissing the appeal on the ground that the minors have not been made parties to it. The mother is made a party respondent only in her personal capacity. I, however, think that on the merits the lower appellate Court was wrong in holding that further notice on the minors was necessary. The minors in this case had notice of the suit, although they were wrongly described as majors. The mother, who is their natural guardian and under whose care they live, as appears from the affidavit filed by the plaintiffs, appeared and filed a written statement for herself and for the minors through a pleader. Then there was a formal order of the Court appointing her as guardian of the minor defendants. In my opinion the mother by appearing in the suit for herself and for her minor children consented to act as guardian of the minors and the order appointing her as such guardian was quite correct. At one stage of the suit it appears that the pleader appointed by the mother for herself and her minor children filed a petition stating that without serving notice on the minor defendant no guardian can be appointed for them. As I have said there was notice on the minor defendants, although they were wrongly described as majors. I think, therefore, the first Court was right in not taking any action on this objection and I hold that the judgment of the appellate Court was wrong on the merits. But the appeal

ought to be dismissed on the first ground I have stated.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 136

CHITTY AND RICHARDSON, JJ.

Taher Khan and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Appeal No. 421 of 1917, Decided on 14th August 1917, against order of Sess. Judge, Faridpur, D/. 29th June 1917.

Penal Code (1860), Ss. 366 and 494—S. 366 applies to case of abduction of married woman—"Marry" has same meaning as in S. 494.

Section 366 applies to the case of the abduction of a married woman. The word "marry" in this section has the same meaning as it has in S. 494 of the Code, i. e., the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid.

[P 136 C 2]

Manmatha Nath Mukerjee, *Amarendra Nath Bose* and *Pankaj Kumar Ganguli*—for Petitioners.

Orr and *Camell*—for the Crown.

Judgment.—The four appellants were tried before the Sessions Judge of Faridpur sitting with two Assessors on a charge framed under S. 366, I. P. C. The Assessors were for acquitting the appellants. The learned Sessions Judge has convicted them and sentenced them each to rigorous imprisonment for two years. The actual facts are simple enough. The abducted woman Wazidunnessa had been living with her husband at Dhubri. On her husband's death she returned as a widow to live with her mother Abdunnessa at Paikandi in the Faridpur district. While there she received a proposal of marriage from one Daliladdi. The proposal was distasteful to her—Daliladdi being an old man with wife and children, and she therefore refused. She and her mother however came to the conclusion that it was desirable that she should marry a man who would reside with them and also maintain the mother. She accordingly, on 18th April last, entered into a marriage in nika form with one Piziraddin. On the following day the four appellants with Daliladdi came to her house and took her away by force to the house of the appellant Mobarak Ali. There is evidence that while she was at that house, she received another proposal of marriage from Daliladdi.

The abduction took place in broad daylight and does not seem to have been accompanied with much force or violence; but there is no reason to suppose that the woman Wazidunnessa went with the appellants willingly. Both the learned Sessions Judge and the Assessors appear to have been agreed as to the facts proved in their main outline. The Assessors however felt some difficulty in finding that the intention charged, namely, that the woman should be compelled to marry Daliladdi against her will, had been sufficiently established by the evidence. We have been taken through the depositions of the witnesses; and, having considered those depositions, we are satisfied that the learned Sessions Judge was right in the conclusion that the accused abducted the woman with the criminal intent necessary to an offence under S. 366, I. P. C. In this Court it is suggested that S. 366 does not apply to the case of the abduction of a married woman. It is suggested that that might be an offence under some other section of the Code, for instance S. 498. We see no reason to doubt however that the word "marry" in S. 366 has the same meaning as the same word has in S. 494. What it means is—the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. If the facts and the law applicable to them are as we have stated, the question in this case narrows down simply to the question of sentence. The appellants, as we have said, have been sentenced each to two years' rigorous imprisonment. In the circumstances, that sentence seems to us to be excessive. If we reduce it however it is in the hope that the appellants will not molest either Wazidunnessa or her mother or husband again. If they do so, they may find themselves in a worse position than they are now. On the whole, we are of opinion that the ends of justice will be met by reducing the sentence passed on each of the accused to a sentence of rigorous imprisonment for six months; and we order accordingly.

V.B./R.K. *Sentence reduced.*

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TEUNON AND SHAMSUL HUDA, JJ.

Azimuddin Ahmed and *another*—Defendants—Petitioners.

v.

Alauddin Bhimya and *another*—Plaintiffs and Pro forma Defendants—Opposite Parties.

Rule Nisi No. 493 of 1917, Decided on 13th August 1917, against decree of Munsif, 2nd Court, Serajgunge, in Title Suit No. 859 of 1916.

*** Specific Relief Act (1877), S. 9—Suit under S. 9 is not maintainable after final order made in proceedings under Criminal P. C. (1898), S. 145.**

The plaintiff was unlawfully dispossessed by the defendants from lands in his possession some time in February 1916. Proceedings under S. 145 were instituted on 16th March 1916, and with the initiation of the proceedings the property was attached by the Court under the provisions of Cl. (4), S. 145, and the final order in the proceedings was made on 31st March 1916 in favour of the defendants:

Held: that on these facts a suit under S. 9, Specific Relief Act, was not maintainable: 7 *C L J* 547, *Foll.* [P 137 C 2]

Per *Shamsul Huda, J.*—But for an intervening attachment under S. 145 (4), a mere order under S. 145 is not sufficient to deprive the plaintiff of his right to relief in a suit under S. 9, Specific Relief Act. [P 137 C 2]

Manmatha Nath Roy—for Petitioners.

A. K. Fazlul Haq—for Opposite Parties.

Teunon, J.—In this case the plaintiff, who is the opposite party before us, has obtained a decree against the defendants for recovery of possession of a certain plot of land under the provisions of S. 9, Specific Relief Act. The findings of the Munsif were that the plaintiff was in fact dispossessed by the defendants some time in Falgoon 1322, that is to say, some time in February 1916, and that the dispossession was otherwise than in due course of law. But it next appears that with reference to the same plot of land there were proceedings under the provisions of S. 145, Criminal P. C. Those proceedings were instituted on 16th March 1916, and the final order in the said proceedings made on 31st March 1916 was in favour of the defendants. It also appears that after or simultaneously with the initiation of the proceedings under S. 145, Criminal P. C., there was an order of attachment made under the provisions of sub Cl. 4 of that section. The Munsif has held that notwithstanding the order of attachment and the final order made on 31st March, he had jurisdiction to make a decree under S. 9, Specific Relief Act on the ground that the initial or original dispossession in Falgoon or February was otherwise than in due course of law.

In support of this view and of the view contended for by the opposite parties we have been referred to two cases, one decided by the High Court of Allahabad and reported as *Jwala* v. *Ganga Prasad* (1), and another decided by the High Court of Bombay and reported as *Nagappa* v. *Sayad Badrudin* (2). These cases would seem to be in point, except in so far that it does not appear that in these cases there was any intervening attachment. But we are not bound to follow those decisions though they are entitled to our utmost respect, and indeed if the matter were res integra I am not prepared to say that I might not have been disposed to take the same view. But on the facts that have been found we find it impossible to distinguish the case from the case in this Court: *Loo Moore* v. *Manoranjan Guha* (3). There it was found that there had been dispossession by the defendant on 26th October 1906. Thereafter proceedings under S. 145, Criminal P. C., were initiated on the same date between 3rd and 10th November, and on 10th November the property was attached by the Court under S. 145 (4), Criminal P. C. The facts of this case cannot be distinguished from the facts in that case, and the learned Judges who decided that case relying, it would appear, in great measure on the effect of the intervening attachment, held that on those facts a suit brought by the plaintiff under S. 9, Specific Relief Act, was not maintainable. We are, content to follow that case and in that view we make this Rule absolute, but under all the circumstances we make no order as to costs.

Shamsul Huda, J.—I wish only to add that but for the intervening attachment I would have held that the mere order under S. 145, Criminal P. C., was not sufficient to deprive the plaintiff of the right to relief in a suit under S. 9, Specific Relief Act.

V.B./R.K. *Rule made absolute.*

1. (1908) 30 All 331.
2. (1902) 26 Bom 353.
3. (1908) 7 C L J 547=12 C W N 696.

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CHITTY AND SMITHER, JJ.

Rokun Ali—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 634 of 1917, Decided on 13th December 1917, against order of 4th Presy. Magistrate, Calcutta.

(a) Evidence Act (1 of 1872), S. 24—Confession as to illicit possession of opium made to Superintendent of Excise is admissible—Opium Act (1 of 1878), S 9.

A confession made by an accused person on his trial for illicit possession of opium to a Superintendent of Excise is admissible in evidence, provided no inducement, threat or promise was held out or made to the accused in order to procure the confession. [P 139 C 2]

***(b) Evidence Act (1872), Ss. 123 and 162—Register of postings does not refer to matters of State and is not privileged.**

An entry in a register of postings showing that certain Customs Preventive Officers were ordered to be at their stations at a particular hour does not refer to matters of State and is not excluded from disclosure under S. 123 or 162. [P 138 C 2]

***(c) Evidence Act (1 of 1872), S. 124—Statement by subordinate officer to his superior officer within hearing of various people is not privileged.**

A statement made by a subordinate officer to his superior officer regarding the apprehension of a certain accused person within the hearing of various people cannot be withheld from the Court under S. 124. [P 139 C 1]

Camell and *Monmotho Nath Mukerjee*—for Appellant.

B. C. Mitter and *Jnan Chunder Guha*—for the Crown.

Chitty, J.—The appellant Rokun Ali was convicted by the 4th Presidency Magistrate of an offence under S. 9, Act 1 of 1878, that is to say, of being in possession of opium without a license, and was sentenced to nine months' rigorous imprisonment and a fine of Rs. 300. The case for the prosecution depended on the evidence of the Excise Officers—Inspector Dinesh Chandra Sen Guha, Sub-Inspector, Kiran Chandra Gupta and Mojjum Hossain. There is also the evidence of Abdul Aziz the diver, who recovered a bundle of opium from the river, and of Tookal Ali Guasi, a Jamadar. On the second day of hearing Rai Sahib S. K. Raha, the Superintendent of Excise, was also called and he spoke to an admission made by the appellant, in which he confessed to being in possession of the opium and explained that he was taking it for shipment on a steamer on account of a Chinaman, whom he suggested the Superintendsnt should endeavour to arrest. The appellant called on his behalf a number of Customs Officers—three of whom deposed, directly contrary to the story for the prosecution, that the appellant had been arrested not in the boat, as alleged by the Excise Officers, but on the shore, and that no opium was in fact found in the boat. The learned Presidency Magistrate disbelieved the evidence of these witnesses, pointing out a number of discrepancies in their statements and also finding that they had come forward to give false evidence in consequence of their jealousy and chagrin at having been deprived of the case by the Excise Officers. The only question before us is whether the evidence of the Excise Officers is to be preferred to the statements of the appellant and his witnesses.

A question, however, of law arose with regard to the admissibility of two pieces of evidence with which it will be convenient first to deal. Mr. Fitzgerald, the Inspector of Customs, was called and was asked to corroborate the statements from the posting register in order to show that the Preventive Officers were in fact at or near Prinsep's Ghat on the night in question, i. e., 22nd and 23rd August. This was disallowed. The recollection of the learned counsel and pleader on either side is not the same with regard to what took place in the Police Court; but it appears from Mr. Fitzgerald's statement that he declined to put in the book as it was a confidential book. The defence now say that this plea of privilege was put forward by him at the instance of the prosecution. However that may be, it is obvious that no question of privilege could arise in respect of this posting register. There might be entries in that book which were privileged and could not be disclosed, but the entry in question is merely a note of the times when particular Preventive Officers were ordered to be at their stations. It is obvious, therefore, that it did not refer to matters of State which could be excluded from disclosure under S. 123 or 162, Evidence Act. The other question was also one of privilege in regard to Mr. Boyd's evidence. Mr. Boyd, the Superintendent of the Customs Preventive Service, was called and the defence wished to find out from him whether or not Inspector Dinesh Chandra Sen Gupta had made a particular admission on the morning of the 24th, when

admittedly Mr. Boyd and Mr. Raha had a conference and the witnesses Dinesh Chandra Sen Gupta, Thomson and Fitzgerald were present. Mr. Boyd appears to have stated that he treated what took place at that interview as confidential; in other words, he claimed privilege under S. 124, Evidence Act. As to this, again, there can be no question of privilege. What took place between Mr. Raha and Mr. Boyd might possibly be privileged under that section, but that one of the subordinate officers had made a statement regarding the events of that particular night in the hearing of the various people at that conference could not possibly be withheld from the Court under that section. We accordingly intimated that we would record the evidence of these two witnesses on the two points referred to. They were called before us on Tuesday last and further examined. Their examination did not carry the case any further as neither of them remembered what had taken place, nor could they say definitely that Dinesh Chandra Sen Gupta had, in fact, made any such statement. The posting register was produced and put in. That, too, does not carry the case very much further, as it only shows orders that particular officers should be at particular places at particular times. There seems to be no reason to suppose that these Customs Officers were not at or near Prinsep's Ghat sometime or another on the night in question. They obviously interfered to some extent in the proceedings, but that does not mean that they were there precisely at the point of time, i.e., 9 p. m. or just before, when the appellant was arrested by the Inspector of Excise.

The evidence of the prosecution witnesses shows that, acting on the information of an informer, the Inspector of Excise came up from Babu Ghat in a boat to Prinsep's Ghat arriving there just before 9 p. m. Júst off the Prinsep's Ghat he came alongside the boat in which were the appellant and two other Mahomedans. The other two Mahomedans at once jumped into the river and swam away. The appellant is said to have taken up a bundle in the boat and thrown it into the water. He was then arrested by the Inspector and another bundle containing opium was found in the boat. He was then put under arrest and brought to the shore. On the shore another man was certainly arrested but he was let go for want of anything to incriminate him. The appellant was detained at the Ghat, to which the Inspector's taxi had come, for some hours, while the Excise Officers sent for divers and endeavoured to recover the bundle which was thrown into the river. It was not recovered that night and the appellant was accordingly removed in custody. Early the next morning the divers, after long operations, were successful and the second bundle was recovered and was found to contain a large quantity of opium. The amount of opium seized altogether amounted to between 50 and 60 seers.

The appellant's case, as stated in his plea to the Magistrate on 26th September was that he had been arrested on the shore and that no opium was, in fact found on the boat. To corroborate this plea the witnesses for the defence were called. The only question is whether they can possibly be believed. The evidence for the prosecution is perfectly clear and it cannot be disputed that the opium was found on that night in the manner stated by them. The only question really is whether the appellant was the man who threw one of the bundles into the river and was arrested on the boat in possession of the other one. There seems to be no reason to disbelieve the statements of these witnesses who have given their evidence very fairly. It was argued that if there were discrepancies in the defence evidence there were equal discrepancies in that for the prosecution. The discrepancies, however, which the learned counsel endeavoured to point out seem to be really no discrepancies at all. They amount rather to a statement by one witness on a particular point and an admission to another witness that he did not see or had no knowledge of the fact deposed. There is also the important evidence for the prosecution of the Superintendent of Excise. It was stated that the confession made by the accused to him on 24th was inadmissible in evidence. There is, however, no suggestion of anything like inducement, threat or promise which would shut it out under S. 24, Evidence Act. Then it was argued that evidence of that confession was produced at a very late stage. The first hearing of the case was on 26th September. On that day in the cross-examination of the Inspector Dinesh Chunder Sen Gupta it was

elicited not only that the appellant had made an admission to him but also that he had made a further admission to Mr. Raha. Mr. Raha was not that day present in Court.

He attended, however, at the next hearing, i. e. 3rd October and gave evidence with regard to this confession by the accused. There does not seem to have been such delay as would cast a doubt on the accuracy of the Superintendent's statement. There is no reason to suppose that he was called at the later stage to bolster up what might be a failing case, nor that he would deliberately come forward to perjure himself for the mere sake of obtaining a conviction against the appellant. Turning to the evidence of the defence the learned Presidency Magistrate has pointed out a number of inconsistencies in their statements which are more serious It is unnecessary for us to recapitulate them at this stage. It is sufficient to say that the view that the Magistrate has taken on this point appears to be quite correct. The most important witness called for the defence is Mr. Thomson. I am sorry to have to say it, but it does appear to me that he has deliberately come to support what was a false case. The evidence which he gave is altogther improbable and incredible. At one time he says that the excise officer offered to give him the case and be a witness against the accused. At another time he says that he found no opium in the boat, that the accused was not arrested in the boat, that he was arrested on shore, that there was really no case against the accused and there was, therefore no case for either the excise authorities or the customs authorities to take up. At the same time be says that he complained to Mr Boyd that he had been done out of a big haul by the excise officers. If there was no such case it does not appear how he could have been "done out of a big haul." Also he does not explain how or why, if there was a case against some man other than the appellant, the appellant should have been arrested and a false case preferred against him while the true culprit was let go.

The reason for these customs officials coming forward is not far to seek. The Magistrate at once detected it and his opinion appears to be correct. They were disappointed that the excise officers should have made this capture and thus deprived the customs officers of a possible reward. We ascertained from Mr. Boyd that rewards are given in those cases, and that, while there is no fixed scale for rewards, the officers may reasonable expect to be rewarded, more or less, in proportion to the quantity of the opium or other article seized. There is another witness to whom we should refer, viz., the taxi-driver. It is to be regretted that the Inspector of Excise did not take the number of his taxi-cab; but it does not appear that the witness Rahim Ali was really the driver of the taxi which was at Prinsep's Ghat on that night. It would be very easy no doubt to get a taxi-driver to come forward and give evidence to this effect. He does not verify his statements in any way. So also D. W. 7, Jauday Nandan Roy, constable, who states that the accused was made over into his custody. It is an extraordinary thing, if he was there at that time and had the accused in his charge, that he made no report of the circumstance, nor is it shown that he was in point of fact on duty at Prinsep's Ghat. He states that he really was on duty that night at Babu Ghat, that he came to Prinsep's Ghat, and there saw the Inspector Dinesh Chundra Sen Gupta and the others. On the whole evidence there can be no doubt that the conviction of the accused is correct, and, under the circumstances, the punishment does not appear to be too severe. The appeal is accordingly dismissed. The accused must surrender to his bail and serve out the remainder of his sentence.

Smither, J.—I agree that the appeal should be dismissed.

V.B./R.K. *Appeal dismissed.*

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CHITTY AND SMITHER, JJ.

Emperor

v.

Asimoddi and *others*—Accused.

Criminal Ref. No. 10 of 1917, Decided on 9th January 1918, made by Sess. Judge Dacca, D/. 3rd October 1917.

Criminal P. C. (1898), Ss. 297, 298 and 299—Charge to the jury—Misdirection to jury is ground for setting aside verdict—But verdict, not erroneous and perfectly correct on evidence is not liable to be set aside.

The accused were tried by the Sessions Judge and a jury on charges under Ss. 465, 467 and 193, I. P. C., on the allegations that by personating

one Mir Bakhsha, the husband of a certain woman, before the Mahomedan Marriage Registrar, they had induced the Registrar to make an entry of the divorce of the woman by her husband, to wuich entry they had affixed their thumb impressions, and thereby made a false document within the meaning of Ss. 463 and 464, I. P. C. In this charge to the Jury, the Sessions Judge said; "If the person who put his thumb impression in the register as Mir Baksha was not really Mir Baksha, it is clear that he made a false document within the meaning of S. 464 and that his intention was that fraud should be committed and also that injury should be caused to Mir Baksha. He therefore committed forgery:"

Held: that there was a misdirection on the part of the Judge as he did not leave it to the jury, as he should have done, to say whether on the evidence they found that the intention of the accused was dishonest and fraudulent; but that although the misdirection might have been under certain circumstances, a reason for setting aside the verdict of the jury, yet as the verdict was not erroneous and was perfectly correct on the evidence, it should not be set aside.

[P 141, C 2, P 142 C 1]

Orr—for the Crown.

Rajendra Chandra Guha—for Accused.

Judgment.—This is a somewhat peculiar case. Three persons Naimoddi, Asimoddi and Musti were placed upon their trial before the Sessions Judge of Dacca and a jury on charges under Ss. 465, 467 and 193, I. P. C. The offence alleged against the accused was that, by personating Mir Baksha, the husband of one Sabjan and brother-in-law of the accused Naimmuddi before the Mahomedan Marriage Registrar in Dacca, they had induced the Registrar to make an entry of the divorce of Sabjan by her husband Mir Baksha, to which entry they had affixed their thumb impressions and thereby made a false document within the meaning of Ss. 463 and 464, I. P. C. At the trial it appeared that the accused Musti, who was said to have been present in the Registrar's office, had taken no active part in the proceeding, and he was accordingly acquitted by the jury. Nothing more turns upon his share in the case. As to the other accused, in the case of Asimoddi, the jury, by a majority of 3 to 2, found him not guilty. The Judge, disagreeing with that verdict, has referred the case to this Court under S. 307, Criminal P. C. In the case of Naimoddi, the jury, by a majority of 3 to 2, found him guilty of an offence under S. 465, I. P. C. The Judge accepted the verdict of the majority in his case and sentenced him to five years' rigorous imprisonment. We may state in passing that this sentence was illegal, inasmuch as the maximum sentence under S. 465, I. P. C., is imprisonment for two years. Naimoddi appealed to this Court from jail. We directed that his appeal should be put up before us at the time the reference in the matter of Asimoddi was taken up. This was done, and Naimoddi has also instructed the same pleader as Asimoddi. The case made for Naimoddi was that there had been misdirection on the part of the Judge and that the sentence was illegal. We accordingly admitted his appeal and the learned Deputy Legal Remembrancer waiving service of notice of this appeal on behalf of the Crown, Naimoddi's appeal has been argued along with the reference in the matter of Asimoddi. We can, therefore, dispose of the two cases in one judgment.

It will be convenient to take the case of Naimoddi first. The trial being by jury, he could only appeal on a question of law and that in this case would be misdirection by the Judge. In his grounds of appeal he gives two instances of misdirection which, in our opinion, do not amount to any misdirection at all; but a perusal of the heads of charges shows that there was a misdirection on the part of the Judge on another point. The Judge says:

"If the person who put his thumb impression in the register as Mir Baksha was not really Mir Baksha, it is clear that he made a false document within the meaning of S. 464 and that his intention was that fraud should be committed, also that injury should be caused to Mir Baksha. He, therefore, committed 'forgery.' There are two questions; (1) Is the page of the register, Ex. 8, a forgery? (2) Did accused Naimoddi and Asimoddi forge it."

Throughout the rest of the charge we find nothing stated by tht learned Judge on the question of fraud or dishonest intention on the part of the two accused. He states (in the words which we have quoted) an apparently self-evident fact, and has not left it to the jury, as he should have done, to say whether on the evidence they found that the intention of the accused or either of them was dishonest or fraudulent. This might under certain circumstances have been a reason for setting aside the verdict of the jury. But S. 423 (2) Criminal P. C. says:

"Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a

P. N. Das
Advocate High Court

misunderstanding on the part of the jury of the law as laid down by him."

Here we are asked to set aside the verdict of the jury, and to order a retrial. The question is whether we should do that in a case where we are of opinion that the verdict is not erroneous and has not been made erroneous owing to the misdirection by the Judge, but which, on the evidence which we have perused in the course of the hearing of these two cases, is perfectly correct. Though the Judge may have been wrong in not directing the jury more explicitly with regard to the fraudulent or dishonest intention of the accused, it cannot be said that owing to that the jury have arrived at an erroneous verdict. It appears to us that, so far as the facts of the case and the conviction of Naimoddi on these facts are concerned, it would be idle to send the case back, because it appears to be a perfectly clear case on the evidence against both the accused. We, therefore, dismiss the appeal of Naimoddi so far as it relates to the misdirection by the Judge. But the sentences upon him of five years' rigorous imprisonment was clearly illegal. We think that the circumstances of the case will be met by a sentence upon Naimoddi of one year's rigorous imprisonment. Turning to the case of Asimoddi, that is before us on a reference under S. 307, Criminal P. C., and we are not only entitled but bound to go into the facts, and giving due weight to the opinions of the Judge and the jury, to decide the case upon the evidence. The case, as we have already intimated in speaking of Naimoddi, is perfectly clear against both the accused and it is impossible to understand why one member of the jury should have pronounced in favour of Asimoddi when convicting Naimoddi. It is clearly proved that these two men went to the office of the Mahomedan Registrar of Marriages in Dacca on 12th September 1917. That they had been there came to the notice of Mir Baksha, the complainant. He knew (as he has sworn) that Naimoddi had his sister Sabjan (the wife of Mir Baksha) in his house at that time and was reluctant to let her return to her husband. Mir Baksha also had reason to suppose that Naimoddi wanted a divorce to be brought about between the two in order that he might marry his sister to somebody else. Mir Baksha accordingly went to the Registrar's office and found that an entry had been made attested by the thumb impressions of two persons, one personating himself and one posing as Sk. Nimai to identify the husband. Nimai was found not to have been there and has given evidence to say that he never went. A complaint was lodged, and then attempts were made to bring about a compromise between the parties. A baithak was held at the house of the witness Nogendra but, as apparently Naimoddi did not carry out the terms of the arrangement then arrived at, these proceedings were instituted. It was clear in the trial that the offence was one under S. 465 and not under S. 467, as the document was not in any sense "a valuable security". But that Naimoddi and Asimoddi both made a false document by putting their thumb impressions to the entry, Ex. 8, admits of no doubt. The proof of it rests mainly, it is true, on the evidence of the expert who has been examined in this case, but there seems to be no reason whatever to discredit the expert's statements, or the conclusion which he drew. It is quite plain that the thumb impressions in Ex. 8 are those of the two accused and not of Mir Baksha or Sk. Nimai. There can be no question whatever as to the intention of these two men in getting that document drawn up and signing it as they did. It was undoubtedly dishonest and a fraud upon Mir Baksha. That it was a false document under S. 464, I. P. C., cannot be disputed for a moment. If Naimoddi and Asimoddi put their thumb impressions on that document intending, as they did intend, that it should be taken as a signature by Mir Baksha and Sk. Nimai, their action would come directly within the first definition in S. 464. We do not think that there is any distinction to be drawn in the guilt of the two men. We accordingly convict Asimoddi under S. 465, I. P C., and sentence him also to one year's rigorous imprisonment. Asimoddi, if on bail, must surrender to his bail and serve out his sentence.

V.B./R.K. *Accused convicted.*

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FLETCHER AND SHAMSUL HUDA, JJ.

Satish Mohini Debya and *others*—Judgment-debtors—Appellants.

v.

Pabna Bank, Ltd. — Decree-holder—Respondents.

Appeal No. 310 of 1916, Decided on 4th June 1918, from order of Sub-Judge, Pabna and Bogra, D/- 18th July 1916.

(a) Decree—Execution—Mortgage decree.

A mortgage decree cannot be executed against some of the owners of the equity of redemption. [P 143 C 2]

(b) Limitation Act (1908), S. 15 — Final decree set aside in appeal against some defendants and cases against them sent for retrial—Decree-holder applying for execution against rest—Execution Court declining to issue execution until suit decided against other defendants and striking off execution case—Execution decree is stayed by Court's order and time does not begin to run until case of other defendants is decided.

After the final decree in a mortgage suit had been set aside in appeal as against some of the defendants and the case as against them was ordered to be retried, the decree-holders applied for execution of the decree as against the other defendants, but the executing Court, declining to issue execution until the liability of the defendants against whom the decree had been set aside was finally settled, made an order striking off the execution case for the present:

Held: that the execution of the decree was stayed by the Court's order striking off the execution case so that limitation in respect of execution did not begin to run until the liability of the defendants against whom the decree had been set aside was finally settled. [P 143 C 2]

Dwarkanath Mitter—for Appellants.

Brojalal Chuckerbutty and *Gurudas Sinha*—for Respondents.

Fletcher, J.—This is an appeal by the representative, the widow of a deceased judgment-debtor against the order of the learned First Subordinate Judge of Pabna, dated 10th July 1916, directing execution to issue in respect of a certain decree. The matter is an extremly simple one if we take the materal facts and confine our attention to them. The husband of the appellant was a party to a mortgage in favour of an institution called the Pabna Bank, Limited, which is a financial institution, I am told constituted of the local lawyers practising at Pabna. That mortgage was dated 16th June 1908. It is stated that nine days before the mortgage the husband of the appellant, that is, the judgment-debtor Basant Kumar Roy, executed a deed of gift of one of the properties in the town of Pabna in favour of his wife, the present applicant. Be that as it may, the Pabna Bank, Limited, instituted in the year 1908 a suit on their mortgage. They obtained a decree on 15th February 1909, and the order absolute for sale was made on 25th November of the same year. Subsequently, defendants 2, 3 and 4 took further proceedings in the matter. The case came up to the High Court. The decree as against defendants 2, 3 and 4 was set aside and the case was ordered to be retried. But the decree and the order absolute for sale as against the other defendants were not interfered with. In the meantime, on 27th May 1913, an application was made for execution as against the defendants other than defendants 2, 3 and 4. It is quite obvious that a mortgage decree cannot be executed against some of the owners of the equity of redemption, and the learned Judge to whom the application for execution was made said that he was not going on that case until the liability of defendants 2, 3 and 4 had been finally settled. This was clearly a proper order. In the result the case was tried against defendants 2, 3 and 4. It was decreed on 6th February 1915 by a preliminary decree and the final decree was passed on 27th September 1915. Then comes the present application.

The point made is that the decree-holders cannot execute the first decree because it is barred by limitation. That is quite clearly not so. Execution was clearly stayed by the order of 27th May 1913. The Judge said that he declined to make any order in the execution case until the liability of defendants 2, 3 and 4 was finally settled and he struck off, as he stated in his order, the execution case for the present. What could a party do then when the Judge said that until the liability of defendants 2, 3 and 4 was settled, he declined to issue execution? As a matter of fact, the learned Judge was quite right. It is quite impossible to execute a decree in a mortgage suit in the way it was suggested. If that is so, then limitation did not begin to run until the liability of defendants 2, 3 and 4 was finally settled; and that was done on 27th September 1915. In that view, the case was clearly within time and no point can possibly be raised as against the present application on the ground of limitation. Dr. Mitter who appears for the appellant did not make a point as to whether the tabular statement did or did not comply with the terms of O. 21, R. 11, Civil P.C.

That matter seems to be dealt with by the learned Judge of the Court below. If necessary, it is only a matter of amendment and amendment can easily be made. The decree was passed in 1909 against the defendants other than defendants 2, 3 and 4 and the decree passed against defendants 2, 3 and 4 on 6th February 1915 was made absolute on 27th September of the same year. Under and by virtue of those decrees, the mortgagees, the Bank, are entitled to have the property brought to sale and the proceeds dealt with in accordance with the terms thereof.

The real point that Dr. Mitter has raised in the present appeal is the question of fraud and various charges of a similar nature made against the Pabna Bank in the Court below. That question obviously cannot be gone into in a matter of this nature. This is an application to execute certain decrees that have been passed and are found to be binding. So long as those decrees remain undisturbed, it is quite clear that it cannot be said that execution ought not to issue because they were obtained by some improper means. Those decrees, as long as they stand, obviously must be treated as decrees binding on the parties, and are liable to be executed. In my opinion, the learned Judge of the Court below came to a correct conclusion when he directed execution to issue in this case. In that view, the present appeal fails and must be dismissed with costs. We assess the hearing fee at one hundred rupees.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 144

NEWBOULD AND PANTON, JJ.

Satyendra Narayan Bagchi and *others* —Defendants—Appellants.

v.

Sashi Bhusan Chowdhury and *others* —Plaintiffs—Respondents

Appeal No. 922 of 1916. Decided on 16th July 1918, from appellate decree of Sub-Judge, Birbhum, D/- 30th November 1915.

Civil P. C (1908), O. 6, R. 4 and O. 7, R. 1 —Suit for title to tank—Plaint not expressly setting up title by adverse possession but plea included in statement of facts on which claim based—Defendant pleading that plaintiff was never in possession—Issue of title by adverse possession though not distinctly framed fought out on merits—Court finding plaintiff to be in possession for generations—Plaintiff is entitled to decree declaring title by adverse possession.

The plaintiffs in a suit for establishment of title to a tank did not expressly set up in the plaint a title by adverse possession, but the plea of title by adverse possession was included in the statement of facts on which the plaintiffs based their claim for title and the issue of the plaintiffs' title by adverse possession was fought out on its merits in the first Court. The case set up by the defendants was not that the plaintiffs had been in permissive possession, but that they had never been in possession:

Held: that on the finding that the plaintiffs had been in possession for generations and that the defendants had never been in possession, the plaintiffs were entitled to a decree declaring their title by adverse possession. [P 144 C 2; P 145 C 1]

Amarendra Nath Bose and *Jatindra Narain Bagchi*—for Appellants.

Biraj Mohan Mojumdar and *Jotindra Lal Banerji*—for Respondents.

Judgment.—The plaintiffs brought the suit out of which this appeal arises to establish their lakheraj title to a certain tank. Both the lower Courts held that this lakheraj title had not been proved but that the plaintiffs had succeeded in proving a title by adverse possession. It is contended on behalf of the appellants, first, that on the suit as framed the plaintiffs are not entitled to a decree, and, secondly, that the facts found are not sufficient to justify the conclusion that the possession of the plaintiffs was adverse. As regards the first point, the learned pleader for the appellants has addressed an able and interesting argument, taking us through a number of reported cases commencing with the case of *Bijoya Debia* v. *Bydonath Deb* (1) and ending with the case of *Ram Chandra Sil* v. *Ramanmani Dasi* (2). We do not consider it necessary to discuss the point how far the plaintiffs can succeed on a title by adverse possession that has not been expressly set up in the plaint, because it appears to us from a reading of the plaint in this case that the plea of title by adverse possession was included in the statement of facts on which the plaintiffs based their claim for title, and it also appears that the issue of the plaintiffs' title by adverse possession was fought out on its merits in the first Court. Though such an issue was not distinctly framed, it appears from the judgment of the first Court, in joining the issue of limitation to the issue of lakehraj title, that the parties clearly understood that the plaintiffs' claim to title by adverse

1. (1875) 24 W R 444.
2. (1916) 36 I C 890.

possession was in issue. As regards the second point, although the lower Courts have not distinctly stated on what ground they held the plaintiffs' long possession to be adverse, it appears that in those Courts the case set up by the defendants was, not that the plaintiffs had been in permissive possesssion, but that they had not been in possession at all. The defendants tried to prove that they themselves had been in actual possession of this tank The finding that the plaintiffs have been in possession for generations and that the defendants have never been in possession must be taken as conclusive in second appeal; and on those findings, we cannot see that any other inference could be drawn except that the plaintiffs' possession was adverse. Taking this view we dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

* A. I. R. 1918 Calcutta 145 (1)

MOOKERJEE AND WALMSLEY, JJ.

Radhanath Sasmal — Plaintiff—Petitioner.

v.

Uttam Chandra Maiti and *others*—Defendands—Opposite Parties.

Civil Rule No, 32 of 1917, Decided on 18th June 1917, against the decision of Addl. Dist. J., Midnapur, D / 15th September 1916.

***Civil P. C. (1908), O. 16, R. 20—Party producing document under rule but not exhibiting in evidence—Court cannot make order under R. 20 against him.**

Order 16 R. 20, authorises the Court to pronounce judgment against a party who without lawful excuse declines to produce a document then and there in his possession or power; if the document is produced, the requirement of the law is fulfilled.

Where a party who is required to produce a document under this rule produces it but declines to exhibit it as evidence in the case, the Court is not entitled to make an order against him under the rule.

Jyotish Chandra Hazra.—for Petitioner.

Satish Chunder Ghose and *Bhupendra Kumar Ghose.*—for Opposite Parties.

Judgment.—We are invited in this rule to set aside an order which purports to have been made under O. 16, R. 20, Civil P. C. 1908. That rule is in these terms:

"Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give the evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit."

The petitioner was the plaintiff in a suit for recovery of mesne profits. There had been a previous suit between the parties for possession and mesne profits. A certified copy of the judgment in that suit was in the possession of the plaintiff who was present in Court. The Munsif expressed a desire to see that judgment in order to ascertain the scope of the previous suit and the order made therein. The plaintiff produced the judgment which was perused by the Munsif. The munsif then called upon the plaintiff to file the document; but for some unexplained reason the plaintiff declined to do so. The Court thereupon proceeded to make an order for dismissal of the suit under O. 16, R. 20 of the Code. An appeal against such an order is allowed under O. 43, R. 1 (h) of the Code. An appeal was preferred, but was dismissed by the District Judge. In our opinion the trial Court was not competent to make an order under O. 16, R. 20. That rule authorises the Court to pronounce judgment against a person who without lawful excuse declines to produce a document then and there in his possession or power; if the document is produced, the requirement of the law is fulfilled. The plaintiff in this case did produce the document but he declined to exhibit it as evidence in the case. This did not entitle the Court to make an order against the plaintiff under R. 20, O. 16. The result is, that this rule is made absolute, the orders of the Courts below set aside and the case remitted to the Court of first instance to be tried in accordance with law.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 145 (2)

WOODROFFE AND SMITHER, JJ.

Siba Krishna Sinha Sarma and *others* —Plaintiffs—Appellants.

v.

Jagat Chandra Talukdar and *others*—Defendants—Respondents.

Appeal No. 1279 of 1916, Decided on 4th April 1918, from appellate decree of Sub Judge, Mymensingh, D/- 18th April 1916.

Landlord and Tenant—Suit for arrears of rent against one of several heirs of decease

tenant is not maintainable—Contract Act (9 of 1872), S. 43.

A landlord cannot maintain a suit for arrears of rent against one of several heirs of a deceased tenant without joining the others as defendants. S. 43 has no applicability to such a case.

[P 146 C 2]

Jogesh Chandra Roy and *Rajendra Chandra Guha*—for Appellants.

Dwarka Nath Chakraberthy and *Kali Kinkar Chakraverty*—for Respondents.

Woodroffe, J.—This was a suit to recover arrears of rent in respect of a tenure. This tenure originally belonged to a man of the name of Ram Saran Bachaspati, and the persons sued for rent were two persons of the names of Jagat Chandra Talukdar and Nritya Sundari Dassi who were his heirs. It appears, in the first place, that in this suit the plaintiffs sued both the persons entitled to the tenure. When the case came on for hearing an objection was taken that, as stated in the pleadings, the interest of defendant 1 had ceased in the tenure, for in 1305 he sold it to two persons of the names of Syam Sundar Sarkar and Nritya Sundari Dassi, and the former sold it again to Dwarka Lal Sarkar and the latter to one Anath Bandhu Guha.

One of these persons applied to be made a party to the suit. It appears that as regards the transfer there is no question of the right of transferability—the landlord's fee was paid and the name of the transferee was recorded in the khatian. On that and on the registration of the transfers the liability of defendant 1 ceased and such liability as was upon him devolved upon his transferees. The plaintiff however was unwilling to make the transferees parties to the suit. As he did not do so, both the Courts below held that the suit was not well founded and that it could not proceed without the addition of the transferees as defendants and both the Courts thereupon dismissed the suit. The question therefore before us is narrowed down to a single point, namely, whether in the circumstances of this case the plaintiff could sue defendant 2 alone. This question again was dependent on a consideration of that which has been argued before us, namely, whether or not the liability of defendants 1 and 2, who were admittedly heirs of Ram Saran Bachaspati, was a joint liability or a joint and several liability. The question then is whether the plaintiff could proceed against one of the heirs without joining the other. This turns upon the question of the applicability in the present case of the provisions of S. 43, Contract Act. In my opinion it has not been shown that, that section has applicability in the present case, which is one as I have said of heirs and transferees from such heirs. This is not a case of a contract which is referred to in that section nor, as has been suggested, has an implied contract by reason of the transferees taking possession of the land or having gone to the landlord to have their names recorded and so forth been made out. Of that we have no evidence before us in this case. A number of decisions have been referred to, but in none of them are the facts on all fours with the present case. I think the judgments of both the Courts below are right. The appeal is therefore dismissed with costs.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 146

FLETCHER AND SHAMSUL HUDA, JJ.

Mohananda Dutta Chowdhury — Defendant—Appellant.

v.

Baikantha Nath Dutta and *others*—Plaintiffs—Respondents.

Appeal No. 776 of 1916, Decided on 14th March 1918, against appellate decree of Addl. Dist. Judge, Sylhet, D/- 17th December 1915.

Hindu Law—Widow—Surrender—Surrender in favour of reversioners—When valid stated.

A surrender in favour of her husband's reversioners made by a Hindu widow otherwise than for consideration to meet legal necessities, in order to be valid, must be of the whole of her interest in the estate. [P 147 C 2]

Mohindra Nath Roy and *Gobinda Chander De Roy*—for Appellant.

Sasadhar Roy (*Senior*)—for Respondents.

Fletcher, J.—This is an appeal by defendant 2 against the judgment of the learned District Judge, Sylhet, affirming the decision of the Munsif of Habigunge. The suit was brought to recover possession of a one-anna share as against defendants 1 and 2 on a declaration of title by purchase. The admitted facts are these: The original owner of the property was one Gopinath. He had three sons; defendant 1, the father of defen-

dant 2, and one Chandranath. Chandranath died leaving a widow, Tripura Sundari, a daughter who married one Protab and the son of that daughter named Jnanendra. The title in this case is made in this way. On 19th July 1901 Tripura Sundari executed a document (Ex. 4) in favour of Jnanendra who was then a minor. The document, after the ordinary recital that she was in want, stated as follows:

"If I make you absolute owner of a one anna share out of my share of the properties mentioned below by transferring the same to you by a deed of release and if your father sells that share by a kobala accompanied by an ekrar to compensate loss in your behalf, some persons are ready to purchase that share."

That does not purport to be a sale by the widow for the purpose of meeting her necessities. It simply states that it would be a convenient way of selling the property if it is made over to the grandson Jnanenda. Then the deed states:

"I, on relinquishing whatever right I have of enjoyment and possession of a one-anna share out of my share of the undermentioned properties worth Rs. 300, etc., make you absolute owner in respect of the said share. From this day, whatever right of enjoyment and possession I have in the lands proportionate to that share being extinguished, you become absolute owner."

It is said that that document is a sale by the widow or may be treated as a sale by the widow for the purpose of meeting her present necessities. That cannot be anything of the sort. The document purports to be a release by the widow of an one-anna share of her life-interest and the purpose for which the release was made was thus stated in the deed, namely that the release having been made to Jnanendra, Jnanendra's father Protap by executing an ekrarnama might be able to get some person to purchase the property. The cases of the Privy Council and of this Court are quite clear that a release by a widow to the reversioner cannot be made of less than the whole of her interest. The reason is to prevent these continual releases to the reversioner for the time being and large portions of the property from being withdrawn from the person who ultimately turns out to be, in fact, the reversioner on the widow's death and also that if a widow has got to give up the whole of her interest she would be very careful before parting with the whole of the property at the same time. It is said in this case that when this man Protap sold the property seven months after, that transaction along with Ex. 4 formed one and the same transaction. I do not agree. The plaintiffs did not allege that it was so and obviously it cannot be so. Moreover the fact found by the learned Judge is that the consideration money obtained by Protap at the sale is not traced beyond the hands of Protap. It is not shown that it went to Jnanendra or to somebody else. I think a case like this is clearly opposed to the decision of the Full Bench of this Court that a surrender by a Hindu widow made otherwise than for consideration to meet legal necessities must be of the whole of her interest. This case was an attempt to surrender a small portion and Ex. 4 did not, in my opinion, operate to pass that one anna share to Jnanendra which was subsequently purported to be sold to the plaintiffs by Protap. That being so we ought to set aside the decision of the learned District Judge and allow the present appeal and dismiss the plaintiffs' suit with costs both in this Court and in the lower Court.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 147

FLETCHER AND CHATTERJEA, JJ.

Joy Chandra Das—Appellant.

v.

Mahamed Amir—Respondent.

Appeal No. 213 of 1916, Decided on 17th August 1917, from order of Dist. Judge, Dacca, D/- 1st June 1916.

(a) Provincial Insolvency Act (1907)—Summary proceedings cannot be held for discovering properties of Insolvent — Bankruptcy Act S. 27.

The Provincial Insolvency Act contains no section corresponding to S. 27, Bankruptcy Act. An insolvency Court has therefore no jurisdiction to hold summary proceedings for the purpose of summoning before it and examining persons in order to discover whether any portion of the insolvent's property has been concealed by him by having vested it in a benamidar and thereupon directing the benamidar to transfer to the Official Receiver the property so vested in him [P 148 C 1]

(b) Insolvency—Insolvent proved to have concealed property by vesting it in benamidar—Remedy of creditor is to institute suit against benamidar to recovery property—Benami.

When a scheduled creditor in an insolvency proceeding has a prima facie case that a portion of the insolvent's property has been concealed by the insolvent by having vested it in a benamidar, his remedy is to apply to the Court to direct the Official Receiver to institute a suit against the benamidar to recover the property in

question on condition that the creditor so applying shall put the official receiver in funds and properly indemnify him against the costs in the suit. [P 148 C 1]

Sarat Chandra Basak and *Bepin Chandra Bose*—for Appellant.

Rupendra Lal Roy—for Respondent.

Fletcher, J.—This is an appeal by a scheduled creditor in an insolvency proceeding. The appeal is preferred against an order made by the learned District Judge in whose Court the insolvency proceedings are pending refusing to examine certain persons and the insolvent and his wife with reference to a portion of the property of the insolvent, which is alleged to have been concealed by the insolvent by having vested the same in the name of his wife. The case has been argued before us that the Court must have inherent jurisdiction to hold summary proceedings which S. 27, Bankruptcy Act of 1883 authorizes—to which there is a corresponding section in the Presidency Towns Insolvency Act. We cannot assume that any such summary powers are given. The case must turn on the sections of the Act itself. The Provincial Insolvency Act contains no section corresponding to S. 27, Bankruptcy Act. The Ccurt has therefore as the learned Judge remarks, no jurisdiction to summon before it the wife of the insolvent and to examine her and direct her to transfer to the Official Receiver the property vested in her name, if it proves to be the property of the insolvent. The learned Judge's order that this is not a proper proceeding is right. But the course that he has suggested that the appellant should adopt is not accurate, His view is that the appellant can maintain a suit to recover the property. It is quite clear that he cannot. The usual order that is made in a case of this nature is that the creditor should apply to the Court to direct the Official Receiver to institute and continue a suit against the wife of the insolvent to recover the property in question, making it a condition precedent that the creditor so applying, that the Official Receiver shall institute such a suit, does put the Official Receiver in funds and properly indemnifies him against the costs in the suit. That is ovbiously the proper course for the appellant to take.

He must apply to the learned District Judge, if he has a prima facie case, as the report of the Official Receiver suggests that there is a prima facie case, that the Official Receiver be directed to institute a suit against the wife of the insolvent cn these terms, namely that creditor should put the Official Receiver in funds and indemnify him against the costs of the suit, and if he fulfils those conditions, the Official Receiver should bring a suit to recover this property from the wife of the insolvent. The suggestion that this can be done in the course of the insolvency proceedings by a summary proceeding is not supported by the terms of the sections of the Provincial Insolvency Act. The present appeal therefore so far as the main question is concerned, must stand dismissed. As I have already stated, the creditor is entitled to make that application to the learned Judge with reference to a suit being instituted by the Official Receiver for recovery of this property. As the respondent is an insolvent and is supposed not to have any money except the tools necessary to carry on his trade and the necessary bedding and clothing for himself and his family, although he is quite able to indulge in engaging eminent lawyers to conduct his case, we do not make any provision for the costs of this appeal.

Chatterjea, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 148

CHATTERJEA AND RICHARDSON, JJ.

Juranu Mahamed—Defendant—Appellant.

v.

Jathi Mahamed—Plaintiff—Respondent.

Appeal No 1257 of 1915, Decided on 29th August 1917, against appellate decree of Offg. Sub-Judge, Julpaiguri, D/- 6th November 1915.

Civil P. C. (1908), O. 21, Rr. 93, 92 and 91—Purchaser deprived of property by person claiming under paramount title cannot sue to recover purchase money.

An auction-purchaser who is deprived of the property purchased by him because the judgment-debtor had no saleable interest therein or who is evicted under a title paramount to that of the judgment-debtor, cannot under the present Code of Civil Procedure bring a suit to recover from the decree-holder the purchase-money paid by him. [P 149 C 2]

Under the general law, apart from statute, there is no warranty of title at a Court sale: 3 *Cal* 806 (*P C*), *Foll.* [P 149 C 2]

Kshitish Chandra Neogy—for Appellant.

Narendra Nath Sen—for Respondent.

Judgment. — The facts are clearly stated by the learned Munsif. In execution of a decree obtained by the defendant as mortgagee of an occupancy holding, the holding was put up to sale and purchased by the plaintiff in February 1910 for Rs. 335. The plaintiff obtained possession in May 1910, but was subsequently sued in ejectment by the landlords in whose favour a decree was made on 28th August 1912. The plaintiff then brought the present suit to recover his purchase-money with interest. The suit was dismissed by the Munsif who held that such a suit was not maintainable. An appeal by the plaintiff was successful and the appeal before us has been preferred by the defendant from the judgment and decree of the Subordinate Judge, dated 6th March 1915. The question is whether an auction-purchaser, who is deprived of the property sold to him by reason of the fact that the judgment-debtor had no saleable interest therein or who is evicted under a title paramount to that of the judgment-debtor, is entitled to bring a suit to recover his purchase-money from the decree-holder. It appears to have been held that S. 315, Civil P. C., 1882, conferred a statutory right upon the purchaser which was sufficient to support a suit of this nature [*Munna Singh* v. *Gajadhar Singh* (1), *Pachayappan* v. *Narayan* (2), *Gurshidawa* v. *Gangaya* (3) and *Ram Kumar Shaha* v. *Ram Gour Shaha* (4)]. As pointed out however in *Nannu Lal* v. *Bhagwan Das* (5), the corresponding provision in the present Code, O. 21, R. 93, is framed in very different terms. Under that rule the purchaser's right to a refund only arises when the sale has been set aside under the preceding R. 92 and the right conferred is

"to an order for repayment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid."

That implies that the order will be made as incidental to the proceedings by which the sale is set aside. R. 91 only confers a right to make an application to the Court, that is, to the Court of execution. The Code confers no right to bring a suit either directly or constructively. The right to bring a suit therefore must depend upon the further question whether the title to property sold in execution of a decree is guaranteed either by the Court or by the decree holder. Under what we may term the general law apart from statute there is no warranty of title at a Court sale. See *Dorab Ally Khan* v. *Abdool Azeez* (6). In the judgment of the Privy Council in that case the following observation occurs:

"Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor."

If that be the law—apart from any such statutory right as that which may have been conferred by S. 315 of the Code of 1882—then the present suit is incompetent and the learned Subordinate Judge was wrong in reversing the Munsif's decree. This conclusion is in accordance with the view of the Allahabad High Court in the case already cited. It is also supported by a dictum of the Madras High Court in a recent case *Parvathi Ammal* v. *Govindasami Pillai* (7). It is true, as the respondent's learned pleader reminded us, that a different view has been taken in Bombay [*Rustomji* v. *Vinayak Gangadhar* (8)]. But with great respect we are unable to appreciate the grounds on which that decision rests. The position may be summed up in the words of Muthusami Ayyar, J., in *Sundara Gopalan* v. *Venkatavarada Ayyangar* (9):

"The decision of the Privy Council seems to me to be an authority for the proposition that the implied warranty of title in respect of sales by private contract cannot be extended to Court sales, except as far as such extension is justified by processual law in India."

The precise point which arises here did not arise in the case before Muthusami Ayyar; J., and was not dealt with. It seems possible however that if the question had arisen, that learned Judge might have himself been disposed to take the narrower view of the rights of the auction-purchaser even under the Code of 1882. However that may be, the present Code, as already stated, is differently

1. (1883) 5 All 577 (F B).
2. (1888) 11 Mad 269.
3. (1898) 22 Bom 783.
4. (1910) 37 Cal 67=2 I C 559.
5. (1917) 39 All 114=37 I C 9.
6. (1877 78) 3 Cal 806=5 I A 116 (P C).
7. (1916) 39 Mad 809=30 I C 827.
8. (1911) 35 Bom 29=7 I C 955.
9. (1894) 17 Mad 228.

expressed and does not support the remedy by suit which the respondent claims. It has to be remembered that what is sold at a Court sale is the property, not of the decree-holder but of the judgment-debtor. It may often happen that the bidders at the sale know more about the property than the decree holder and in any case, as the Allahabad High Court points out *Nannu Lal* v. *Bhanagw Das* (5),

"to allow the purchaser to get back the price without having the sale set aside, perhaps long after the sale, would obviously open the door to much fraud and would place the decree-holder at a very great disadvantage,"

We allow the appeal and restore the decree of the Munsif with costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 150 (1)

RICHARDSON AND BEACHCROFT, JJ.

Emperor

v.

Sagar Singh and *another*—Accused—Petitioners.

Criminal Revn. No. 1066 of 1917, Decided on 20th November 1917.

Penal Code (1860), S. 168—Police officer carrying on shop is liable to be convicted under S. 168—Police Act (1861), S. 10.

The words "any employment or office whatever" in S. 10, Police Act, are wide enough to cover the case of a police officer who engages in trade. [P 150 C 2]

The conduct of a police servant carrying on a shop comes within the prohibition contained in S. 10, Police Act, and he is therefore, liable to be convicted under S. 168, Penal Code. [P 150 C 2]

Dasarathi Sanyal and *Hiralall Chakrabarty*—for Petitioners.

Orr—for the Crown.

Judgment.—The two petitioners before us are brothers; petitioner 1 is a Habildar, and petitioner 2, a constable of the Armed Police Reserve at Mymensingh. They have been convicted of an offence under S. 168, I. P. C., and sentenced to two months' simple imprisonment each. S. 168, I. P. C., lays down that whoever, being a public servant and being legally bound as such public servant not to engage in trade, engages in trade shall be punished with simple imprisonment, etc. This Rule was obtained on the ground that the facts alleged by the prosecution do not constitute an offence under that section. The point which has been taken is that the prosecution has not shown that the two petitioners are legally bound as public servants not to engage in trade. In the Bengal Police Manual in para. 812 there is this provision:

"Without the pevious sanction of the Local Government a police officer may not engage in any trade or undertake any employment other than his public duties."

As to that, the argument of the petitioners is that the prohibition is not a statutory prohibition. Upon that question, in my opinion, it is not necessary to express any definite opinion. For our present purpose it is unnecessary to say whether police officers are or are not legally bound by that prohibition within the meaning of S. 168. It is sufficient to refer to S. 10, Police Act 1861. S. 10 enacts

"No police officer shall engage in any employment or office whatever, other than his duties under this Act, unless expressly permitted to do so in writing by the Inspector-General."

The words "any employment or office whatever" appear to me to be wide enough to cover the case of a police officer who engages in trade. What has been found in the present case is that these petitioners were carrying on and conducting a shop not far from the police barracks where they actually sold grocery stores. I see no reason to say that their conduct in so doing does not come within the prohibition contained in S. 10, which I have read. Without straining language a man may be employed or may employ himself in trade or industry or any other occupation. In this case it has clearly been found that the petitioners were engaged or employed in keeping a grocery shop. In that view there is no ground for disturbing the convictions and this Rule must be discharged. The petitioners must surrender and serve out the remainder of the sentences imposed upon them.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 150 (2)

FLETCHER AND SMITHER, JJ.

Trailokya Nath Roy Chowdhury—Defendant—Appellant.

v.

Durga Nath Bhattacharjya—Plaintiff—Respondent.

Appeal No. 874 of 1916, Decided on 10th May 1918, from appellate decree of offg. Dist. Judge, Commilla, D/- 23rd September 1915.

Bengal Tenancy Act (1885), S. 98—District Judge has ample powers as to remuneration of manager—Question of limitation in suit for arrears of pay of retired common manager on basis of District Judge's order does not therefore arise.

Under S. 98 the District Judge has ample powers to pass orders with respect to the remuneration of the common manager. Therefore no question of limitation arises in a suit brought by a retired common manager to recover arrears of his pay on the basis of an order made by the District Judge directing its payment. [P 151 C 1]

Jogesh Chandra Roy and *Rupendra Kumar Roy*—for Appellant.

Gobind Chandra De Roy—for Respondent.

Fletcher, J.—This is an appeal by the defendant against the decision of the learned Officiating District Judge of Commilla, dated 23rd September 1915, affirming the decision of the Munsif of the same place. The suit was brought by the plaintiff who was a common manager appointed by the District Judge under the provisions of S. 95, Bengal Tenancy Act, to recover arrears of pay from 15th May 1910 when he entered into service down to the 19th September of the same year when he made over charge to his successor. The only question raised in this appeal is whether the suit is barred by limitation. The learned Judge of the lower appellate Court, in my opinion, quite rightly held that no question of limitation arose in the case at all. The District Judge under S. 98, Ben. Ten. Act, has absolute control over matters like this. Under the terms of the section, he has ample power to pass orders with respect to the remuneration of the common manager. Now, what was done in this case was that on 26th July 1913, the District Judge passed an order that the plaintiff was to be paid what was found to him. The District Judge had ample jurisdiction to make that order under the powers conferred by S. 98, Ben. Ten. Act. Having made that order, it was the duty of the person who received that order—the present common manager who had to obey the order of the District Judge, under whose control he was—to comply with the terms of that order. That order not having been complied with, the plaintiff brought the present suit. No question of limitation arises in this case. The reason why the suit was resisted is not far to seek and that is this: The present common manager who is also under the control of the District Judge apparently thought for some reason that he would be accountable to the estate if the plaintiff's suit proved successful. The defendant had no ground to resist the claim of the plaintiff for arrears of his pay. The present appeal fails and is dismissed with costs.

Smither, J.—I agree.

V B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 151

CHATTERJEE AND WALMSLEY, JJ.

Udit Narayan Jha—Judgment debtor—Appellant.

v.

Mt. Jasoda Sahun Kalan and *others*—Decree-holders—Respondents.

Appeal No. 204 of 1914, Decided on 20th August 1914, from order of Offg. Sub-Judge, First Court, Bhagalpur, D/- 5th March 1914.

(a) Civil P. C. (1908), S. 34, O. 22, R. 4(2)—Hindu widow and next reversioner executing mortgage bond—Decree obtained against both—Objections by widow alone disallowed—Next reversioner substituted after her death raising same objections—Reversioner is competent to reopen matters settled by orders made previous to widow's death.

A Hindu widow in possession of the estate of her husband and the next reversioner jointly executed a mortgage bond. A decree was obtained on foot of the bond against both the mortgagors and was put in execution against them. The widow alone raised certain objections to the execution which were disallowed. After the death of the widow pending execution the next reversioner, being substituted in her place, raised the same objections:

Held: that the reversioner was competent to re-open the matters settled by orders made prior to the death of the widow, as after her death he became, as the heir of the last male owner, fully clothed with all the rights of a proprietor, whereas before the death of the widow in possession he had a mere contingent interest which might never come into being. [P 152 C 2]

(b) Civil P. C. (1882), S. 209—Interest—Jurisdiction to grant further interest after expiry of period of grace is under S. 209—Proper period for allowing such further interest is when decree absolute is made—Decree absolute not providing for same—It should be held that no such interest is allowed.

After the period of grace allowed by the preliminary decree in a mortgage suit has expired, the matter passes from the domain of contract to the domain of judgment and the jurisdiction of the Court to grant further interest after the expiry of the period of grace is under S. 209, Civil P. C. of 1882. The proper period for allowing such further interest would be when the decree absolute is made; therefore, where the decree absolute does not provide for any such interest, it should be held that no such interest was allowed. [P 153 C 1]

Ram Chunder Mozumdar and *Uma Charan Laha*—for Appellant.

Mahendra Nath Roy and *Gurudas Sinha*—for Respondents.

Chatterjee, J.—M. Nainabaty, a Hindu widow in possession of the estate of her husband, and the next reversioner, who is the appellant before us, jointly executed a mortgage-bond on which the creditor obtained a decree against both and executed the same against both, claiming interest at the bond rate until actual payment. Nainabaty alone made an objection as regards interest subsequent to the period of grace but her objection was disallowed and an appeal to the High Court was filed but withdrawn. The two judgment-debtors then jointly sold a part of the mortgaged property by private sale under the sanction of the Court and satisfied a part of the decree. The decree was then sold to the respondent, who applied for execution claiming interest at the same rate as the original decree-holder; pending execution Nainabaty died and the appellant was substituted in her place: as he was already a judgment-debtor on the record as a reversioner, this order of substitution must mean that he then became a judgment-debtor in his own right as full owner. He now filed a fresh objection on the ground that the decree-holder was not entitled to interest after the period of grace under the terms of the decree: about the same time he filed an application for the amendment of the decree on the ground that it was not in accordance with the judgment. These two proceedings were run as alternative proceedings, so that if the one failed the other might be fought out. Both the applications were rejected and we have before us the miscellaneous appeal in the objection case under S. 47, and the rule in the amendment case.

The first question that suggests itself on the facts stated is one of the competency of the present proceedings. The appellant Udit Narain was a party to the decree and a party to the execution: can he re open matters settled by orders made prior to the death of Nainabaty? I think there is a fallacy involved in the question. The Udit Narain that was a party before the death of the widow in possession was merely the presumptive reversioner Udit who had no present interest in the property in dispute, who had a mere contingent interest, a mere spes successionis which he could not dispose of: his right was contingent on his surviving the widow and might never come into being. The Udit Narain who has initiated these proceedings is the present heir of the last male owner and is fully clothed with all the rights of a proprietor. The identity is only in the name and not in the title or the character, so far as these are concerned he is quite a different man. I think he is entitled to defend his newly acquired title by all means accessible to his new character. Coming to the merits, I find that the ordering portion of the judgment was:

"The principal amount is to bear interest at the rate stipulated in the bond and the costs to bear interest at six per cent, per annum, should the defendant first party make default to pay the decretal amount within six months from this date it shall be realised by the sale of the mortgaged properties."

The decree gives the (1) principal with interest at the bond rate up to date of suit, (2) interest at the bond rate from date of suit to the date of realization. (3) interest on the interest at six per cent, per annum from date of suit to date of realization, (4) interest on costs at six per cent, per annum from date of decree to date of realization, (5) costs, and then orders that if they fail to pay the whole of the decretal amount within the period fixed by the Court (six months) the decretal amount would be realized by the sale of the mortgaged properties. Under the provisions of Ss. 86 and 88, T. P. Act as interpreted by their Lordships of the Privy Council in the case of *Sundar Koer* v. *Rai Sham Krishen* (1):

"A general account shall be taken once for all and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that after the expiration of that day if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend not on the contents of his bond but on the directions in the decree."

Section 209 of the old Civil P. C. which applies to the present decree, provided that when the Court gives a decree for money it can direct, in addition to the principal sum with intrest up to date of suit, the payment of interest on the principal at a reasonable rate from date of suit to date of decree and further interest from date of decree to date of payment. If no such interest is expressly given it is to be considered as refused.

1. (1907) 34 Cal 150=34 I A 9 (P C.)

Now if Ss. 86 and 88, T. P. Act include the whole period up to the expiration of the period of grace, the jurisdiction to grant further interest must be under S. 209, Civil P. C: for it is after that period that the matter passes from the domain of contract to the domain of judgment. In the present case there is no indication of any interest being decreed subsequent to the period of grace; all the five items of the decree including the costs form the decretal amount, the failure to pay which would maks the amount realizable by sale. This is the preliminary decree and until the six months expired there was no knowing whether any further interest would be payable. It seems that the proper period for allowing further interest would be when the decree absolute is made. The decree absolute or rather order absolute in this case does not provide for any such interest, and I think no such interest was given by the decree. It is contended that the words in the original ta-roz-wosool used in contradistinction from the words adai show that the decree meant to make a distinction between the date fixed for payment and the date of actual realization. I think this argument is not sound. The words wosool and adai are relative terms. The creditor makes wosool or realization when the debtor makes adai or payment. So that the decree as made seems to speak of the same point of time by the words wosool and adai and is to my mind one in accordance with the judgment. It is true that it allows interest on interest at six per cent, per annum from date of suit to date of realization but that has been accepted. In this view of the matter, I think that the rule should be discharged and the appeal decreed. The interest will be calculated up to the end of the period of grace and if on that calculation anything is found due to the decree-holder, execution will go on for the same. If the whole amount due should be found to have been satisfied before the present objection the execution case will be dismissed. The appellant is entitled to his costs, which we fix at three gold mohurs.

Walmsley, J.—I agree.

V.B /R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 153

TEUNON AND NEWBOULD, JJ.

Ram Lal Mandal and *others*— Appellants.

v.

Asutosh Mandal and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 401 of 1915, and Rule No. 49 of 1916, Decided on 10th December 1917, from order of Dist. Judge, 24-Parganas, D/- 16th June 1915.

Civil P. C. (1908), O. 21, Rr. 15 and 19 (b)—Suit for rent by cosharer—All cosharers made pro forma defendants — Some holding dual position of being tenants and cosharer—Suit decreed in favour of plaintiff and also in favour of cosharers pro forma defendants—Application for execution by pro forma defendants holding dual position maintainable —Court had to decide first what each party owed to other and allow execution for difference.

Plaintiff, a cosharer landlord, brought a suit for rent impleading several persons as defendants to the suit, of whom defendants 1 to 14 held a dual position being tenants and cosharer landlords, 15 to 21 were purely tenants and 22 to 41 were cosharer landlords. All the cosharer landlords were made pro forma defendants. A decree was made for Rs. 76 odd in favour of the plaintiff and for Rs. 380 odd in favour of the cosharer landlords, the pro forma defendants. The pro forma defendants 34 to 38, who were also tenants defendants 1 to 5, applied for execution of the decree against defendants 7 to 21 for Rs. 285 and odd, which was the whole balance of the decree passed in favour of the pro forma defendants, Rs. 95 odd having been realized in a previous execution proceeding:

Held; that such an execution was maintainable, but the Court under the provisions of O. 21, R. 19 (b), Civil P C., should first ascertain what amounts were due from each party to the other and thereafter allow execution to proceed for the difference, making such order as it deemed necessary for protecting the interests of the persons who had not joined in the application for execution. [P 154 C 1]

Amarendra Nath Bose and *Sarat Chandra Roy Chowdhury* — for Appellants.

Samatul Chandra Dutta and *Satish Chandra Mukerjee*—for Respondents.

Judgment.—This appeal arises out of an application for execution. It appears that a cosharer landlord brought a suit for rent against tenants 21 in number and made his cosharers parties to the suit. They were defendants 22 to 41. In the result there was a decree in favour of the plaintiff against defendants 1 to 21 for the sum of Rs. 76 10 karas and in favour of the pro forma defendants 22 to 41 against the same tenants, defendants 1 to 21, for the sum of Rs. 380 3 gandas and 2 karas. In the present proceedings

the pro forma defendants 34 to 38 have applied for execution in respect of a sum of Rs. 285 odd annas against defendants 7 to 14 or according to the Munsif, against 7 to 21. In this appeal in view of the provisions of O. 21, Rr. 15 and 19, two objections have been taken. It is contended in the first place that the applicants should have prayed for execution of the whole decree made in favour of the defendants 22 to 41, that is to say, for execution in respect of the sum of Rs. 380 odd annas. But as a matter of fact the sum in respect of which the respondents-decree holders have applied for execution represents, we are now informed, the whole balance of that decree now outstanding, credit having been given for a sum of Rs. 95 odd annas realized by execution on a previous application. This objection therefore necessarily fails. The second objection taken arises out of the fact that of the defendants against whom the decree has been made, defendants 1 to 14 hold a dual position. As defendants 1 to 14 they are tenants, and reckoned as pro forma defendants 28 to 41 they are cosharer landlords. The decree that has been made is in fact in favour of defendants 1 to 14 and 6 others and is also made against themselves and 7 others.

The result is that just as defendants 7 to 14 against whom execution is being taken and defendant 6 owe something to the executing decree-holder defendants 34 to 38 (who are also tenant defendants 1 to 5), so defendants 1 to 5, that is, the executing decree-holder defendants 34 to 38 also owe something under this decree to decree holder defendants 27 to 41, who are in fact also tenant defendants 6 to 14. It would seem therefore that under O. 21, R. 19 (b), both parties being entitled to recover sums of money each from the other, the respective amounts due from each to the other should first have been ascertained and execution thereafter proceeded for the difference, the Court under the provisions of O. 21, R. 15, making such order as it deemed necessary for protecting the interests of the persons who had not joined in the application. When the application goes back to the first Court the executing Court will take evidence and ascertain, if the parties are not agreed, what sum or share is in fact now payable under the decree by the executing decree-holders (defendants 34 to 38, otherwise defendants 1 to 5) to the other decree-holder defendants and after deducting that sum from the whole amount now due from defendants 1 to 21 will realize the balance so ascertained.

We now learn that the money claimed, Rs. 285 odd, has already been paid into Court. In that case the executing Court will proceed to apportion it among the decree holders on determination of their shares. With these observations we dismiss this appeal, and as we consider that the appellants-defendants 9 to 11 are substantially in the wrong, we direct that they do pay the costs of this appeal. We assess the hearing fee at two gold mohurs. The appeal having been disposed of, the connected Rule No. 49 of 1916 is discharged.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 154

FLETCHER AND NEWBOULD, JJ.

Muralidhar Roy and *others*—Plaintiffs—Appellants.

v.

Sasadhur Pal and *others*—Defendants—Respondents.

Appeals Nos. 1907 and 2169 of 1914, Decided on 31st July 1917, from appellate decrees of Addl. Dist. Judge, Dacca, D/- 17th April 1914.

Adverse possession—Landlord and tenant—Knowledge by landlord is necessary.

Before the possession of a tenant can become adverse to the landlord the latter must be proved to have had knowledge of such possession.

[P 155 C 1]

Sarat Chander Basak and *Hiramba Chandra Guha*—for Appellants

B. Chakraburtty and *Akhoy Kumar Banerjee*—for Respondents.

Fletcher, J.—These are two appeals preferred by the plaintiffs against a decision of the learned Additional District Judge of Dacca, dated 17th April 1914, affirming the decision of the Subordinate Judge of the same place. The plaintiffs sued to recover possession of a certain share in a number of villages which they had purchased. The defence was that the defendants held under a subordinate tenure at rent a which was not liable to enhancement. The lower Courts have accepted the story as to the tenure in respect of three villages. No question arises with respect to these villages. With regard to the other villages, the learned Judges in the Courts below held that there had been encroachments and that the claim of the land-

lords to recover possession was barred by limitation, on the ground that the tenant had acquired a limited interest by adverse possession. That is the only point that arises in these appeals. That the learned Judges found that there was a possession for more than 12 years is quite clear. The period is far in excess of 12 years. The only question is whether the Judges have found expressly or by necessary implication that that possession was known to the landlords for a period of more than 12 years. The view that the learned Judge of the lower appellate Court seems to have taken is that that period must have been for more than 12 years before 1891 because he was of opinion that after 1891, neither party could be said to be in peaceful possession.

I am not sure that that is not too favourable to the plaintiffs. However, that point has not been dealt with and therefore we must take it that the period of 12 years was prior to 1891, that the defendants had adverse possession of these other villages and that of that possession the plaintiffs were aware. It may be admitted at once that there is no express finding, although it is difficult to to see why the learned Judges in the Courts below had gone into this question with such labour and with such trouble and at such length if they intended to make an omission of such an important finding as to the question of the knowledge of the plaintiffs because it is abundantly clear to anybody that in a case like this, before the possession became adverse the plaintiffs had, or, at any rate must have had knowledge. Nothing turns on the point whether the learned Judge's remarks in his judgment about the tenure are not limited to three villages because no question would arise with respect to these three villages. But with regard to the other villages he says that this tenure was notoriously in existence. That means that in the district the matter was one of public notoriety that these defendants were in possession of these villages, and I take it that the evidence had disclosed facts from which the learned Judge drew the conclusion that the plaintiffs or their predecessors in-title were either residents of, or were connected with, the district and that these matters of public notoriety had come to the ears of the plaintiffs or their representatives. That is what I gather the learned Jugde means when he talks about the tenure being notoriously in existence, and when he taks about the ijara kabuliyat being registered. It is a matter of public notoriety that everybody in India knows everybody else's business. In a small place, everybody knows who is mortgaging his property from I think the general conversation which goes under the popular title guft, what his neighbours are doing and what deeds are being registered. If that is so the learned Judge was quite capable, being a resident and a Judge of the District, of knowing all these habits and he was entitled to come to the conclusion that from that time the plaintiffs' predecessor-in-title must have known of this adverse possession and therefore from that date—the date which he refers to—the period is far longer than 12 years, at any rate well in excess of 12 years before 1891. All the other material statements in the judgment point to the same conclusion. There are many other facts which the learned Judge has referred to in the course of his judgment which would point to the conclusion that the predecessor in-title of the plaintiffs knew for many years prior to 1891 of the possession of the defendants of these villages other than the three villages originally comprised in the Joor. On the whole, although I personally think that a matter like this can never be so satisfactory when it is to be drawn from certain statements instead of having a clear and straightforward finding, I do not think that in this case there can be any doubt that the learned Judge meant to find that this long possession of the defendants must have been known to the plaintiffs' predecessor-in-title for more than 12 years prior to 1891. I think therefore, that we ought not to interfere with judgment appealed against. The present appeals therefore fail and must be dismissed with costs. The respondents will not be allowed the costs of the documents that they have printed.

Newbould, J.—I agree.

V.B./R K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 156 (1)

FLETCHER AND SHAMSUL HUDA, JJ.

Jahiral Haque and *another*—Plaintiffs—Appellants.

v.

Sadar Ali and *another*—Defendants—Respondents.

Appeal No. 269 of 1917, Decided on 12th June 1918, from appellate decree of Sub-Judge, Chittagong, D/- 9th November 1916

Bengal Tenancy Act (1885), S. 153—Suit for rent not exceeding Rs. 100—No special appeal lies to High Court.

In a suit for rent where the amount claimed does not exceed Rs. 100, no special appeal lies to the High Court where the only question decided in the suit is whether the relation of landlord and tenant exists between the parties.

[P 156 C 2]

Dhirendra Lal Kastgir and *Tarakeswarnath Mitter*—for Appellants.

Charu Chander Sen—for Respondents.

FACTS will appear from the following extract from the judgment of the lower appellate Court. This appeal has been preferred by defendants 1 and 2 against the decree for rent passed against them and others, and the point for determination is whether the relationship of landlord and tenant subsisted between the appellants and the plaintiffs respondents. The Record of Rights (Ex. 6) shows that within Taraf Sambhu Ram and under the proprietors Rahamatali and others, defendant 1 and the father of defendant 2 and some other persons were recorded as tenants. There is no reliable evidence to prove that the rent lands appertained to Hissas Nos. 3 and 4 and that Rahamatali alone was entitled to get rent for the same from the appellants and others. The oral evidence which consists of the deposition of the plaintiffs' father cannot be relied upon, and there is no other evidence to corroborate him on the above points. In the Record of Rights, Rahamatali and others were mentioned as proprietors and I do not see how the expression can be construed as meaning Rahamatali and his brother and not Girish and others, who admittedly had shares in the Taraf. That rent was realized from defendants 1 and 2 by or on behalf of the plaintiffs and their alleged predecessor Rahamatali, is not proved by reliable evidence. The statement of the plaintiffs' father, who is interested in the result of the suit, cannot be believed without corroboration. There are no collection papers to support his deposition. Non-production of the alleged collection is not sufficiently accounted for.

The plaintiffs' father says that there are witnesses to prove realization of paddy by him from the defendants but none of them has been examined. It is not necessary to decide in the rent suit whether the wakfnama, under which the plaintiffs are alleged to have got the right of Rahamatali, is valid and whether it was acted upon. That Rahamatali alone was the landlord in respect of the rent lands is not proved by reliable evidence. The plaintiffs claim rent as Mutawalis but their names do not appear to have been registered as such. Defendant 1 and others purchased the shares of Girish and Nanda Lal in the Taraf under a registered Kobala (Ex. B). The C. S Plots, comprising the lands of the rent sued for, are covered by the above Kobala. It was not likely that defendant 1 paid rent to the plaintiffs for the above lands when he himself was one of the purchasers under the Kobala. For the above reasons I find that relationship of landlord and tenant between the plaintiffs-respondents and defendants-appellants is not proved by reliable evidence.

Judgment.—This appeal must be dismissed. No special appeal lies to this Court having regard to the provisions of S. 153, Ben. Ten. Act. The only question decided in the suit is, whether the relationship of landlord and tenant exists. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 156 (2)

FLETCHER, J.

Charles Walter George Cox — Petitioner.

v.

Emily Florence Cox— Opposite Party.

Misc. Suit No. 3 of 1910, Decided on 3rd June 1910.

(a) Divorce Act (4 of 1869), Ss. 7 and 11—Petition cannot be proceeded with if safeguards to prevent chance of connivance or collusion not observed.

A petitioner cannot be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion. [P 157 C 2]

(b) Divorce Act (4 of 1869), Ss. 7 and 11—Petition for dissolution of marriage—Inabi-

lity to discover name of co-respondent—Procedure laid down.

Where a petitioner for dissolution of marriage is unable to discover the name of the co-respondent he should apply to be excused from making him a party to the petition on motion to the Judge supported by an affidavit before the hearing of the petition. [P157 C 2]

(c) Divorce Act (4 of 1869), Ss. 7 and 11—Co-respondent not made party to dissolution of marriage — Citation ought not to be issued.

Where there is no corespondent to a petition for dissolution of marriage the Master ought not to issue citation to the respondent unless the Judge has granted leave to the petitioner to proceed without a co-respondent. [P 157 C 2]

A. N. Chaudhuri and *P. C. Mitter* — for Petitioner.

Avetoom and *A. C. Banerji*—for Opposite Party.

Judgment.—This is a petition presented to the Court by C. W. G. Cox for the dissolution of his marriage with the respondent E. F. Cox on the ground of adultery. To this petition there is no co-respondent. The adultery alleged in the petition is said to be proved by the admission contained in a letter dated the 31st January, written by the respondent and addressed to the petitioner, in which it is said that she admitted that in a weak moment she had committed adultery with a man who sympathises with her but whose name she will not give up. The other case of adultery alleged is in the month of December, when it is said the respondent on three occasions was visited in the petitioner's house by a man whose name the petitioner has been unable to discover. Now the petition was presented to the Court and the Master directed citations to issue to the respondent. In my opinion he was wholly wrong in doing that. However that may be, the jurisdiction is a special jurisdiction vested in the Court by the Indian Divorce Act to enable it to grant divorces in respect of persons professing the Christian religion and resident in India. The Act is chiefly modelled on the Matrimonial Causes Act of 1857. S. 7 is the first material section being placed under the heading "Jurisdiction," and it says:

"Subject to the provisions contained in this Act the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

The other section that is material in this case and which is substantially taken from S. 28, Matrimonial Causes Act 1857, is S. 11 which enacts:

"Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition unless he is excused from so doing on one of the following grounds to be allowed by the Court: (i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed; (ii) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it: (iii) that the alleged adulterer is dead,"

Now the rules in England which govern this application are Rr. 4, 5 and 6 of the Divorce Court Rules. R 4 provides:

"Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge ordinary shall otherwise direct. R. 5 says: Application for such direction is to be made to the Judge ordinary on motion founded on affidavit."

That it must be by affidavit shows obviously that the direction must be by application to the Judge on motion founded on affidavit before the hearing of the petition. Then R. 6 applies to the case where the address of the adulterer is unknown to the petitioner. It is obvious in this case that the direction ought to have been applied for on motion to the Judge supported by an affidavit and the affidavit ought to be sufficient to satisfy the Court that the petitioner, after having made reasonable endeavours has been unable to find the name of the co-respondent. It seems to me to be a matter of grave public importance that a person should not be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion. In my opinion the Master ought not to have issued the citation when the petition contained no co-respondent, unless the Judge had granted leave to the petitioner to proceed without a co-respondent. In my opinion, the Court has no jurisdiction to entertain the petition and that therefore the petition must be dismissed with costs to the respondent.

V.B./R.K. *Petition dismissed*

A. I. R. 1918 Calcutta 158 (1)

CHITTY AND SUHRAWARDY, JJ.

Ramesh Chandra Sen—Petitioner.

v.

Nijuddi Sheikh and others—Opposite Parties.

Criminal Revn. No. 135 of 1918, Decided on 1st March 1918.

Criminal P. C. (1898), S. 145—Magistrate refusing time for filing written statement and passing exparte final order—Order must be set aside.

In a proceeding under S. 145, Criminal P. C., the land in dispute was attached, and 16th January was fixed as the date of hearing. On that date the first party, who had not been served with notice until the 8th January, applied for time to file a written statement, but the application was refused and the case tried practically ex parte, with an order in favour of the second party;

Held: (1) that the proceedings were not conducted quite fairly to the first party, inasmuch as the land being under attachment there was no immediate prospect of a breach of the peace; (2) that the order of the Magistrate should be set aside and the case sent back to him for further inquiry and trial according to law.

[P 185 C 1]

Manmatha Nath Mukerjee and *Nakuleswar Mukerjee*—for Petitioner.

Surendra Kumar Roy—for Opposite Parties.

Judgment—In this case we do not think that the proceedings have been conducted quite fairly to the first party. The proceedings were drawn up on 29th December 1917, 16th January being fixed as the date of the hearing. By that order the land was attached. The first party was not served, at any rate, until 8th January, so that more than half the time which was fixed by the order drawing up the proceeding had elapsed before he got notice of it. On the 16th the Mukhtar for the first party applied for time for his client to file his written statement. That was refused and the case went practically ex parte except for the cross-examination of some of second party's witnesses by the Mukhtar. There was no immediate hurry in this matter, inasmuch as the land was under attachment and, therefore, there was no immediate prospect of a breach of the peace. It may be noted that the police report was in favour of possession of the first party: the order has given it to the second party. We think that the order should be set aside and the case sent back to the Magistrate for further enquiry and trial according to law.

V.B./R.K. *Case sent back.*

A. I. R. 1918 Calcutta 158 (2)

FLETCHER AND SHAMSUL HUDA, JJ.

Kirti Chandra Daw—Decree holder—Petitioner.

v.

Bepin Behari Pal Chaudhuri—Judgment-debtor—Opposite Party.

Civil Rule No. 207 of 1918, Decided on 21st May 1918, against the order of Sub. Judge, 2nd Court, Hooghly.

Execution—Before dismissal, notice to parties is necessary.

An execution case cannot be struck off or dismissed without giving notice to the parties.

The mere fact that an order dismissing an execution case was made without any notice to the decree holder is sufficient to set aside the order so passed. [P 185 C 2]

Sarat Kumar Mitter—for Petitioner.

Fletcher, J.—This Rule must be made absolute. The facts are these. The decree-holder petitioner obtained a decree for Rs. 30,000 in the Original Side of this Court. That decree was transmitted to the Court of the Subordinate Judge of Hooghly for execution. It is not necessary to go into the long and various proceedings that have taken place with reference to the execution of that decree. It is sufficient to say that in the end the properties of the judgment-debtors remained under attachment and, that being so, most of the judgment-debtors compromised the matter with the decree-holder and it was agreed that as regards their liabiiity the decree-holder should accept a certain sum in cash and, on the payment being made, their share should be released. It was also provided by the terms of the compromise that pending the the payment the attachment should continue. The compromise, however, did nct affect the shares of two of the Judgment-debtors, namely, one Bepin Behari Pal Chaudhury and another who had been adjudicated an insolvent; in fact, the compromise purported to keep alive the rights of the decree-holder as against these two shares. It is quite clear that the attachment subsists as against the shares which were left out. It may further be observed that the dismissal of the execution case on 14th January 1918 was made by the learned Subordinate judge without any notice to the decree-holder which, in any case, would be sufficient for setting aside the order so passed. A Judge cannot, without giving notice to the parties, strike off cases and dismiss

them in the manner the learned Judge has done in the present case. We, therefore, set aside the order of 14th January 1918 passed by the learned Subordinate Judge and all we need say at present is that the execution case be restored to the file.

Shamsul Huda, J.—I agree.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 159

TEUNON AND CHOWDHURY, JJ.

Beni Madhab Sarkar —Plaintiff—Appellant.

v.

Gobinda Chandra Sarkar and *others*—Defendants —Respondents.

Appeal No. 1446 of 1912, Decided on 28th March 1916, from Appellate Decree of 2nd Addl. Dist. Judge, 24 Perganahs, D/-23rd March 1912.

(a) HinduLaw— Partition—Suit for—All properties must be included — It cannot be treated as suit for immovable property and moveable property separately.

In a suit for partition of joint family properties it is very proper for the plaintiff to include in his plaint the whole of his claim, that is to say, the whole of the properties that are alleged by him to be the properties of the joint family, immovable properties, moveable properties and funds which according to him have resulted from the joint business carried on by members of the family on behalf of all. [P 159 C 2]

A suit for partition in which the plainttff asks for separate possession of his share of the joint property cannot be treated as a suit for recovery of possession of immovable property and a suit for recovery of possession of moveable property so that the plaintiff cannot be put to his election as regards his claim in respect of moveable properties and his claim in respect of immovables. [P 159 C 2]

(b) Court Fees Act (1870), Ss. 7, 11 and Sch. 2, Cl. 17– Partition suit—Proper fee is Rs. 10—Suit including claim for accounts of joint family business—Plaintiff is entitled to put approximate value upon claim — Procedure to be followed if Court-fee is found insufficient after investigation is given in S. 11 of Act.

The Court-fee properly payable on a plaint in a partition suit is Rs. 10 and where the suit includes also a claim for accounts in order to ascertain the amount of joint funds resulting from a jofnt family business, the plaintiff is entitled under S. 7. Court Fees Act, to put an approximate value upon his claim in that matter, and should it turn out in investigation that the Court-fee is insufficient, the course to be pursued is that laid down in S. 11, Court FeesAct. [P 159 C 2]

Monmotho Nath Mukerjee and *Satindra Nath Mukerjee*—for Appellant.

Prokash Chandra Mazoomdar and *Mon Mohun Bose*—for Respondents.

Judgment.—This is an appeal against the decree of the District Judge of Alipur rejecting a plaint on the ground that the plaintiff had failed to comply with an order of the Court requiring him to supply the requisite stamp paper or Court-fees. The appeal also involves the question of the propriety of an order putting the plaintiff to his election as regards his claim in respect of movable properties and his claim in respect of immovables. On both these questions we are of opinion that the Courts below have fallen into error, and the error is obviously due to the fact that they have treated this suit as a suit for recovery of possession of immovable property and a suit for recovery of possession of moveable property. It is not a suit for recovery of possession. We have examined the plaint and we find that it is clerly a suit for partition, and in his plaint the plaintiff has very properly included the whole of his claim, that is to say, the whole of the properties which are alleged by him to be the properties of the joint family, ime movable properties, moveable properties and funds which according to him have resulted from the joint business carried on by members cf the family on behalf of all.

On this plaint the plaintiff paid a Court-fee of Rs. 10, and in respect of his claim for accounts in order to ascertain the amount of joint funds resulting from the business he has paid the sum of Rs. 7-8 as. on his approximate valuation of Rs. 100. It is settled law that under Sch. 2, Art. 17, Cl. 6, Court-Fees Act, a Court fee of Rs. 10 is the fee properly payable on a plaint in a partition suit. In respect of his claim for account it is clear that under S. 7, Court-fees Act the plaintiff is entitled to put an approximate value upon his claim in that matter, and should it turn out on investigation that that Court-fee is insufficient, the course to be pursued is laid down in S. 11, Court Fees Act. For these reasons we decree this appeal. We hold that the Court fee paid is sufficient, that the plaintiff should not be put to any election in respect of his claim for moveable or immovable properties, and we remand the suit to the first Court in order that it may be tried and determined on the merits. As regards the costs of this hearing, we direct that the costs be paid by the defendants. We assess the hearing

fee at five gold mohurs. The costs in the Courts below will abide the result.

V.B./R.K. *Appeal decreed.*

A. I. R. 1918 Calcutta 160

CHATTERJEA AND GREAVES, JJ.

Monmohan Panday and *others*—Defendants—Appellants.

v.

Bidhu Bhusan Ray Chowdhury and *others*—Plaintiffs—Respondents.

Appeal No. 102 of 1915, Decided on 22nd March 1918, against original decree of Sub-Judge, First Court, 24-Parganas D/- 14th January 1915.

(a) Civil P. C. (5 of 1908), O. 30, R. 4—Order applies only to suit brought in name of firm.

Order 30, R. 4, applies only to a case where the suit is brought in the name of the firm.

(b) Civil P. C. (5 of 1908), O. 22, R. 4 and O. 30, R. 4—Suit decided in favour of persons described as proprietors of firm—Appeal — One of plaintiffs dying — Representative not brought on record — Decree being in favour of plaintiffs jointly, appeal abates.

In a suit where the description of the plaintiffs as given in the plaint was "the proprietors and maliks" of a firm and then the names of the plaintiffs were mentioned, the Court below gave a decree to the plaintiffs and in the decree one *B.* and other persons were described as the plaintiffs without the addition of the words that they were maliks of the firm. After an appeal from the decree had been filed by defendant one of the plaintiffs-respondents died, but his legal representatives were not brought on the record within the time allowed by law:

Held: that the decree being in favour of the plaintiffs jointly, the appeal could not proceed in the absence of the legal representatives of the deceased plaintiff-respondent. [P 161 C 1]

Haraprasad Chatterjee and *Mritunjoy Chatterjee*—for Appellants.

Sarat Chandra Basak, *Jatindra Mohan Ghose* and *Sib Chander Palit*—for Respondents.

Chatterjea, J.—We think that the preliminary objection taken to the hearing of the appeal must prevail. The appeal arises out of a suit to recover money on a hatchitta executed by two persons, named Upendra Nath Banerjee and another, as managing partners of the "Calcutta Hosiery" in favour of Ray Chowdhury and brothers. The suit was instituted, however, by Bidhu Bhusan and several other persons as plaintiffs. In the plaint the description of the plaintiffs was—The proprietors and maliks of the firm styled: Ray Chowdhury brothers," and then the names of the plaintiffs were mentioned. The Court below gave a decree to the plaintiffs and in the decree the names of Bidhu Bhusan and other persons were described as the plaintiffs without the addition of the words that they were maliks of the firm of Ray Chowdhury Brothers. After the appeal had been filed in this Court, one of the plaintiffs, Dakhina Ranjan, died and his legal representatives were not substituted within the time allowed by law. It appears that an application was made out of time and that a Rule was issued to show cause why the substitution should not be made though out of time. The Rule, however, was discharged, the result being that the appeal was dismissed as against one of the plaintiffs, the deceased Dakhina Ranjan

Now, the decree being in favour of six plaintiffs jointly, the appeal, cannot proceed in the absence of the legal representatives of one of them. The learned pleader for the defendants-appellants refers to O. 30, R. 4, which lays down that notwithstanding anything contained in S. 45, Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. It is contended that the suit was really instituted in the name of the firm of Ray Chowdhury Brothers. We are unable, however, to take that view. The suit was brought in the names of the particular individuals who were described as plaintiffs, and not in the name of the firm, and this is made clear by the decree that was passed in the case. In the case of *Ram Narain Nursing Dass* v. *Ram Chunder Jankee Loll* (1), in a suit by surviving partners for the recovery of a partnership debt which became due during the life of a deceased partner, the representatives of such deceased partner, having regard to S. 45, Contract Act (9 of 1872), were held to be necessary parties.

The title of the suit was—Issur Dass and Jugarnath, surviving partners of Nursing Dass deceased who carry on business in 99, Cross Street. Calcutta in the name and style of Ram Narain Nursing Dass. . .That appears to be a stronger case than the present. O. 30, R. 4, does not help the appellants, as that rule applies

1. (1891) 18 Cal 86.

only to a case where the suit is brought in the name of the firm. But even if we are to hold that the appeal can proceed in the absence of the representatives of the deceased plaintiff, we do not think that there would be any benefit to the appellants because the representatives of the deceased plaintiffs can apply for execution of the entire decree against the defendants as the decree in their favour cannot be touched by us. Under the circumstances, we think that the appeal must fail and is accordingly dismissed with costs, two gold mohurs, to Dr. Basak's clients. The Deputy Registrar's costs have already been deposited.

Greaves, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 161

FLETCHER AND NEWBOULD, JJ.

Benodini Debya and *others*—Appellants.

v.

Hridoy Nath Ghoshal and *others*—Respondents.

Appeals Nos 210 and 347 of 1915, Decided on 17th May 1917, from original decrees of Dist. Judge, 24 Pergannas, D/- 10th May 1915.

Probate—Delay in applying for probate (17 years)—Will is capable of being proved—Careful investigation is demanded.

Although a will propounded a long time after the death of the testator must give rise to a case in which the Court is bound to scrutinize the evidence very carefully, there is no rule of the law of evidence that a will propounded so late, is incapable of being proved. [P 162 C 2]

Where an application for Probate of a will was made 17 years after the death of the testatrix who was an illiterate Hindu lady.

Held : that the prior history of the case was not unworthy of considertation and that the case demanded a careful investigation by the Court. [P 161 C 2]

Manmatho Nath Mukherjee, Jogendra Nath Mukherjee, Nand Gopal Banerjee and *Panna Lal Chatterjee*—for Appellant.

Surendra Chandra Sen, Jotindra Nath Bose and *Surendra Nath Bose*—for Respondents.

Judgment.—These two appeals are preferred by the objectors in a Probate application. The respondents in the present appeal who is a daughter's son of a deceased Hindu lady Harasundari Debi propounded a document dated 24th July 1896 as the last will of Harasundari. The grant of Probate was opposed by the first appellant Benodini Debya who is the widow of the only son of Hara Sundari and also by the second appellant who is a mortgagee. The case put forward was that Hara Sundari made this will on 24th July 1896 and died in the year 1896 or 1897, the state of affairs was that she had three daughters and one son Hari Das. Hari Das died on 28th November 1913 and the will was not put forwrad for proof until after his death. The case was clearly one demanding careful investigation having regard, amongst other reasons, to the long time which elapsed between the death of the testatrix and the date on which the document was put forward for Probate and also because Hara Sundari was an illiterate Hindu lady, the case would have to be carefully scrutinized. On that footing the prior history is not unworthy of consideration in this case. I think that if the will was made there could be little doubt that it was made because the only son of the deceased Hara Sundari was of loose morals and addicted to dissolute and drunken habits. The evidence seems to show that he had early in his career disposed of two gardens or garden houses for the purpose of satisfying his pleasures in these ways. There seems to be no doubt that this property formed the subject of a deed of gift that was given by Hari Das to his mother Hara Sundari and the reason of that deed of gift was to preserve a certain portion of the estate which was the property of Hari Das from being wasted and spent by Hari Das. The case would, therefore, be that unless this lady Hara Sundari had left a will, in the ordinary course, the property would go back to her son Hari Das and the deed of gift would have been presumably a useless transaction.

Now in a case like this the Judge had before him. in the primary Court direct evidence proving the preparation and execution of the will. It is quite true that that evidence is not without certain discrepancies. But the learned Judge having seen the witnesses and heard them give their evidence and observed their demeanour, has come to the conclusion that these witnesses are witnesses of credit. That is the first point that arises on the present appeal. What has the learned vakil in support of the appeal been able to place before us to lead us to come to a different conclusion with regard to these witnesses from that of the learned Judge who was these in the witness-box

give their evidence? He has been able to suggest nothing except that the case was one for careful scrutiny and inquiry which it clearly was. But the learned Judge had to come to a conclusion one way or the other. After careful inquiry and having heard the witnesses on both sides, he came to the conclusion that these witnesses are witnesses of credit. Nothing has been shown to us which would entitle us to come to a different conclusion from that of the learned Judge in the Court below.

The witness to whom the learned Judge paid considerable attention was a Brahmin witness named Shamapada Chatterjee who had reached the mature age of 80 years and retired to the city of Benares with a person who is called in the evidence either his relative or pseudo relative. The case put forward by the learned vakil for the appellant which he states on his own knowledge is that many people retire to Benares for some indirect reason or other, that they go there because they may more easily marry their family or for some similar reason. Making every allowance for the personal knowledge of the learned gentleman, a Hindu of the mature age of 80 years, would not ordinarily have unmarried children, none of this witness's family went to Benares with him except that woman who cooks his meal and who is described as a relative or pseudo relative. The relationship between them appears from the evidence to be a slender one. The line of cross examination of this witness as to his relationship with this relative, seems to suggest that some more tender relationship existed between these two persons than what the witness was willing to disclose. That may or may not be so. That is no reason for disbelieving this man. Then it is said that his memory improved as he went through this long and tedious examination and cross examination before the Commissioners. Well his memory did improve. But it is not unnatural if we find that on the 19th day from the commencement of his examination he was able to repeat the contents of the will by heart. I expect that not only he but also every pleader and commissioner would have known the contents of the will by that time. The evidence of this witness seems to be substantially in accord with the evidence of the witnesses who appeared before the learned Judge and whom the learned Judge believed. On the other hand, against this avidence which the learned Judge has believed, there is nothing except the witnesses who stated that they did not hear anything of the will.

The second point put forward against these witnesses is that if their evidence is true why such a long period elapsed between the death of Hara Sundari and the propounding of the will. There seems to be many reasons for this, one of them being that wills in this country sometimes, I do not say always, are not propounded until it becomes necessary to propound them. Avoidance of probate duty is in some cases sufficient reason for keeping the will back until there is a strong reason for putting forward. Although a will put forward so late as this one, must give rise to a case in which the Court is bound to scrutinize the evidence very carefully, there is no rule of the law of evidence that a will propounded 17 years after the death of the testatrix, is incapable of being proved. Nothing has been shown to us in this case which would entitle us to displace the finding of fact made by the learned Judge in the Court below on the evidence of the attesting witnesses whom he saw give their evidence before him. He came to the conclusion on that testimony that this lady Hara Sundari did in fact execute the will. That being so, we must accept that the document in fact was the last will of Hara Sundari. That being so, the present appeals fail and must be dismissed with costs. We assess the hearing fee in these two appeals at Rs. 250.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 162

FLETCHER AND SHAMSUL HUDA, JJ.

Maharaj Bahadur Singh—Plaintiff—Appellant.

v.

Bhagawan Das—Defendant—Respondent.

Appeal No. 773 of 1916, Decided on 20th April 1918, from appellate decree of Dist. Judge, Birbhum, D/- 28th January 1916.

Bengal Tenancy Act (1885) Ss. 102 (dd) and 106—Suit to amend Record of Rights—Dispute between two neighbouring proprietors—Question for determination is which of proprietors was in possession at date of final publication of Record of Rights.

In a suit under the provisions of S. 106, Ben. Ten. Act, to amend a Record of Rights, in which the dispute is between two neigh bouring proprietors, and which comes within the provisions of S. 102 (dd), the only question between

those rival proprietors that can be gone into, is the question as to which of them was in possession of the land in question at the date of the final publication of the Record of Rights.

[P 163 C 1]

Bepin Behari Ghose II and *Urukram Das Chuckrabartty*—for Appellant.

Judgment.—This is an appeal by the plaintiff against the decision of the learned District Judge of Birbhum, dated 28th January 1916, reversing the decision of the Subordinate Judge of the same place. The plaintiff brought the suit under the provisions of S. 106 Ben. Ten. Act, to amend a Record of Rights. The dispute in this case is a 'dispute between two neighbouring proprietors and, therefore, the case comes within the provisions of S. 102 (dd). The learned District Judge in this case has considered that having regard to the authorities in this Court, the only question between these rival proprietors that he can go into in a suit instituted under the provisions of S. 106, Ben. Ten. Act, is the question as to which of these two rival proprietors was in possession of the land in question at the date of the final publication of the Record of Rights. I think that the authorities in this Court do establish that. I have authorities beginning with the decision of Woodroffe J. and Coxe, J. reported as *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1), and that decision is followed by the cases reported as *Kali Sundari* v. *Girija Sankar* (2), *Ramchandra Bhanj Deo* v. *Nanda Nandanananda Deb* (3) and *Pran Krishna Saha* v. *Trailakhya Nath Chowdhury* (4). We are bound by these authorities and we content ourselves by simply saying that following those decisions the present appeal fails and must be dismissed with costs.

V.B./R K. *Appeal dismissed.*

1. (1908) 12 C W N 8.
2. (1911) 11 I C 184.
3. A I R 1914 Cal 191=20 I C 298.
4. (1915) 27 I C 883.

A. I. R. 1918 Calcutta 163

WOODROFFE AND SMITHER, JJ.

Tarakanta Das Chowdury and *others*—Appellants.

v.

Gopal Chandra Sil—Respondent.

Appeal No. 1311 of 1916, Decided on 24th April 1918, from appellate decree of Sub-Judge, Faridpur, D/- 30th March 1916.

Landlord and Tenant—Tenancy not kaemi mukarrari or agricultural and created before Transfer of Property Act is not transferable.

A tenancy created before the Transfer of Property Act was passed which is not kaemi mukarrari and which is not for agricultural purposes, cannot be transferred except under a custom of transferability. [P 163 C 2]

Dwarka Nath Chakrabutty and *Gopal Chandra Das*—for Appellants.

Dhirendra Lal Kastagir and *Tarkeswar Nath Mitter*—for Respondent.

Judgment.—We are unable to dispose of this appeal upon the judgment as it now stands. Accepting the finding that the tenancy was not for agricultural purposes, we must know whether the tenancy as described in the plaint was created before or after the Transfer of Property Act was passed. It is true that the Judge says that the holding was created some time before the Transfer of Property Act was passed, but it is argued that this refers to the original tenancy and that the plaintiff's case is that a new tenancy was created by the kabuliyat mentioned in para. 2 of the plaint. This is denied and it must, therefore, be clearly found whether the defendants are holding under the original tenancy of a date prior to the Transfer of Property Act or under a new tenancy created after the Act. The contention of the defendant in his written statement was that it was an old tenancy which dates back to the days of the Permanent Settlement, and his argument before us has been that para. 2 of the plaint indicates that the tenancy in respect of which the suit is brought, was created by a kabuliyat dated 16th March 1314 B. S. That is after the passing of the Transfer of Property Act. On the other hand. the learned vakil for the plaintiffs appellants says that it is not meant by that allegation to say that the tenancy was created by that kabuliyat. This is a matter in which, we think, an enquiry should be made. If the tenancy as described in the plaint, was created before the Transfer of Property Act, it would not be transferable unless the custom of transferability is proved. On the other hand, if it was created after the Transfer of Property Act, then the tenancy is transferable. Further it has been alleged by the defendant that he holds the land as mukarrari. As regards this the Subordinate Judge says:

"It is not necessary to find now whether the holding is permanent or at fixed rent."

It is necessary, however, to determine whether the tenancy is a kaemi mukarrari, because if it were kaemi mukarrari, then the tenancy would be transferable. If, on the other hand, it is not kaemi mukarrari, then the other matters to which we have alluded will have to be considered. The case must, therefore, go back to the Subordinate Judge for a determination upon the issues set out in our judgment. The appeal will remain on the file of this Court and on arrival of the findings from the Court below, it will again be placed on board for final disposal.

V.B./R.K. *Case sent back.*

A. I. R. 1918 Calcutta 164 (1)

MOOKERJEE AND BEACHCROFT, JJ.

Pitambar Dhal and *another*—Plaintiffs—Appellants.

v.

Baidya Nath Sit and *others*—Defendants—Respondents.

Appeal No. 81 of 1917, Decided on 24th August 1917, from order of Sub-Judge, 3rd Court, Midnapc D/- 9th December 1916.

Civil P. C. (1908), O. 9, Rr. 4 and 9—Dismissal under R. 4—Rejection of application to restore case—Appeal does not lie.

Under O. 43, R. 1, Cl. (c), an appeal lies against an order refusing to set aside the dismissal of a suit under O. 9, R. 9, but no appeal lies against an order refusing to set aside the dismissal of a suit under O. 9, R. 4. [P 164 C 1,2]

Sitaram Banerjee—for Appellants.

Santosh Kumar Pal—for Respondents.

Judgment.—The preliminary objection, taken to the competency of this appeal, is well-founded and must prevail. The appellants instituted a suit in forma pauperis. On the day fixed for trial when the suit was called on, neither the plaintiffs nor the defendants entered appearance. The result was that the suit was dismissed under R. 3, O. 9 of the Code, which provides that where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. The plaintiffs thereupon applied for an order to set the dismissal aside. This application was made under O. 9, R. 4, and was dismissed on the merits. Against the order of dismissal the present appeal has been preferred. O. 43, R. 1, Cl. (c), shows that an appeal lies against an order under R. 9, O. 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. R. 9 applies to cases under R. 8, that is, cases where the defendant appears and the plaintiff does not appear and the suit is accordingly dismissed for default. The Code distinguishes between cases where neither party appears and cases where the plaintiff is absent and the defendant appears. These are the two classes of cases contemplated by Rr. 3 and 8 respectively, and the applications for restoration are made under Rr. 4 and 9. It is worthy of note that whereas an appeal is allowed against an order refusing to set aside a dismissal of a suit under R. 9, no appeal is allowed against an order refusing to set aside a dismissal of a suit under R. 4. The present case is covered, not by R. 9, but by R. 4. The appeal is dismissed with costs. We assess the hearing fee at one gold mohur.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 164 (2)

SANDERSON, C. J. AND MOOKERJEE, J.

Mahomed Reajuddin Ahmad—Plaintiff—Appellant.

v.

Basuda Sundari Dasi and *others*—Defendants—Respondents.

Letters Patent Appeal No. 51 of 1914, Decided on 18th May 1916, against decision of Mullick, J., D/- 8th April 1914.

Landlord and Tenant—Permanent lease—Landlord granting permanent and heritable tenure—No estate is left in him unless right of re entry is reserved—Right of re-entry held not reserved.

When a landlord grants a permanent and heritable tenure in land, he has no estate left in him, unless he reserves to himself a right of re-entry or reversion. [P 165 C 1]

Where one of the clauses of a lease was as follows: "If the said land and bari be not used for dwelling purposes the right under the pattah shall be void."

Held: that the clause did not amount to a reservation of a right of re-entry. [P 165 C 1]

Jyotis Chandra Hazra—for Appellant.

Brojendra Nath Chatterjee—for Respondents.

Sanderson, C. J.—In my judgment this appeal should be dismissed. The question really depends upon the construction which is to be put upon the lease of 19th March 1879. The learned vakil who has argued this case for the appellant admits tnat the tenure which was thereby created is a permanent and heritable tenure, and, therefore, it would come within the passage to which I drew

his attention just now, in the case of *Nil Madhab Sikdar* v. *Narattam Sikdar* (1). The passage is at p. 828 and is as follows:

"Moreover, it seems doubtful whether, when a landlord grants a permanent and heritable tenure in land, he has any estate left in him, unless he reserves to himself a right of re-entry or reversion; for it has been held in the case of *Sonet Kooer* v. *Himmut Bahadoor* (2) that in the case of the grant of an absoute hereditary mokurrari tenure it will, on failure of heirs of the lessee, escheat to the Crown, and will not revert to the original grantor or his heirs."

It is said by the learned vakil that in the present case the landlord reserved to himself a right of re-entry, because he says the passage is:

"God forbid, if the said land and bari be not used for dwelling purposes the right under the pattah shall be void."

I doubt very much whether that should be construed to be a reservation of the right of re-entry by the landlord. It does not say so in so many words, and the form in which the right of re-entry is usually inserted is well known, and it might have been inserted if it was intended. But even assuming that it does amount to a right of re-entry, upon what does that right depend? The passage which, it is now clear, has been correctly and accurately translated is this:

"If the said land and bari be not used for dwelling purposes the right under the pattah shall be void."

The learned vakil wants us to put a construction upon that sentence in this way: "if the said land and bari be not used for dwelling purposes by us," or I suppose "by our sons, grandsons and so on," "then the right, etc." I do not think that that is the correct interpretation to be put upon that part of the lease, and I do not think that it should be limited in the way, which is contended. Therefore, even if it does amount to a reservation of the right of re-entry on the part of the landlord, the condition upon which it was based has not arisen. The tenure being a permanent one and also a heritable one was capable of assignment, unless there were words clearly and distinctly limiting that right of assignment, and clearly giving the landlord a right of re-entry on the alienation. I do not find that in the document. For these reasons, I think that the judgment of Mullick, J., based as it was upon the same reasons which I have just now enunciated, is correct and, therefore, this appeal must be dismissed with costs.

1. (1890) 17 Cal 826.
2. (1875-76) 1 Cal 391=3 I A 92 (P C).

Mookerjee, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 165

FLETCHER AND SHAMSUL HUDA, JJ.

Haripada Sadhukhan — Defendant—Appellant.

v.

Anath Nath Dey and *others*—Plaintiffs—Respondents.

Appeal No. 352 of 1915, Decided on 16th January 1918, from original decree of Sub-Judge, Howrah, D/- 6th May 1915.

(a) Transfer of Property Act (1882), S. 70—Immovable property—Hypothecation of immovable property fixtures pass to mortgagee.

Where immovable property is hypothecated the fixtures pass to the mortgagee. The rule in this respect as between landlord and tenant does not apply as between mortgagor and mortgagee. [P 166 C 1]

(b) Contract Act (1872), S. 172 — Loose chattels may be hypothecated without transferring their possession—Intention to create security is test.

The method provided by S. 172, for the hypothecation of loose chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether there was an intention to create a security and if there was an intention to create a security, equity gives effect to it. [P 166 C 1]

(c) Registration Act (1908), S. 17—Letter from mortgagor to equitable mortgagee showing object of mortgage does not require registration.

A letter addressed by the mortgagor of an equitable mortgage to the mortgagee, showing for what purpose he has deposited the title deeds, is not a document requiring registration under the provisions of the Registration Act as a mortgage. [P 166 C 2]

Dwarka Nath Chackerbutty and *Kali Kinkar Chackerbutty*—for Appellant.

Mohendra Nath Roy and *Ramani Mohan Chatterjee*—for Respondents.

Fletcher, J.—This is an appeal by defendant 2 against the decision of the learned Subordinate Judge of Howrah dated 6th May 1915. The action was brought by the plaintiff for the purpose of enforcing an enquitable mortgage on certain moveable and immovable properties comprised in an indenture of conveyance executed in favour of defendant 1. Defendant 2 is an attaching creditor of defendant 1, and he says that the property in suit is not subject to any equitable mortgage as stated by the plaintiff. The learned Judge in the Court below decreed the suit in favour of the plaintiff

and hence the present appeal. The learned Judge in the Court below has found that the deposit as mentioned by the plaintiff was, in fact, made. It was evidenced by a letter, dated 20th November 1913, signed by defendant, and it is not denied that the deposit did, in fact, take place within the limit of the Presidency town. Therefore, as regards the immovable property, the security could be created in that manner as provided by S. 59, T. P. Act. This appeal has been argued solely with regard to the moveable property that is mentioned in the conveyance to defendant 1. The moveable property consists of plant and machinery, both fixed and unfixed. As regards the fixed machinry, the law is well established that between the mortgagor and the mortgagee that passes by the mortgage.

The rule as between landlord and tenant does not apply between the mortgagor and mortgagee and the fixtures pass to the mortgagee. That rule has been established for many years. As regards the loose chattels, the case stands differently. It has been argued in the present appeal that the law in British India does not permit of a hypothecation of loose chattels except in the method provided by S. 172, Contract Act; that is, the only security that is permitted on loose chattels is the contract of pawn where the possession of the goods is transferred to the pownee. That is clearly not so. The Contract Act does not state that the whole of the law of the contract in British India is comprised in the Act. In fact, the preamble of the Act shows clearly that the Act only contains a portion of the law of contract applicable in British India and there is nothing to prevent a person from hypothecating his goods to another person for security. The ordinary principles of equity apply in such cases, namely, the question becomes whether there was an intention to create a security and if there was an intention to create a security, equity gives effect to it. It is quite clear that in a case like this, it is impossible to hold, where a large body of the community is engaged in commercial pursuits—say, where a thousand tons of coal or a large parcel of goods is concerned, that the banker is bound to take actual possession of the property. That contention obviously has no force. That is the first point that has been raised. It is quite clear that there is nothing to prevent a security of this nature.

The second point is that the letter, dated 20th November 1913, is a document of title requiring registration under the provisions of the Registration Act. Quite clearly, it is not a document of title. It does not profess to be a document of title, it professes to be a letter addressed by defendant 1 to the plaintiff showing for what purpose he had deposited the document with the plaintiff. That is merely evidentiary to the purposes for which the deposit was made. That clearly is not a document requiring registration under the provisions of the Registration Act as being a mortgage. The next point is, as I have already stated, that no security is recognised on chattels except as provided by S. 172, Contract Act. That is not so, as already remarked. The last point is as to the form of the decree. It is agreed between the parties that the decree made herein does not cast any personal liability on defendant 2 to pay the money found due on the mortgage. The appeal is dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 166

FLETCHER AND SHAMSUL HUDA, JJ.

Rajani Kanta Roy—Defendant—Appellant.

v.

Manmatha Nath Nandi and *others*—Plaintiffs—Respondents.

Appeal No. 1122 of 1916, Decided on 15th April 1918, from appellate decree of Sub-Judge, 1st Court, Hooghly, D/- 23rd January 1915.

Guardians and Wards Act (1890), S. 29—Mortgage without leave — Subsequent sale with permission—Purchaser is not affected by mortgage—Guardian is personally liable.

Plaintiff obtained a mortgage of a minor's property from his certificated guardian without the sanction of the Court. The money lent by the mortgagee was spent by the guardian for the minor's benefit. The property was subsequently sold by the guardian to the defendant with the sanction of the Court. Plaintiff sued the purchaser and the guardian to enforce the mortgage:

Held: (1) that the property passed to the purchaser unaffected by the inchoate right of the plaintiff.

(2) that the proper decree to be given to the plaintiff was that the mortgage money was liable to be repaid personally by the guardian.

[P 167 C 1]

Manmatha Nath Roy—for Appellant.

Manmatha Nath Ganguly—for Respondents.

Judgment.—This is an appeal by defendant 3 from decision of the learned Subordinate Judge of Hoogly reversing the decision of the Munsif of Howrah. The plaintiff brought the suit to enforce a mortgage. The mortgage was given by defendant 2 acting on behalf of her minor sons, of whom she was the certificated guardian. The sanction of the Court was not however obtained under the provisions of S. 29, Guardians and Wards Act. Defendant 3, who is the appellant, subsequently purchased the mortgaged property from the guardian mother acting on behalf of the minors and the sanction of the Court was obtained to that sale. Therefore, under the provisions of the law, that property properly passed to defendant 3. It is said now that as the mother properly spent the money that she borrowed on the mortgage for the benefit of the minors and as the minors were benefited therefore the purchaser who has got a regular and complete title in the way provided for by the law took subject to this inchoate right of the plaintiff. Nothing of the sort. The case in *Hem Chandra Sarkar* v. *Lalit Mohan Kar* (1) does not lay down any such proposition at all.

That case is against the view put forward by the plaintiff and, when properly read, it is an authority in favour of the appellant. The correct decree in this case is clearly the one that was passed by the Munsif, that the money is liable to be repaid to the mortgagee by the mother personally. One cannot have a good mortgage on a property when the law says that certain formalities should be observed and those formalities have not been observed. To hold otherwise is to give the go-by to the provisions of the law. Then it is said that the sale to defendant 3 is voidable unless the minor has elected to confirm the transaction. There are two answers to that. First, the subsequent election of the minor cannot affect defendant 3 whose title has probably matured in the meantime. Secondly, the minor at the time of the suit was still a minor and obviously could not make any such election. The decree of the learned Subordinate Judge must be set aside and the decree of the Munsif restored with costs both here and in the lower appellate Court.

1. (1912) 14 I C 515.

V.B./R.K. *Decree set aside.*

A. I. R. 1918 Calcutta 167

TEUNON AND NEWBOULD, JJ.

Corporation of Calcutta—Plaintiff—Petitioner.

v.

Hemangini Dassi and *others*—Defendants—Opposite Parties.

Rule No. 686 of 1917, Decided on 25th January 1918, against the order of Small Cause Court Judge, Sealdah, in Suit No. 1202 of 1917.

Calcutta Municipal Act (1899), Ss. 299 and 593—Service of notice on one of several co-owners is effectual against others.

The service of a notice under S. 299 upon one of the co-owners of the property in the manner provided in S. 593 is effectual against the other co-owners. [P 168 C 1]

Dwarkanath Mitter—for Petitioner.

S. N. Banerjee and *Probodh Kumar Das*—for Opposite Party.

Judgment.—In this case the petitioner is the Chairman of the Calcutta Corporation. He sued in the Small Cause Court at Sealdah to recover the sum of Rs. 325, being the cost of certain work done by him upon premises No 45, Karaya Bazar Road, under the provisions of S. 597 (2), Calcutta Municipal Act. The defendants in the suit were the two co-owners who hold, it appears, equal undivided shares in the property in question. One of those did not appear. The second appeared and pleaded that there had been no service upon her of the notice issued under the provisions of S. 299 of the Act. The learned Small Cause Court Judge gave effect to this contention and dismissed the suit as against her and decreed the suit against defendant 1, upon whom notice had been admittedly served, to the extent of half the claim. Thereupon at the instance of the Chairman of the Corporation this rule was issued upon both the defendants calling upon them to show cause why the claim of the plaintiff should not be decreed in full against both. As in the Court below, defendant 1 does not appear. Defendant 2 appears and contends, first, that it has not been shown that there is a municipal drain situated at a distance not exceeding 100 feet from the property, secondly, that it has not been shown that to the issue of this notice the Chairman had obtained the approval of the General

Committee: and lastly, that no attempt had been made to serve the prescribed notice upon her in the manner provided in S. 593.

It is not contested that the work has not been done and it is not suggested that the claim made is unreasonable. With regard to the first two contentions, apart from any presumption that might possibly arise from the failure on the part of the owners to prefer any objection under the provisions of S. 598 of the Act, it does not appear that these matters were in fact specifically pleaded in the written statement, and it is clear from the manner in which the case was conducted in the trial Court that they were not put in issue in that Court. It is too late for the defendant to raise those questions now. With regard to the service of notice we find that as a matter of fact the notice addressed to the owner of the premises has been served upon the co-owner defendant 1, by delivery to a male member of her family. The provisions of the section to which we have just referred make it necessary for the Corporation in any such notice to name the owner, and the section further provides that when there are more owners than one, service may be effected upon any one of them It would rather appear that the learned Small Cause Court Judge had overlooked the provisions of this section, and service, upon one being effectual against the other it is clear that against both the defendants there should be a decree in full. We accordingly make this rule absolute and allow the plaintiff's claim in full against both the defendants with costs of the first Court against both and also the costs of this rule against No. 2. We assess the hearing fee at three gold mohurs.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 168

SANDERSON, C. J. AND CHATTERJEA, J.

Gopal Chandra Das—Plaintiff—Appellant.

v.

Nadir Chand Das and *others*—Defendant—Respondents.

Letters Patent Appeal No. 111 of 1916, Decided on 15th March 1917, against decree of Newbould, J., D/- 18th April 1916.

Civil P. C. (1908), O. 41, Rr. 22 and 33—Appellate Court cannot reverse decision of trial Court in appellant's favour in absence of cross-objection.

Plaintiff's suit partially decreed. On appeal by the defendants, the appellate Court not only dismissed the appeal but reversed that portion of the trial Courts's decree which was in favour of the defendants, although the plaintiff had not filed any cross-appeal or taken any cross-objectin under O. 41, R. 22.

Held: that the circumstances of the case did not justify the lower appellate Court in interfering with the trial Court's decree in favour of the defendants under O. 41, R. 33. [P 169 C 2]

Sarat Chandra Bysak and *Bepin Chandra Bose*—for Appellant.

Jotindra Nath Roy—for Respondents.

FACTS appear from the following Judgment of Newbould, J.—"This appeal arises out of a dispute between uncle and nephew over a small strip of land valued at Rs. 35 only. One Nilambar was the father of the plaintiff and the grandfather of the defendants 1 and 2. In year 1291 B. S. Nilambar executed a deed of gift in favour of the plaintiff by which he gave him plots Nos. 1 and 3 of the plaint. At that time, Nilambar was living in plot No. 2 which is to the east of plot No. 1, and between these two plots there was a passage which Nilambar expressly reserved to the width of 2¼ cubits After Nilambar's death the plaintiff inherited 1/3rd of the property left by him and another brother of the plaintiff and defendants 1 and 2 got the remaining 2/3rds share. After the gift to him, the plaintiff built a house on plot No. 1 and according to the plaintiff, he left another foot of land enlarging the passage to the east. In 1308, the plaintiff executed a kobala (Ex. A) on the construction of which the decision of this appeal depends. By this kobala, the plaintiff conveyed a 1/3rd share in plot No. 2 and in the passage and his interest in plot No. 3. So far there is no dispute.

The point in dispute is whether the plaintiff reserved to himself any portion of the passage between his house and plot No. 2, the house in which Nilambar lived. The first Court found that the plaintiff transferred only that portion of the passage which he had inherited from Nilambar. The lower appellate Court has found that he has transferred the whole passage. In my opinion the lower appellate Court is right. Though the deed refers to the plaintiff's 1/3rd share in the passage, there are other statements in the deed which are inconsis-

tent with the plaintiff having reserved any land to the east of his building for himself. The western boundary of the land conveyed is stated to be the plaintiff's bari; and had any portion of the passage been reserved, that would have been stated to be the western boundary. Also in the deed, reference is made to the lane east of the plaintiff's homestead which is to the west of the property sold. This also suggests that the whole of the passage and not a part of it was sold. Also the doors of the plaintiff's house are described as being to the west of the property sold. Another point is that the plaintiff by the deed allowed the defendants to close the doors of his house leading to the passage, which one would not have expected him to do if the plaintiff himself owned a strip of land along the passage. And again, the plaintiff reserved the right—and this is the only right that he expressly reserved in connection with the passage—to place scaffolding for building purposes in the passage when necessary. Had the plaintiff reserved to himself any right to the passage, I cannot believe that he would not have mentioned it in the deed of sale. The passage reserved by Nilambar was stated to be 2½ cubits wide and the measurement taken by the Munsif shows that the present passage is only 3 to 6½ inches wider than this. This is inconsistent with the plaintiff's story of having added a breadth of one foot to the passage, and rather points to the dimensions given by Nilambar having been a rough estimate not based on measurements with a standard cubit.

It cannot be said that by the kobala the plaintiff clearly transferred only such land as he has inherited, as the land of plot No. 3 of the plaint was transferred by the same kobala and that is admittedly land which is included in the deed of gift. For the above reasons, I think that the learned Subordinate Judge was right in holding that, on a proper construction of the kobala (Ex. A), it must be held that the whole of the passage was transferred to the defendants. The appeal therefore fails. The defendants have taken a cross-objection to the finding of the lower appellate Court with reference to an obstruction which they have made at a point marked A on the map attached to the plaint. The Munsif dismissed the suit so far as this particular relief was concerned, and the plaintiff did not file any cross-appeal or take cross-objections under O. 41, R. 22, Civil P. C. The circumstances of the case were not such as to justify the lower appellate Court in interfering with the Munsif's decree in this respect under R. 33, O. 41, Civil P. C., and following the decision of this Court in the cases of *Ganga Dhar Muradi* v. *Banabashi Padihari* (1) and *Abjal Majhi* v. *Intu Bepari* (2), I hold that the cross-objction taken must succeed on this point. The result is that the appeal is dismissed and the cross-objection allowed. The decree passed by the lower appeliate Court is modified to this extent that the order declaring the plaintiff's title and right to khas possession of plot A will be expunged. The respondents will get their costs both in the appeal and the cross-objection."

Judgment.—This appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. A I R 1914 Cal 722=24 I C 203.
2. (1916) 32 I C 494.

A. I. R. 1918 Calcutta 169

TEUNON AND SHAMSUL HUDA, JJ.

Emperor

v.

Romesh Chandra Gupta—Accused.

Criminal Ref. No. 81 of 1917, Decided on 29th June 1917, made by Dist. Magistrate Tipperah.

Criminal P. C. (1898), S. 439 (2)—Order prejudicing accused cannot be made in his absence.

Under S. 439, Criminal P. C., no order can be made to the prejudice of the accused unless he has had an opportunity of being heard in his defence in the Court which passes the order. The fact that the Magistrate who referred the case to the High Court under S 438, gave a hearing to the accused before making the reference, is not a sufficient compliance with the provisions of S. 439. [P 170 C 1]

A. Rasool and *Asita Ranjan Ghose*—for Accused.

Newbould and Smither, JJ. (*1st June* 1917.)—In this case, the sentence passed on the petitioner was enhanced by this Bench dealing with undefended criminal cases on the recommendation of the District Magistrate of Tipperah who referred the case under S. 438, Criminal P. C. It appears from the letter of reference that before making the reference the District Magistrate gave the accused a hearing. It, therefore, appeared to us

that the provisions of Cl. (2) S. 439, Criminal P. C., had been sufficiently complied with. That clause runs thus:

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

After hearing the learned counsel for the petitioner and giving further consideration to the matter, we think that the hearing referred to in that section should be before the Court which passes the order of enhancement and the hearing before the referring Court was insufficient. We accordingly review our order and set it aside, and as the petitioner is now represented by counsel, this reference No. 81 of 1917, from the District Magistrate of Tipperah will be dealt with by the regular criminal Bench. Pending further orders in this matter the petitioner will be released on bail to the satisfaction of the District Magistrate. Let the bail order go down at once.

Judgment. — This is a reference made by the District Magistrate of Tipperah under the provisions of S. 438, Criminal P. C. It appears that the accused with whose case we are now dealing, one Romesh Chandra Gupta was employed in Chandpur Post Office as a postal clerk, and it has been found that he misappropriated a sum of Rs. 151-8-0 made over to him by the addressee of a value payable parcel. When his offence was detected, he admitted his guilt to his superior officer and subsequently to the departmental officer who held an enquiry into the matter. When placed on his trial he again pleaded guilty. It further appears that the money misappropriated, has been made good by his relatives. Now these are all matters which may properly be taken into account on the question of sentence. But still we cannot but think that the sentence of one day's simple imprisonment and a fine of Rs. 50 is not an adequate punishment for the offence committed. His age was also taken into account. But it appears that he is of the age of 25, that is to say he is of an age when it should have been possible for him to resist a temptation of the sort held out. In considering what sentence we should now inflict upon him we ought, however, to consider further the period hat has elapsed since his conviction on the 15th November 1916 and also the fact that under an order of this Court passed on the 11th May he has in fact suffered seven days rigorous imprisonment. Since then, too, and also in the proceedings before the District Magistrate he has had to undergo a very considerable expenditure. Further since the initiation of these proceedings, he or his relatives have no doubt suffered great anxiety. Talking all the circumstances into account we think that it will be now sufficient for the ends of justice if, maintaining the sentence of fine, we impose upon the accused the sentence of rigorous imprisonment for a period of six months to run from the date on which he surrenders. The accused will now be called upon to surrender and undergo the sentence now passed upon him.

S.N./R.K. *Sentence enhanced.*

A. I. R. 1918 Calcutta 170

RICHARDSON AND WALMSLEY, JJ.

Gendu Nasya and *others*—Plaintiffs—Appellants.

v.

Sadi Bania and *others*—Defendants—Respondents.

Appeal No. 64 of 1915, Decided on 14th February 1918, from appellate decree of Dist. Judge, Dinajpore, D/- 26th August 1914.

Practice — Fraud — Decree obtained by—Proof that processes were suppressed is sufficient.

In a suit for a declaration that a certain decree was obtained by fraud and is of no effect, a solid foundation is furnished, if the plaintiff establishes that the usual processes were suppressed by the defendant. [P 170 C 2; P 171 C1]

Mohini Mohan Chukraburtty and *Phanindra K. Singh*—for Appellants.

Dwarka Nath Mitter and *Bireswar Bagchi*—for Respondents.

Richardson, J.—This appeal is preferred by the plaintiff. He brought the suit for a declaration that a certain decree which had been obtained against him was fraudulent and of no effect. The plaintiff's case appears to be that summons in the suit in which the decree was made was not served on him and that the suit was based upon a forged document. In the trial Court the learned Munsif found in his favour and made a decree accordingly. In the Court of appeal below the learned District Judge has dismissed the suit. As to the non-service of summons, if the plaintiff had been able to establish that the usual processes had

been suppressed, no doubt, that would have furnished some solid foundation for the suit. The learned District Judge, however, has found that the summonses were duly served in the usual course. That part of the case, therefore, goes.

There remains the case as to forgery. In view of the authorities on the subject, the judgment of the District Judge may be in some respects open to criticism in that he has not come to an express finding, but we may refer to the judgment delivered by the Munsif in this case. The learned Munsif begins by saying "it is scarcely possible to prove frauds of this description by direct evidence." Then he goes on to say that the plaintiffs "practically" have not been able to adduce any direct evidence. Then he deals with the evidence which the plaintiff did adduce. In view of the kind of evidence and the kind of materials the Munsif had before him and on which he acted, I am of opinion that it would serve no useful purpose to remit the case to the District Judge for any further finding. The appeal wiil accordingly be dismissed with costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 171

MOOKERJEE AND WALMSLEY, JJ.

Ram Kinkar Tewari and *another*—Judgment-debtors—Petitioners.

v.

Sthiti Ram Panja—Opposite Party.

Civil Rule No. 357 of 1917, Decided on 31st August 1917, against order of Dist. Judge, Burdwan, D/- 19th March 1917.

(a) Bengal Tenancy Act (1885), Sch. 3, Art. 3—Landlord dispossessing as purchaser in execution of decree for rent—Art. 3 does not apply.

Where a landlord in execution of a decree for arrears of rent puts a holding to sale, purchase it himself and obtains delivery through Court, such dispossession of the tenant is not dispossession within the meaning of Art. 3. [P 172 C 1]

(b) Civil P. C. (1908), O 21, R. 22—Fraudulent suppression of process — Execution sale is void.

The omission to serve a notice under S 248, of the Code of 1882 or under O. 21, R. 22, of the Code of 1908 is by itself sufficient to render an execution sale void for want of jurisdiction, inasmuch as the notice is the very foundation of the jurisdiction. [P 172 C 2]

(c) Civil P. C. (1908), S. 47—Applicability—Limitation Act (1908), Art. 181.

Where every process prescribed by the Legislature, with a view to apprise the judgment-debtors or their representatives that execution is to proceed against them, has been fraudulently suppressed, the case is governed by S 47, Civil P. C., and the period of limitation applicable is that provided by Art. 181, Lim. Act, and S. 18, Lim. Act, is also applicable. [P 173 C 1]

(d) Limitation Act (1908), S. 18—Onus is on person committing fraud to prove that opposite party knew facts constituting fraud.

Where S.18, Lim.Act, applies, the burden rests upon the person who has committed the fraud to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constituted the fraud at a time which is too remote to allow him to seek the assistance of the Court. [P 173 C 1]

Bankin Chandra Mookerjee—for Petitioners.

Bepin Behary Ghose and *Satindra Nath Mukherjee*—for Opposite Party.

Judgment.—We are invited in this Rule to consider the propriety of an order of refusal to set aside an execution sale in reversal of the order of cancellation made by the primary Court. On 14th July 1905, Becharam Panja obtained a decree for Rs. 16-12-0 for arrears of rent against Kshetranath Tewari. On 11th July 1908, the decree-holder applied for execution against the three infant sons of the judgment-debtor who had died meanwhile. In the application for execution, it was stated that the infants were under the guardianship of their mother. The amount for which execution was taken out was Rs. 28-9-0. The property was put up to sale on 22nd September 1908. The decree-holder was the only bidder present and the property was knocked down to him on his bid of Rs. 25. The sale was confirmed on 5th November 1908. On 18th December 1915, the maternal uncle of the infants applied to the Court to set aside the sale, on the allegation that it had been brought about by the fraudulent suppression of all processes and that the decree holder had thereby managed to acquire a property worth at least Rs. 300 for a sum of Rs. 25.

The application further stated that the petitioner had become aware of the sale of the property of his nephews only so recently as 29th November 1915. The Court of first instance found upon every point in favour of the applicant. The Court held that the notice under S. 248, Civil P. C , 1882, the notice on the mother of the infants calling upon her to act as guardian ad litem of her infant sons, the writ of attachment, and the sale proclamation had never been served. There

was further the significant fact that, in each instance, a false return of service had been made. The Court also found that the true value of the property was as alleged by the petitioner, and thereupon set aside the sale. On appeal, the District Judge stated that he saw no reason to differ from the conclusions of the first Court upon the various questions of fact and law, but he proceeded to express the opinion that a very important aspect of the case had been overlooked by every one concerned. He held that as the infants had failed to prove possession within two years of the date of the application, their title had been extinguished under Art. 3, Sch. 3, Ben. Ten. Act read with S. 28, Lim. Act, which applied by virtue of S 185, Ben. Ten. Act. In this view, the District Judge set aside the order of the Court of first instance and dismissed the application for cancellation of the sale.

There can be no doubt that the order of the District Judge cannot possibly be supported. It is plain that Art. 3, Sch. 3, Ben. Ten. Act has no application to the case before us. It is well settled that where a landlord, in execution of a decree for arrears of rent, puts the holding to sale, purchases it himself and obtains delivery through Court, such dispossession of the tenant is not dispossession within the meaning of Art. 3: *Kamal Dhari Thakur* v. *Rameshwar Singh Bahadur* (1). Indeed, so long as the sale remains in force, the possession of the landlord auction-puchaser cannot possibly be challenged by way of suit. On behalf of the decree-holder, the view taken by the District Judge has not consequently been supported. But an endeavour has been made to maintain the order of the Distric Judge on the ground that the application is barred by limitation. The argument in substance is that although the sale took place on 22nd September 1908 and the right to apply for cancellation arose at that time, the present application, which was made on 18th December 1915, must be governed by the Limitation Act 1908, which by S. 6, restricts in a large measure the advantage enjoyed by infants under S. 7, Lim. Act, 1877. It is pointed out that whereas under the law as it stood in 1908, the infants petitioners would have been entitled to make the application even after the attainment of their majority under the law as it stood in 1915, the application would be barred unless it was made within the time prescribed in Col. 3, Sch. 1; in support of this view reliance has been placed upon the decisions in *Arayil Kali Amma* v. *Pelappakkara* (2) and *Chidambaram Chetty* v. *Karuppan Chetty* (3). The question raised does not, as we shall presently show, require consideration in this case; but when it arises, it may require careful examination, in view of the principle recognized in the cases of *Manjuri Bibi* v. *Akkel Mahmud* (4), *Budhu Kumar* v. *Hafiz Hussain* (5) and *Gopeshwar Pal* v. *Jiban Chandra* (6). It is plain, as the Courts below have found, that every notice contemplated by the Code has been fraudulently suppressed in this case.

Now as pointed out by the Judicial Committee in *Raghunath Das* v. *Sunder Das Khetri* (7), the omission to serve a notice under S. 248 of the Code of 1882 or under O. 21, R. 22 of the Code of 1908, is by itself sufficient to render the sale void for want of jurisdiction; for the notice is the very foundation of the jurisdiction. This view is in accord with a long series of cases in this Court: *Ramesuri Dassee* v. *Doorga Dass Chatterjee* (8), *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (9), *Sahdeo Pande* v. *Ghasiram Gyawal* (10), *Mrs. Levinia Ashton* v. *Madhabmoni Dasi* (11), *Imamunnissa Bibi* v. *Liakat Hussain* (12), *Parashram* v. *Balmukund* (13). It is further clear that the infants were not represented by a duly appointed guardian, as no notice was ever served upon the mother; nor was there any acceptance of guardianship by her: *Khairajmal* v *Daim* (14), *Narsing Narain* v. *Jahi Mistry* (15), *Bal Kishan Lal* v. *Topeswar Singh* (16), *Dinabandhu Nandi* v. *Mashada Khatun* (17), *Purna*

1. (1913) 19 I C 545.
2. (1911) 34 Mad 292=5 I C 420.
3. (1912) 35 Mad 678=8 I C 543.
4. (1913) 19 I C 793.
5. (1913) 20 I C 821.
6. A I R 1914 Cal 806=41 Cal 1125=24 I C 37.
7. A I R 1914 P C 129=42 Cal 72=24 I C 304=41 I A 251 (P C).
8. (1881) 6 Cal 103.
9. (1893) 20 Cal 370.
10. (1894) 21 Cal 19.
11. (1910) 5 I C 390.
12. (1881) 3 All 424.
13. (1908) 32 Bom 572.
14. (1905) 32 Cal 296=32 I A 23 (P C).
15. (1912) 13 I C 414.
16. (1912) 14 I C 845.
17. (1912) 17 I C 263.

Chandra Kumar v. *Bijoy Chand Mahatap* (18), *Krishna Chandra* v. *Jogendra Narain* (19), *Safdar Ali* v. *Kishun Lal Lal* (20). This consequently, is not a case where the Court is invited to set aside the sale merely on the ground of irregularity in publication or conduct of the sale. Here every process prescribed by the legislature with a view to apprise the judgment-debtors or thejr representatives that execution was to proceed against them had been fraudulently suppressed The case is thus governed by S. 47 of the Code of 1908, and the period of limitation would be that provided by Art. 181, Sch. 1, Lim. Act. It is further plain that this is pre-eminently a case where S. 18, Lim. Act applies. Here the judgment debtors, who are infants, have been kept from the knowledge of their right to apply for a reversal of the sale, and as observed by Lord Hobhouse in delivering the opinion of the Judicial Committee in *Rahimbhoy Habibhoy* v. *C. A. Turner* (21), the burden rests upon the person who has committed the fraud to prove conclusively that the person injured by his fraud has held clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to seek the assistance of the Court. The maternal uncle of the infants asserts that these proceedings were instituted by him within a few days of the date when he became aware of the fraudulent sale, and this has been believed by the Courts below.

The result is that this Rule must be made absolute, the order of the District Judge set aside, and that of the Court of first instance restored. This order will carry costs both here and in the Court below. We assess the hearing-fee in this Court at three gold mohurs.

V.B./R.K. *Rule made absolute.*

18. (1913) 18 I C 859.
19. A I R 1915 Cal 203=27 I C 139.
20 (1910) 7 I C 241.
21. (1893) 17 Bom 341=20 I A 1 (P C).

A. I. R. 1918 Calcutta 173

CHITTY AND WALMSLEY, JJ.

Durga Charan Bose—Plaintiff—Appellant.

v.

Lakhi Narain Bera and *another*—Defendants—Respondents.

Appeal No. 2010 of 1917, Decided on 25th June 1918.

(a) Decree—Setting aside — Court competent—Suit cannot lie to nullify it except on ground of fraud.

It is not open to a litigant, except on the ground of fraud, to maintain a suit to rescind or nullify a decree passed in a former suit to which he was a party and which was tried out by a competent Court. [P 174 C 2]

(b) Promissory Note — Question whether executant signed pro-note as security for others cannot be tried except for question of consideration.

In a suit on a promissory note the question whether the defendant, executant of the notes, signed it by way of security for others cannot be tried or determined, except so far as it affects the question of consideration. [P 175 C 1]

(c) Civil P. C. (1908), O. 41, Rr. 19 and 33 —Appeal by some defendants without making other defendants respondents—Appellate Court cannot pass decree against co-defendants without adding them as parties to appeal—Appellate Court should restore and rehear appeal if it has passed such decree and co-defendant applies for restoration after adding him as party.

Where some of several defendants appeal from a decree without bringing their co-defendants before the appellate Court as respondents, the appellate Court has no jurisdiction to pass any decree against the co-defendants without adding them as parties to the appeal. [P 175 C 2]

An appeal having been preferred by some of the defendants, the appellate Court set aside the decree of the lower Court as against them and made a new decree against a co defendant who was not a respondent to the appeal. Thereupon the latter applied for the restoration and re-hearing of the appeal in his presence:

Held: that although no provision of the Civil Procedure Code dealt with such a case, yet the appellate Court should restore the appeal and rehear it in the presence of the co-defendant after adding him as a party. [P 175 C 3]

Charu Chandra Biswas—for Appellant.

Manmotho Nath Roy — for Respondents.

Judgment.—This is an appeal preferred by Durga Charan Bose, plaintiff in Suit No. 398 of 1915, which suit has been dismissed by the District Judge. We are also asked to revise the decree and order of the Additional District Judge in Appeal No. 291 of 1913 arising out of Suit No. 12 of 1912 in which Durga Charan Bose was defendant 9. The facts of the case are somewhat peculiar. There was a dispute between Lakhi Narain Bera and Hari Krista Bera on the one side and Gopal Chandra Jana of Nadabhouga and others on the other over certain paddy, which resulted in proceedings under S. 107 and S. 145, Criminal P. C. The matter was referred to the arbitration of Pramada Nath Dutt, Muktear of the Beras, and Durga Charan Bose, the present appellant, the Muktear of the opposite party. Of

the merits of that dispute we have no means of judging, nor is it necessary for the present purpose to discuss them. It is sufficient to say that on 19th January 1910 Durga Charan Bose executed a promissory note for Rs. 250 in favour of the Beras payable on demand. On that promissory note the Beras instituted Suit No. 12 of 1912 against Gopal Chandra Jana and 7 others, defendants 1 to 8, and Durga Charan Bose, defendant 9. The suit came on for hearing before the Munsif. Defendants 3 and 8 not being served, the suit was dismissed as against them. Defendants 1, 2, 4, 5, 6 and 7 denied all knowledge of the promissory note, pleaded that it was void for want of consideration, and raised other defences. Durga Charan Bose contended that there was no consideration for the note and that, if there was, it had in fact been satisfied. It may be noted that he no longer puts forward these pleas but admits his liability on the promissory note.

The Munsif found that the promissory note was executed by Durga Charan Bose for good consideration but really as a surety for defendants 1 to 8 who owed certain moneys to the Beras. He accordingly on 31st March 1913 passed a decree against all the defendants (other than defendants 3 and 8 who were not served) and directed that the decretal amount should be realized first from the properties or persons or both of defendants 1, 2, 4, 5, 5, 6 and 7 only, and then the balance, if necessary, from the properties of defendant 9 (Durga Charan Bose). Against this decree defendants 1, 2, 4, 5, 6 and 7 appealed making the Beras, the plaintiffs, respondents, but not Durga Charan Bose their co-defendant. The appeal was heard by the Additional District Judge, Mr. Duval, on 28th February 1914. Before him the plaintiffs' pleader admitted that on the pleadings there was no cause of action against defendants 1 to 8, whatever rights defendant 9 might have against them. The learned Additional District Judge accordingly set aside the decree against defendants 1, 2, 4, 5, 6 and 7 but added (and those words appear also in his decree) "a decree will be given against defendant 9 only". On 20th March 1914 Durga Charan Bose applied for the restoration of the appeal. After hearing the parties the Additional District Judge on 24th June 1914 passed the following order:

"The decree in the lower Court was against defendants 1 to 7" (it was not as a fact against defendant 3) "and defendant 9 and it was acquiesced in by defendant 9. I do not see how I can permit defendant 9 to re-argue the appeal. I dismiss the application. I find no section under which it can come".

Durga Charan Bose took no further steps of any kind until 24th April 1915, when he filed the suit out of which the present appeal arises (Suit No. 398 of 1915). In this suit he proceeded only against the Beras, plaintiffs in Suit No. 12 of 1912, and not against his co-defendants in that suit. He prayed for a declaration that the appellate decree of the Additional District Judge above mentioned (Money Appeal No. 291 of 1913) was not binding upon him, but fraudulent, illegal, invalid, inoperative, null and void and "dictum" (whatever that may mean); that the Additional District Judge had no jurisdiction to pass such a decree; and that the said decree was "non-executable" against him.

The Munsif granted him a decree, but that has been reversed by the District Judge, Mr. Cuming, and the plaintiffs' suit dismissed. We think that the decision of the learned District Judge is correct. It is not open to a litigant, except on the ground of fraud, to maintain a second suit to rescind or nullify the decree in a former suit to which he was a party and which was tried out by a competent Court. The case of *Balwant Prasad Pande* v. *Ram Ratan Gir* (1) is directly in point. To quote the words of Lord Shaw, "such a procedure is radically incompetent." The appeal fails and is dismissed with costs. The matter does not, however, end there. We are asked to revise the decrees in Suit No. 12 of 1912, and this we have power to do under S. 115 Civil P. C. In this suit, a series of mistakes has been committed, the last of which, we regret to see, was committed in this Court in the issue of this Rule. The Rule was directed to issue on the "8 defendants-respondents." What was obviously intended was to issue a Rule on the two plaintiffs, the Beras, and the six defendants, 1, 2, 4, 5, 6 and 7, against whom the suit had proceeded. The Bera plaintiffs, though not served with the Rule, are before us in the cognate matter of Appeal No. 2010 of 1917 and have no objection to the order which we

1. A I R 1915 P C 99=37 All 485=30 I C 849 =42 I A 171 (PC).

propose to pass on this Rule. The petitioner Durga Charan Bose is to blame in this matter as he gave in para. 11 of his petition the names of the 8 persons who were to be served. They are the persons who were the original defendants 1 to 8 in Suit No. 12 of 1912. It appears from the record that defendant 8 is now daed and his heirs have not been brought on the record. This is, however, of no importance inasmuch as the suit never proceeded against defendants 3 and 8, and they have no concern with the subsequent proceedings. None of the persons, defendants 1 to 7, who have been served appear in this Rule.

Turning to the proceedings in the suit it is clear that the plaintiffs, the Beras sued only on the promissory note. They had, therefore, no cause of action against defendants 1 to 8 who were no parties to that note. The question whether Durga Charan Bose had signed the promissory note by way of security for defendants 1 to 8 could not be tried or determined in this suit, except so far as it affected the question of consideration. Durga Charan Bose alone could be held liable on the promissory note, and the decree of the Muusif making defendant 1, 2, 4, 5, 6 and 7 liable as principal debtors and Durga Charan Bose liable as a surety only, was clearly erroneous. For some extraordinary reason defendants 1, 2, 4, 5, 6 and 7 in their appeal against this decree, did not bring Durga Charan Bose before the Court as a respondent. The learned Additional District Judge, therefore, was correct in setting aside the Munsif's decree, against the appellants, but had no jurisdiction to pass the decree, which he passed, or indeed any decree, against Durga Charan Bose, who was no party to the appeal before him. We think that the learned Additional District Judge was in error in refusing to restore the appeal and rehear it in the presence of Durga Charan Bose after adding him as a party. It is true that no section of the Civil Procedure Code deals with such a case, but then it was never contemplated that a Court would deal with a person, who was no party to the proceeding before it, as if he were a party properly added and properly served. The learned Additional District Judge would have been in order if in allowing the appeal of defendants 1, 2, 4, 5, 6 and 7 he had said nothing about defendant 9. In that case the decree of the Munsif against defendant 9 would have stood.

But as it was he made the decree, against him a decree of the appellate Court which he had no jurisdiction to do. There are two courses open to us. We may set aside the decree of the Additional District Judge and remand the appeal for re-hearing in the presence of Durga Charan Bose, or we may now pass such final decree in Suit No. 12 of 1912 as in our opinion ought to have been passed by the Courts below. As we entertain no manner of doubt as to what the decree should be, we adopt the latter course. We set aside the decrees of both the Courts and pass a decree in favour of the plaintiffs against defendant 9, Durga Charan Bose, for Rupees 307-8-0 and costs, and interest at six per cent. per annum from 31st March 1913 until realization. The suit is dismissed against defendants 3 and 8, who were not served, without costs, and against defendants 1, 2, 4, 5, 6 and 7, with costs in both the lower Courts and interest on such costs at 6 per cent. per annum until realization. We make no order as to costs of this Rule, as the plaintiffs have incurred no additional costs in respect of it and the defendants 1 to 7 have not appeared. This decree will not affect the rights, if any, which Durga Charan Bose may have against defendants 1 to 8 and which, as we have said, could not be investigated in this suit.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 175

CHITTY AND SMITHER, JJ.

Srilal Chamaria and *another* — Petitioners.

v,

Emperor—Opposite Party.

Criminal Misc. Case No. 27 of 1918, Decided on 8th March 1918, for transfer of case.

Criminal P. C. (5 of 1898), S. 526—Magistrate, essential and necessary witness for defence—Transfer should be allowed.

In applying for the transfer of a case on the ground that the Magistrate before whom it is pending is a witness for the defence, the accused must satisfy the High Court that the Magistrate will be a necessary and essential witness for the defence. [P 176 C 1]

B. C. Mitter, Monmotha Nath Mukherjee and *Bhibhiti Busan Saha* — for Petitioners.

Camell—for the Crown.

Chitty, J.—The question before us on this Rule is whether the case now pending against the petitioners before Mr. K. B. Das Gupta should not be transferred to some other Magistrate, on the ground that that gentleman is a necessary witness for the defence. In applying for a transfer of this kind I think that an accused must satisfy this Court that the Magistrate whom he desires to call as a witness will be a necessary and essential witness for the defence.

In this case the accused say that the Magistrate is required to give his evidence as to the credit of another witness Kuruna Bhusan Banerjee, who is no doubt one of the principal witnesses for the prosecution, and that his evidence will be admissible under S. 155 (1), Evidence Act. In support of this application they have put forward certain facts which they claim to have eiicited from the witness Girija in cross-examination. It is not suggested that the witness Girija has said anything in his examination-in-chief which is relevant to the present inquiry into the guilt of the petitioners. It is therefore unnecessary for the petitioners to impeachGirija's credit in the way that they suggest. Their application is solely having reference to the evidence of Karuna. We have been taken through the evidence of Girija more than once by Sir B. C. Mitter, but we are quite unable to find in that evidence any definite statement that Kuruna was either a Bench Clerk of Mr. Das Gupta, which admittedly he never was, or that he was so brought into contact with him in the office that Mr. Das Gupta would be in a position to express any opinion as to his credibility as a witness. Mr. Das Gupta himself has submitted an explanation to this Court in which, at the outset, he frankly admits that he has no desire to try the case, but that on the contrary it would be a great relief to him if it were transferred from his file.

But, taking the facts alleged in the petition, he gives them one and all a categorical denial. It appears from his explanation that, during the years that he has been at Lall Bazar, at Jorabagan and at Bankshall Street, Karuna Bhusan Banerjee has never worked under him in any capacity either in his Court or in any office of which he has been in charge. He never worked as his Bench clerk or interpreter or process-clerk, nor did he work in the Jorabagan office when Mr. Das Gupta was in charge of that office, nor in the copying department or accounts department or in the record room of which the Magistrate has been in charge for over two years. The Magistrate further states that he had no occasion to know anything about his conduct or credibility as he never worked under him and that he held no inquiry regarding his conduct in any matter in any of the Courts. He adds that there is no such post as "office master" used by the witness Girija, possibly taking it from the cross-examining counsel. Turning to Girija's evidence, his statements amount to this :that he expresses an opinion as to Mr. Das Gupta's possible knowledge of certain subordinates in the police Court of whom Karuna is one. He does not however make any statement from which it can be necessarily inferred that Kuruna was at any time under Mr. Das Gupta in a way in which that Magistrate would be brought to Judge of his conduct or credibility. It is said that the Magistrate has only referred to the inquiry into Karuna's own defalcation, with which inquiry the Magistrate admittedly had nothing to do. It is said that there was another inquiry in 1914 into Girija's conduct.

It is suggested that in that inquiry Mr. Das Gupta must have also inquired into Karuna's conduct. That inquiry was with reference to certain events which took place in the copying department. This witness cannot say whether Kuruna was ever in the copying department, but thinks he was either in the copying department or statistics department. He is not able to say which. There is certainly nothing to show that Karuna was in any way connected with the inquiry into Girija's conduct in 1914 or that he was in any way implicated in the charges which were then made against that clerk and other clerks in that office. It is not suggested on the part of the petitioners that the simple word of the accused is to be accepted in matters of this kind. They must show that the Magistrate is an essential and necessary witness and they must show that to the satisfaction of this Court. In this cass I am clearly of opinion that they have wholly failed to show anything of the

kind. I would therefore discharge this Rule.

Smither, J.—When an accused person applies to this Court for a transfer of his case on the ground that he wishes to examine as a defence witness the Magistrate who is trying the case, I do not think that we should make the transfer as a matter of course. We should look into the question whether the Magistrate can give material evidence, and we must look into that question in this case. It is said that this Magistrate can give evidence as to the credibility of Karuna, the principal prosecution witness. The suggestion is that the Magistrate has formed an opinion about the witness, because the Magistrate has been working as a Presidency Magistrate in charge of certain offices and the witness has been working as a clerk in the Presidency Magistracy offices. But this witness has not worked under this Magistrate at all, so far as I have been able to see, either in an office under his control or as a Bench Clerk. On the other hand, he has worked under other Magistrates as a Bench Clerk, and in offices controlled by those other Magistrates; and the proper persons to give evidence on the lines on which the defence says it wishes to examine this Magistrate are those other Magistrates—one of whom is the Chief Presidency Magistrate, who is already a witness in this case.

V.B./R.K. *Rule dischared.*

A. I. R. 1918 Calcutta 177

FLETCHER AND RICHARDSON, JJ.

Sm. Akiyyannessa and *others*—Defendants—Appellants.

v.

Abdul Gani Sadagar—Plaintiff—Respondent.

Appeal No. 1895 of 1915, Decided on 13th February 1917, from appellate decree of Dist. Judge, Chittagong, D/- 9th June 1915.

(a) Bengal Land Revenue Sales Act (1859), S. 37—"Protected interest."

A tank existing prior to the defendant's lease is not a "protected interest" within Excep. 4, S. 37. [P 178 C 2]

(b) Practice—New plea—No issue framed as to abatement of suit though raised in W. S.—Question of abatement cannot be allowed to be raised in second appeal.

The question of abatement of a suit, which was raised in the written statement of the defendants who were substituted in the place of a deceased defendant but as to which no express issue was framed, cannot be allowed to be raised in second appeal. [P 178 C 1]

(c) Practice—Evidence—Affidavit.

An affidavit as to what was argued in a case, sworn by a person who did not know the language in which the argument was made, is worthless. [P 178 C 1]

Probodh Kumar Dass—for Appellants.

Chandra Sekhar Sen—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned District Judge of Chittagong, affirming the decision of the Munsif of the same place. The plaintiff brought the suit to recover possession of certain lands on the annulment of an encumbrance. Both the Courts below have decided the case in favour of the plaintiff. The present appeal has been brought by some of the defendants, and the first point that has been raised is as to whether the Courts below ought not to have found that the suit had abated and no proper case had been made for setting aside the abatement. The facts are these: The suit was instituted on 18th April 1911. In June 1912 the original defendant 5 died. On 19th June 1914 the plaintiff applied to substitute the heirs of the deceased defendant 5 and an order was, accordingly, made. That order was however made ex parte. After that the substituted defendants applied for and obtained further time in order to file their written statement. In their written statement they did raise the case that the suit had abated and no grounds had arisen for setting aside the abatement. But when the issues were settled, no express issue was framed as to whether a case entitling the Court to set aside the abatement had or had not arisen. The evidence which lay in a very small compass on the plaintiffs' side was to the effect that defendant 5 died in Rangoon and that the plaintiff did not know of the death earlier.

The evidence on the defendants' side was practically nil. In the course of his judgment on the issue as to limitation, the Munsif did make some remarks that are said to have reference to this point. But that does not appear to be so. It is also a most important matter that in the judgment of the learned District Judge, no reference is made to this matter at all. It is said on an affidavit made by one of the parties, whose name I have forgotten but who describes himself as the son of late Sanaulla and who does not know a word of English and had had

the affidavit interpreted to him and signed his affidavit after an explanation in the Vernacular, that the learned Judge totally misapprehended the case, and that this point was raised and pressed; and this deponent states that, although he is unaware of the language of the Court, he knows all these facts of his own knowledge. A man who can state that must have got an elastic conscience; a man who does not know the language of the Court obviously cannot know these facts of his own knowledge. I may as well pledge my oath that I who am ignorant of the Bengali language understand what two Bengali gentlemen speak in their own language. It is quite clear that this affidavit is a valueless affidavit and no attention ought to be placed on it at all. The point now made is that it was the real point in the case and must have been taken in the lower Courts. I am not satisfied that it was so. If it had been raised and if a proper issue had been framed on it, then the plaintiff having stated that defendant 5 died in Rangoon would have produced evidence which might have satisfied the Court that he did not know and could not have known of the death of defendant 5 before the date on which he first came to know of it. It is no use keeping such a point aside to be raised in second appeal with a view to get the case remanded and retried on a further issue. But the point must be raised and taken at the outset and an issue framed on it.

The next point is that the learned Judge has altogether made a mistake about the case that he had to try. A certain *dag*, as it is called, of the property sought to be recovered bears the number 746. It consists of a tank. It is quite true that that tank like other tanks usually has banks, because it is impossible to dig a tank on the ground without having taken out a certain amount of the earth to contain the water and also, if one so wishes, to enjoy the fish. Otherwise, unless one gets some of the improved and modern forms of locomotion to reach the tank he must have to walk to and from the tank so as to enjoy either the water or the fish. It is quite obvious that it was not in the contemplation of the parties with reference to property valued at Rs. 20 only that the parties should reach this tank by any of the more modern methods of locomotion. It has been found that *dag* No. 746 is a tank. It is a tank no doubt and it is a tank existing from before the defendants' lease and, on the authorities of this Court, such a tank is not a protected interest within Excep. 4 to S. 37, Act 11 of 1859. That gets rid of the second point. The third point is that there was a lease held by the defendants. The document was not put in evidence. The Judge said that he must do the best he could without the document as the defendants failed to give it in evidence. The appellants now say that they ought to have been given some time to produce the document. They had some time and a good deal of time too. I do not see any reason why they should have any further time and it is not a matter that should be raised in second appeal. In the result the appeal fails and must be dismissed with costs.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 178

FLETCHER AND SHAMSUL HUDA, JJ.

Naja Mia—Plaintiff—Appellant.

v.

Abdur Kadar and *another*—Defendants—Respondents.

Appeal No. 1685 of 1916, Decided on 25th April 1918, from appellate decree of Dist. Judge, Chittagong, D/. 8th April 1916.

(a) Practice—Pleadings.

In this country a very high standard of pleadings cannot be expected. [P 179 C 1]

(b) Civil P. C. (1908), O. 8, R. 5—Omission to deny allegation of title in plaint by defendant does not amount to constructive admission warranting decision in plaintiff's favour—Practice, Pleadings.

Where, in a suit for possession of land, the defendant in his written statement did not specifically deny the allegation made by the plaintiff in his plaint that the property sued for formed a portion of a certain taluk and the Munsif, holding that there was a constructive admission by the defendant of the plaintiff's title as alleged in the plaint, decreed the suit without considering the evidence adduced on both sides on the question of title:

Held: that the lower appellate Court was justified in reversing the decision of the Munsif on the ground that there was no such admission on the part of the defendant as would warrant a decision in favour of the plaintiff's title, specially as the trial Court had required proof of the plaintiff's title in spite of the so-called admission by the defendant. [P 179 C 1]

Kshitish Chandra Sen—for Appellant.

Probodh Kumar Dass—for Respondents.

Fletcher, J.—This is an appeal preferred by the plaintiff against the judgment of the learned District Judge of Chittagong, dated 8th April 1916, reversing the decision of the Additional Munsif of the same place. The suit was one brought for recovery of possession of land. The plaintiff claimed that he had got a settlement from defendant 2, who had purchased the taluk that had formerly belonged to one Mobarak Ali and which had been sold for arrears of revenue under the Patni Regulation. Defendant 1 said that he was a purchaser of the property from Mobarak Ali's daughter. The appeal is preferred substantially on this ground. It is said that defendant 1 in his written statement failed to deny the allegation made by the plaintiff that the property sued for formed a portion of Mobarak Ali's taluk and that, therefore, there was a constructive admission and no proof was required of that. There are many answers to this: first of all, proof was required by the Court. Evidence was given on both sides as to whether this land was or was not within the limits of Mobarak Ali's taluk. From this it is quite clear that the Judge in the Court of first instance did not act on this supposed admission. Secondly, in these written statements filed before the Munsif, one cannot expect a very high standard of pleadings. Defendant 1 in this case says that he denied everything; he denied the title of the plaintiff and denied all the allegations contained in the plaint.

Of course, that may not be a very scientific way of drafting a written statement. But what is clear from that is that this defendant intended to put every fact in issue and all the facts being in issue and the Judge having required proof of the title of the plaintiff, in coming to the conclusion that the learned Judge did come to, he simply dealt with the case on the footing that there was no supposed admission made by defendant 1. The learned Judge was not bound by the view that the learned Munsif took. That seems to be quite obvious. The other point raised, namely, whether the plaintiff's lessor has got a title under the Patni Regulation, which must overrule any title that defendant 1 has, has absolutely no force in it at all because the first thing and the essential thing for the plaintiff to prove is that the property sued for forms a portion of the taluk brought to sale under the Patni Regulation, and this he has failed to prove. The appeal fails and is dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1918 Calcutta 179

MOOKERJEE AND GREAVES, JJ.

Braja Nath Pal Chowdhury—Defendant—Appellant.

v.

Surendra Krishna Roy and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 75 of 1916, Decided on 25th June 1917, from order of 2nd Sub-Judge, Hooghly, D/- 18th December 1915.

*** (a) Civil P. C. (1908), O. 5, R. 17—Place of service of summons.**

On the refusal of a defendant to accept summons, attempted to be served upon him at a place where he does not ordinarily reside, the summons must be served in the house in which he ordinarily lives. [P 180 C 1]

(b) Civil P. C. (1908), O. 9, R. 13 — Mortgage suit — Ex parte decree should be set aside in entirety.

Where, on the application of some of the defendants for setting aside a mortgage decree passed ex parte against them, the decree is set aside, it should be set aside in its entirety. [P 180 C 2]

B. Chuckerbutty and *Manmatha Nath Ganguly*—for Appellant.

Akshoy Kumar Banerji—for Respondents.

Judgment.—This is an appeal against an order refusing to set aside an ex parte decree. The decree was made in a mortgage suit on 21st January 1913. The application to set aside the decree was made on 17th April 1915. The Subordinate Judge has dismissed the application on the ground that the summons was duly served upon the applicant. In our opinion the evidence does not support that conclusion. The summons is said to have been served on 1st December 1912 at a place called Bantra in the district of Howrah. The case for the petitioner is that he resides ordinarily in his house at Cawnpore in the same district and that he has done so for many years past. He further asserts that on the day the summons is said to have been served, he was not in Bantra, but in his house at Cawnpore. These statements were made on oath and make out a prima facie case. To rebut this, the decree-holders bring forward the peon who served the summons,

The identifier is not produced because he is dead, and the witnesses to the service have not been called because apparently they cannot be found. The oral testimony of the peon is extremely unsatisfactory and his statements in the return of service are equally unsatisfactory. The statements come to this: that he went to serve the summons to Bantra and that defendant 1 (the appellant before us) was in "the verandah upstairs in a state of illness." So he sent the summons through Chandra Kanta Sil, agent of the defendants, and asked for its receipt. As the receipt was not granted, the summons was affixed in the usual manner at the outer door of the house.

The recital in the return does not state that the peon went upstairs and met defendant 1. It is extremely unlikely that he should have done so. He does not state how he learnt that defendant 1 was lying in a state of illness upstairs. His evidence given in the present proceedings does not clear up the matter. Apparently it was hearsay. But even if defendant 1 was in the house at Bantra at the time, the question arises, whether the service effected at the place was good service upon him under O. 5, R. 17, Civil P. C. If we assume that defendant 1 refused to accept the summons sent to him, the summons would have to be served in the house in which he ordinarily lived. According to the appellant he lives ordinarily in his house at Cawnpore and has done so for many years past. That statement stands practically uncontradicted. Consequently we cannot hold that service was effected upon defendant 1 in accordance with law. We may point out that within two days of the alleged service one of the defendants, Kunjo Bihary Pal Chowdhury, appeared before the Subordinate Judge and stated that the summons had been left in the house at Bantra, although some of the defendants had not resided there, and stated specifically that the defendant Braja Nath Pal Chowdhury, who is the appellant before us, lived at his own house in village Cawnpore. It is extremely unlikely that this statement is untrue and should have been made in view of a possible application by Braja Nath Pal Chowdhury for setting aside the ex parte decree which might be made against him. It has finally been argued that the application is barred by limitation. Under Art. 164, Sch. 1, Lim. Act, the application has to be presented within thirty days of the date of the decree or of the date on which the petitioner becomes aware of the decree.

The petitioner states on oath that the application was made within two days of the date when he first became aware of the decree. It is suggested, however, that he must have been aware of the dedecree many months earlier, because summons was served upon him from this Court of a Rule obtained by the respondent to amend the decree which had been made in the suit. The Subordinate Judge has not accepted this evidence and in our opinion very properly. The respondent has not produced the primary evidence of the service of the Rule He might have easily done so by applying for copies of the papers from the record of this Court. We are, therefore, of opinion that the application was made in time. The result is that this appeal is allowed, the decree of the Court below set aside and the suit revived. The Subordinate Judge will take up the case for disposal as early as possible. As the decree was made in a mortgage suit, and as the usual accounts must be taken in the presence of all the defendants, the entire decree is set aside; the whole case will be under the consideration of the Subordinate Judge. The costs of the trial up to the present stage will be costs in the cause. The appellant is entitled to his costs of this appeal from the plaintiffs-respondents. We assess the hearing fee in this Court at two gold mohurs. Let the record be sent down as early as possible.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 180

FLECTHER AND WALMSLEY, JJ.

Bijoy Chand Mahatab Bahadur—Plaintiff—Appellant.

v.

Secy. of State and *other*—Defendants—Respondents.

Appeal No. 161 of 1917, Decided on 8th August 1918, from appellate decree of Dist. Judge, Bankura, D/- 1st December 1916.

(a) Limitation Act (1908), Art. 96—Rectification of, lease—Suit for, on ground of common mistake under which some land wrongly included in lease—Suit is governed by Art. 96.

A suit for the amendment or rectification of a lease on the footing of a common mistake of the lessor and the lessee under which some land

was wrongly included in the lease, is governed by Art. 96, Sch. 1, Lim. Act and must be brought within three years from the date when the plaintiff became aware of the mistake.

[P 182 C 2]

(b) Civil P. C. (1908), S. 35—In absence of special reason costs follow event.

As regards costs of suit the parties are, in the absence of any special reason, entitled to have the ordinary rule observed, namely, that usually costs follow the event. [P 182 C 1]

(c) Land Tenures—Ghatwali Chakran Lands—*P* taking settlement of resumed ghatwali lands from Government subject to permanent lease granted to *U* on condition that property would be treated as permanently settled estate—One *B* subsequently suing with reference to small portion of land alleging it to be lakheraj—*P* and Government made parties to suit and *B* succeeding—*P* then suing Government for rectification of lease and refund of small sum—Mere fact that portion of land was deprived without reduction of rent payable by *U* does not entitle *P* to damages.

The plaintiff took settlement of certain resumed ghatwali lands from the Government, subject to a permanent lease granted by the Government to one *U*, on the footing that the property so settled with the plaintiff would be treated as a permanently settled estate Subsequently one *B* brought a suit with reference to a small portion of the said lands, which he alleged was lakheraj. That suit to which the present plaintiff and the defendants were made parties, was successful. The plaintiff then brought a suit against the Government for rectification of the lease and for the refund of a small sum of money :

Held : that the mere fact that as rent receiver the plaintiff was deprived of a small portion of the lands without any reduction of rent payable to him by *U*, would not entitle him to any damages. [P 181 C 2]

Basant Kumar Bose, *Bepin Behari Ghose*, *II*, and *Sarat Kumar Mitter*—for Appellant.

Ram Charan Mitter and *Srish Chandra Chowdhry*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned District Judge of Bankura, dated 1st December 1916 affirming the decision of the Munsif of Bishunpore. The plaintiff brought the suit for the amendment or rectification of an indenture of lease and as consequential thereon, for the refund of a certain small sum of money. The facts are these : The Government had resumed certain ghatwali lands. Those lands were let out permanently to one Umesh Chandra Roy. After the grant of this permanent lease to Umesh Chandra Roy, the Maharaja of Burdwan entered into an indenture with the Secretary of State for India in Council, by which he took a lease of the resumed lands subject to the lease that had been granted to Umesh Chandra Roy in perpetuity, on the footing that the property would be treated as a permanently settled estate and the Government revenue should not be liable to increase. Subsequently, one Bholanath brought a suit with reference to a small portion of this land, which he alleged was lakheraj. To that suit, both the present plaintiff and the defendant were made parties as defendants and the suit was successful. So a portion of the land apparently included in the lease to the plaintiff went to Bholanath. The finding of the Court of first instance is this : Notwithstanding that the plaintiff may have lost the bare interest in this small piece of land, he is still obtaining the same rent from Umesh Chandra Roy. Whether that is so or not I do not know. But obviously it was the duty of the plaintiff to give evidence of what damage he suffered. The mere fact that as rent receiver he has been deprived of a small portion of this land without any reduction of the rent payable by Umesh Chandra Roy, would not entitle the plaintiff to substantial damage. Without proof of substantial damage, it would be nominal damage, if Umesh Chandra Roy, on the terms of his bargain, is liable to pay to the plaintiff the same amount of rent notwithstanding the loss of a small piece of land. The matter was however dealt with by the learned District Judge on a different point of view. He held that the present suit was barred by limitation. It is quite clear that the suit was instituted five years after the time when the parties came to know of the matter. In 1909, both parties came to know that this piece of land, that Bholanath recovered possession of in his suit, had been by a mistake included in the lease executed by the defendant to the plaintiff, and thereupon the plaintiff became aware that any right to have the document rectified or as he calls it amended in his plaint, arose when he became aware that Bholanath's suit was finally decided in his favour. He waited for five years before stirring up ; and the frame of the suit in this case, as it was put quite clearly in the plaint, was for the amendment of the document on the ground of mistake, and that is supported by the grounds of appeal to this Court because the first ground of appeal is framed on the basis that the

land recovered in Bholanath's suit had been included in the lease to the plaintiff by a mutual mistake of the plaintiff and the defendant. Therefore the plaint in the present case is clearly founded on the ground of a mutural mistake between the plaintiff and the defendant. If there was a mutual mistake between the parties, it is quite clear that Art. 96, Lim. Act, governs the suit. Art. 96 is as follows :

"For relief on the ground of mistake . . . . . three years from when the mistake became known to the plaintiff."

The plaintiff's own case is that his suit is on the footing of a common mistake between the plaintiff and the defendant, by which this land was included in the lease to the plaintiff. The plaintiff became aware of that mistake in 1909 and under the terms of Art. 96, he was bound to bring his suit within three years of becoming aware of the mistake. I agree with the view of the learned District Judge that the present suit is barred by the terms of Art. 96, Sch. 1, Lim. Act. The appeal therefore fails and must stand dismissed. The cross-objection of the defendant is preferred only with regard to costs. No reasons have been shown why the usual order should not be made as regards this. It does not appear that the learned District Judge exercised any discretion or considered the matter. As far as I can see, he seems to have considered this question of costs such a trifling matter as to be beneath the notice of the litigants. That obviously is not so. The parties are entitled to have the ordinary rule observed, namely, that usually costs follow the event. In this case nothing has been shown why the usual practice should not be adhered to. In that view, we must allow the cross-objection of the defendant and direct that the plaintiff's suit be dismissed with costs both in this and in the two lower Courts.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 182 (1)

FLETCHER AND SMITHER, JJ.

Aja Nasya—Plaintiff—Appellant.

v.

Karimbaksh Sarkar and *others*—Defendants—Respondents.

Appeal No. 1964 of 1916, Decided on 7th May 1918, from appellate decree of of District Judge, Ranpore, D/- 16-12-915.

Practice—Appeal—Remand order—Decree by lower Court after remand—Remand order cannot be challenged.

In an appeal to the High Court against a decree passed by the lower Court on a remand of the case to that Court by an order of the High Court the appellant cannot challenge the propriety of the remand order.

Indu Bhusan Roy—for Appellant.

Atul Chandra Gupta—for Respondents.

Judgment.—This appeal must stand dismissed. The case has been before this Court on a former occasion. On that occasion a remand was made and the questions to be decided by the lower Court on remand were definitely laid down. It is no use for the appellant now to try to challenge the remand order. We must take the order as it stands. On remand, the learned Judge of the lower appellate Court has come to conclusions of fact which are fatal to the plaintiff's case. In that view, we must dismiss the present appeal with costs.

V.B /R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 182 (2)

FLETCHER AND SMITHER, JJ.

Mohendra Lal Sinha—Plaintiff—Appellant.

v.

Krishna Kumari Debi and *others*—Defendants—Respondents.

Appeal No. 2238 of 1916, Decided on 10th May 1918, from appellate decree of Sub Judge, 2nd Class, Burdwan, D/- 4th July 1916.

Transfer of Property Act (1882), S. 108(j)—Lease of homestead land is transferable.

The interest of a lessee of a homestead is transferable under the Transfer of Property Act, unless it was in existence prior to the coming into operation of the Act. [P 183 C 1]

Jyotish Chandra Sirkar—for Appellant.

Surendra Nath Guha and *Ram Mohan Mukerjee*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Burdwan affirming the decision of the Munsif of the same place. The suit was brought for rent of a homestead. That rent is due is admitted. Defendants 1 and 2 are stated to be the original tenants. Defendants 3 and 4 are purchasers from the original tenants, the property having been sold to them in order to enable the original tenants to pay off a mortgage, so it is stated by the Munsif, due to the plaintiff. It is said that the holding is not capable of transfer

There is nothing to support that on the record. There is nothing to show that this was an interest in existence prior to the coming into operation of the Transfer of Property Act. If the case is governed by the Transfer of Property Act, the interest is clearly transferable. I do not think that in a case like this we ought to send back the case to be re-heard de novo on the ground that the plaintiff wants to put in some further evidence, to enable him no doubt to eject these people who have purchased the property on furnishing money to pay off the mortgage. I do not think that the plaintiff ought to be allowed now to put in further evidence. He ought to have proved in the first Court that the interest came into existence before the date of the Transfer of Property Act. The appeals fails and is dismissed with costs.

Smither, J.—I agree.

V.B./R K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 183

SANDERSON, C. J. AND WOODROFFE, J,

Satindra Mohun Tagore and *another* —Appellants.

v.

Sarala Sundari Debi and *another*—Respondents.

Appeal No. 18 of 1917, Decided on 20th April 1917, from original judgment of Chitty, J. in Testamentary Suit No. 9 of 1915, D/. 25th January 1917.

Will—Caveat — Remote reversioners are entitled to sue when nearer reversioners are making amicable settlement.

In a testamentary suit caveats against the will were entered by *B*, the immediate reversioner of the deceased, and some other persons, alleging that the will propounded was a forgery. Subsequently *B* entered into an agreement with the propounders of the will for an amicable settlement on their paying him a large sum of money raised by the sale or mortgage of a portion of the estate. Before this agreement was assented to by the other caveators, *S* and *R*, who would be immediate reversioners of the testator after the death of *B*, during the lifetime of the testators' widow filed caveats against the will:

Held: that *S*. and *R*. had locus standi to enter the caveats as *B* by entering into the agreement had done his best to render it impossible for him successfully to challenge the will or had at least shown that at all events he could not be relied upon seriously and successfully to contest the will. [P 185 C 1]

Quaere.—Whether any interest, however slight, or even the bare possibility of an interest in the estate left by an alleged testator, is enough to entitle a party to oppose the will. [P 185 C 1]

N. Sarkar—for Appellants.

S. R. Das—for Respondents.

Sanderson, C. J.—In this case the appeal is from the judgment of my learned brother Chitty, J., which was given upon an application by the plaintiffs in a testamentary suit that a certain caveat, which was filed on 20th December 1916 by Satindra Mohun Tagore and Ronendra Mohun Tagore should be discharged. The will which was the subject matter of the suit was the will of one Atanunandan Tagore who died, as we are informed, at the age of 19 years, and left a widow who was then 13 years old and who at the time of the suit was said to be 16 years old. Caveats had been entered against the will by three persons, Diptendra Mohun Tagore, Bidyut Prokash Ganguly and Srimati Hazari Dassi Debi. Of these, Diptendra Mohun Tagore is now dead; Bidyut Prokash Ganguly is alive; and so is Srimati Hazari Dassi Debi who is the mother of the widow of the testator Atanunandan. Caveats had also been entered by the two appellants Satindra Mohun Tagore and Ronendra Mohun Tagore. But on 17th November 1914, a letter had been written by the solicitor for the plaintiffs alleging on behalf of his clients, namely, the widow of the deceased testator and the executor and the executrix named in the will, that the appellants had not any interest whatsoever, and that consequently the solicitor was instructed not to allow inspection of the will for which the appellants had been asking. The result of that, and, I think of further communications, was that on 8th March 1915 the caveats which had been entered by Satindra Mohun Tagore and Ronendra Mohun Trgore were withdrawn.

Now, the position at that time was as follows: Bidyut Prokash Ganguly was contesting the validity of the will as is shown by the fact that on 11th March 1915 he affirmed an affidavit in which he set up very serious allegations. In para. 9 of his affidavit he alleged that the brother-in-law of Srimati Sarala Sundari Debi, who was the executrix of the will, had not only murdered his mother-in law but that also one Triguna Sundari Debi and had cut off four of the fingers of the hand of the said Srimati Sarala Sundari Debi and in addition to that, he struck the testator such a blow

upon his face that he lost the sight of both his eyes and that in consequence of that unfortunate incident he had no training or education of any sort whatever and by constantly brooding over his misfortune he practically lost his memory and intelligence as well as balance of mind and lived the life of practical imbecility until his death: and in para. 22 he went on to allege that the will was simply and wholly the act of Ashutosh Bannerjee and Srimati Sarala Sundari Debi (who are the executor and executrix of the will), in order to get the estate absolutely in their clutches and to get the son of the said Ashutosh Bannerjee adopted. I ought to have said that, although we have not the will before us, we are informed that the main provisions of it are to the effect that the property was left to the widow with power to adopt a son if she so desired. That was the position of affairs at the time when Satindra Mohun Tagore and Ronandra Mohun Tagore withdrew their caveats,

On 30th June 1915 the suit was set down as a contested suit. It appears that before that date an order had been made for a commission to issue for the examination of certain witnesses, namely on 22nd May 1915; and, inasmuch as on 11th November, Diptendra Mohun Tagore died, the death was recorded, and liberty was given to the Commissioner to proceed with the commission. That was the state of affairs up to the end of November 1915. The next fact which is necessary for me to mention is this: Apparently, in December 1915, a proposed settlement with Bidyut Prokash Ganguly was made, and that is evidenced by a letter which was written on 9th December 1916 by Mr. Sen acting on behalf of the executor and the executrix, addressed to Messrs. Manuel, Agarwalla and De who were acting as solicitors on behalf of the mother of the widow in these terms:

"I have the pleasure to inform you that subject to the sanction of the Court my clients and Mr. B. Ganguly have arranged to settle this case amicably on the terms of which I enclose for for your information a copy. Having regard to the relationship of the parties and seeing that your client has no personal interest in the matter I trust you will agree with me that this settlement is very desirable and should be carried out."

The material provisions of the settlement were as follows: Mr. B. Ganguly being the next reversioner after the widow of the deceased, in case no adoption takes place or fails, was to be paid out of the estate of the said A. N. Tagore the sum of Rs., 155,000

"out of which he will meet and pay his own costs and the costs of Srimati Hazari Dasi Debi, the mother of the said widow, one of the defendants in the suit;"

and that the said sum of Rs. 1,55,000 should be paid by the executor and executrix by sale or mortgage of a portion of the estate of the deceased within two months after the grant of probate. That agreement was to be subject to the sanction of the Court, as was provided by Cl. 6 of the agreement, namely, that these terms would be treated as without prejudice to any or either of the parties to she suit until recorded and confirmed by the Court with the usual certificate that they were for the benefit of the infant widow. We do not know what took place after that, but we must approach the case on the basis that the widow's mother has not agreed to that proposal up to the present time. Apparently Satindra Mohun Tagore and Ronendra Mohun Tagore having got to know of this proposal proceeded on 20th December 1916 to file their second caveat, and the paragraph in their affidavit upon which they rely is para. 14 which is to this effect:

"That previous to this there was no necessity for our entering caveat as we were under the impression that Bidyut Prokash Ganguly, who had always maintained that the will was a forgery, would properly prosecute the proceedings started on the caveat entered into by him, but now that he is willing to have probate granted of a forged will on being promised a large sum of money we have been advised to contest the will which has been set up as aforesaid."

That is the caveat which the learned Judge in the Court below has directed should be struck off the file. Now, two main points have been raised in the argument in this Court. The first is that Satindra Mohun Tagore and Ronendra Mohun Tagore have not got sufficient interest to entitle them to file caveats against the will. The relationship is as follows: there is no doubt that Bidyut Prokash Ganguly is the immediate reversioner in case of the death of the widow without a son being adopted; and, that if Bidyut were to die before the widow then the persons who would then become the immediate reversioners are the appellants Satindra Mohun Tagore and Ronendra Mohun Tagore. There is no doubt

that Bidyut Prokash Ganguly, the immediate reversioner, is entitled to contest the will on the authority of the decision in the case of *Brindaban Chunder Shaha* v. *Sureshwar Saha Paramanik* (1), and it is said that that case is an authority for the proposition that any interest, however slight, and even the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper. In my judgment I do not think it necessary in this case for us to consider whether the rule laid down in the English cases has been adopted in this country as the rule applicable to such a case as this, because it was admitted during the course of the argument that if the immediate reversioner is not protecting the estate, then the next reversioner is entitled so to do; and I intend to base my judgment in this case on the facts of this case and not to lay down any general rule upon the question whether any interest, however slight, or even the bare possibility of an interest is enough te entitle a party to oppose a testamentary paper. With regard to Bidyut Prokash Ganguly, as I have already pointed out, he has entered into this agreement to the material terms of which I have already referred; and in my judgment, he has thereby done his best to render it impossible for him successfully to challenge the will; or, looking at it from another point of view, in my judgment, he, by the agreement into which he has entered. has shown that at all events he cannot be relied upon seriously and successfully to contest the will. But Mr. Das argued that it is not a concluded matter because there is the mother of the widow who is contesting and there is no suggestion that she is going to abandon the position which she has taken up in contesting the will.

I assume that and I decide this case upon that assumption, because Mr. Das has pointed out that he has not had an opportunity of answering the affidavit which had been put forward on the actual day of hearing before Chitty, J. But even assuming that the widow's mother at the present moment has not agreed to compromise the suit, I still think that under the special and peculiar circumstances of this case, the appellants Satindra Mohun Tagore and Ronendra Mohun Tagore have sufficient interest to entitle them to enter caveat and contest the suit.

1. (1909) 3 I C 178.

I do not think it necessary for me to say anything more upon that point. The second point urged is that the appellants ought not to be allowed to enter caveats at this stage, because they had already entered caveat on a previous occasion and withdrew them and, to use the words of the learned Judge, "they ought not to be allowed to blow hot and cold in that way."

The answer to that seems to me to be that it cannot be said to be a case of blowing hot and cold, because the conditions which existed when caveats were first entered and withdrawn do not exist at the present moment. The caveats were withdrawn, as I have already pointed out when the opposition of Bidyut Prokash Ganguly could certainly be regarded as a genuine and strenuous opposition; but having regard to agreement into which he has entered I think, as I have already said, he cannot be relied upon in future seriously to contest the will. Therefore the conditions being different, the accusation of "blowing hot and cold" cannot reasonably be made against the appellants, and I do not think that, that is sufficient reason for preventing them from filing caveats on 20th December 1916. The result therefore in my judgment is that the two appellants ought to be allowed to enter caveats. I think it would be a misfortune if there should be another suit, and consequently they ought to be added as defendants to the suit which is now proceeding. Mr. Sarkar has agreed that he will accept the evidence which has already been taken on commission, provided that he is allowed to have an opportunity of putting further questions in cross-examination, if he is advised so to do: and the appellants will therefore be added as defendants to the suit upon the understanding that they will accept the evidence which has already been given, subject to any application which may be made by the appellants to the Judge trying the case for leave to put further questions in cross-examination.

We cannot decide whether that leave ought to be granted or not, and it will be for the learned Judge trying the case to decide that. For these reasons I think that the appeal should be allowed with costs here and in the Court of first instance.

Woodroffe, J. —I agree with the order proposed by the learned Chief

Justiee on this ground: the caveator Diptendra Mohun Tagore is dead, and the caveator Bidyut Prokash Ganguly has entered into a compromise to settle this litigation, and there is thus left out of the original caveators, only Srimathi Hazari Debi acting on behalf of the minor widow. It seems to me that it is very likely that Hazari Debi was consulted about the compromise, and though it has not been shown that she has actually assented to this compromise, I am not satisfied under the circumstances of this case that the interests of the reversioner appellants will be sufficiently protected unless they are allowed to intervene.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 186

FLETCHER AND SHAMSUL HUDA, JJ.

Dwarka Nath Dey Chowdhury—Plaintiff—Appellant.

v.

Sailaja Kanta Mullik—Defendant—Respondent.

Appeal No. 603 of 1916, Decided on 12th March 1918, from appellate decree of Addl. Sub-Judge, Nadia, D/- 22nd September 1915.

Landlord and Tenant—Suit for arrears of rent—Decree with limitation that it should not be executed against tenant personally is not valid.

Where in a suit for rent the Court finds that the defendant-tenant is liable, it should pass a decree in favour of the landlord-plaintiff in the ordinary way without any limitation as to the execution of the decree, e. g. that the decree shall only be executed against the jama in default and not against the tenant personally.

[P 186 C 2]

Where in a suit for rent the Court, holding that the plaintiff's evidence as to the defendant's possession of the jama was meagre and unsatisfactory, but was not so bad as could be wholly discarded, made a decree in favour of the landlord with the limitation that the defendant-tenant would not be personally liable under the decree:

Held: that the decree must be set aside and the case remanded for re-hearing and a clear finding whether the defendant was or was not liable for rent in respect of the jama, and that on that finding there should either be a decree in the ordinary manner without any limitation or the suit should be dismissed altogether.

[P 186 C 2]

Jogesh Chandra De and *Khitish Chunder Chakraburttg*—for Appellant.

Sasi Sekhar Bose—for Respondent.

Judgment.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Nadia modifying the decision of the Munsif of Ranaghat. The plaintiff brought the suit to recover rent in respect of three jamas. The defences raised were three: First of all, that the plaintiff had not got the title, secondly, that the suit could not proceed owing to the boundaries of the jotes not being given and thirdly, that there was no relationship of landlord and tenant. The first Court decided the suit wholly in favour of the plaintiff. On appeal, the lower appellate Court has reversed that decision and has given a decree to the plaintiff as regards one jama only. We are not concerned with that jama, because the learned Judge of the lower appellate Court concurred with the Judge of the Primary Court as regards that and there is no appeal with reference to it. It is only with regard to the other two jamas, which are called Mudafat Kamal Chand Mullik and Biswa Nath Mullik, that our decision is invited, and with respect to them the learned Judge of the Court of Appeal below stated that the evidence was meagre, that there was no evidence on the plaintiff's side that the defendant was in possession of them and that he was not favourably impressed with the witnesses.

The learned Judge also remarked that he was not prepared to discard the evidence on the plaintiff's side as concocted or forged but that he must say that it was not sufficient to make the defendant personally liable for the rent of those two jamas. As argued by both sides, that however cannot stand. Either the defendant is liable or is not. There is no half way between these two and the case must go back to the learned Judge of the lower appellate Court to re-hear the appeal with regard to these two jamas, Mudafat Kamal Chand Mullik and Biswa Nath Mullik and to come to a clear finding as to whether the defendant is or is not liable for rent in respect of them. If he finds that the defendant is liable, he must pass a decree in favour of the plaintiff in the ordinary way without the limitation that has been attempted to be imposed in the judgment appealed against. If the evidence does not establish the defendant's liability, he must decide it that way. Costs will abide the result of the re-hearing by the lower appellate Court.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 187 (1)

TEUNON AND NEWBOULD, JJ.

Madhusudan Gope — Plaintiff—Petitioner.

v.

Behari Lall Gope and *another*—Defendants—Opposite Parties.

Rule Nisi No. 602 of 1917, Decided on 8th February 1918.

Civil P. C. (1908), S. 24—Small Cause suit valued at Rs. 140 transferred from Sub-Judge having Small Cause powers not exceeding Rs. 500 to Munsif having Small Cause powers up to Rs. 100 only—Munsif's Court is Court of Small Causes within S. 24 (4).

A Court of Small Causes under S. 24 (4) includes Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Provincial Small Causes Courts Act. [P 187 C 2]

A suit of the value of Rs. 140 cognizable by a Court of Small Causes was transferred by the District Judge from the Court of a Subordinate Judge vested with Small Cause powers not exceeding Rs. 500 to the Court of a Munsif with Small Cause powers up Rs. 100 only.

Held: that the Court of the Munsif to which the suit was transferred must be deemed to be a Court of Small Causes under S. 24 (4) to permit the trial of the suit by that Court. [P 187 C 2]

Bepin Behary Biswas—for Petitoner.

Romesh Chundra Sen — for Opposite Parties.

Judgment.—In this case it appears that a suit of a Small Cause Court nature valued at Rs. 140 was instituted in the Court of the Subordinate Judge at Dacca vested with powers under S. 25, Bengal, Agra and Assam Civil Courts Act, for trial of suits cognizable by Courts of Small Causes up to a value not exceeding Rs. 500. For certain special reasons into which we need not enter the District Judge of Dacca by an order, made under the provisions of S. 24, Civil P. C., transferred the suit for trial to the Court of a Munsif at Dacca vested with Small Cause Court powers, but exercising jurisdiction in such cases only up to a value not exceeding Rs. 100. The suit was tried by the Munsif without objection taken by the plaintiff who is the petitioner before us, and it resulted in a decree for a sum of about Rs. 75. The petitioner now comes to this Court and contends that by virtue of the provisions of S. 16, Provincial Small Causes Courts Act, and by reason of the pecuniary limitation on his Small Cause Court jurisdiction, the Munsif was not competent nor had he any jurisdiction to try the suit in question.

The answer to this contention put forward by the opposite party is that by virtue of the provisions of sub-S. (4), S. 24, Civil P. C., the Court of the Munsif must, under the circumstances, be deemed to be a Court of Small Causes within the meaning of S. 16, Provincial Small Causes Courts Act. In support of this contention he refers us to the cases reported as *Sankarama Aiyar* v. *Padmanabha Aiyar* (1), *Sukha* v. *Raghunath Das* (2). By the petitioner we have been referred to the case reported as *Dalal Chandra Deb* v. *Ram Narain Deb* (3), in which the learned Judge who heard and decided that case intimated that they were inclined to a contrary view. That expression of opinion was not however, as indeed the learned Judges themselves have pointed out, necessary to the decision of the case before them and must therefore be regarded as an expression of opinion and no more. With all deference, we are unable to agree in that opinion and for the reasons given in the case decided by the Madras and Allahabad High Courts so which we have referred we are of opinion that a Court of Small Causes under S. 24 (4), Civil P. C. does include Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under Act 9 of 1887. It follows therefore that the Court of the Munsif to which the suit in question was transferred must be deemed to be a Court of Small Causes, so at least, as to permit the trial of the said suit by such Court What procedure the Munsif should have adopted and what finality attaches to his decision it is not necessary for the purpose of this rule to determine. In the view we take this rule must be discharged with costs, the hearing fee being assessed at one gold mohur.

V.B./R.K. *Rule discharged.*

1. (1915) 38 Mad 25=17 I C 425.
2. (1917) 39 All 214=37 I C 809.
3. (1904) 31 Cal 1057.

A. I. R. 1918 Calcutta 187 (2)

FLETCHER AND SHAMSUL HUDA, JJ.

Rudra Nath Roy—Appellant.

v.

Joy Chand Kaibaratna (Das) and *others*—Respondents.

Appeal No. 980 of 1916, Decided on 20th March 1918, from appellate decree of Sub-Judge, 2nd Class, Sylhet D/- 23rd December 1915.

Fishery -- One co-owner granting lease—Others cannot claim part of value unless their right is not satisfied.

-- Where the lessees of "bil" from some of its co-owners catch fish in it and make a profit by selling it the other co-owners cannot recover by way of damages a part of the value realised by the sale, unless it is shown that when they went for fishing, they where obstructed by those lessees or that they could not get enough fish in the "bil" to satisfy their right of fishery. [P 188 C 1]

Gopal Chunder Das—for Appellants.

Birendra Coomer De— for Respdts.

Judgment.—In this case, the plaintiffs appeal against the decision of the learned Subordinate Judge of Sylhet, dated the 23rd December 1915, and the defendants have preferred a cross-appeal. It will be convenient in the view we take of the case to deal with the cross-appeal first. The plaintiffs are co-owners or part owners of a certain bil. The defendants have a lease from some of the other co owners. That is a fact found. The defendants have caught fish from that bil and apparently have made a profit by the sale thereof. The plaintiffs do not allege that they have been excluded from exercising their rights, but they want to have by way of damages a portion of the value realized by the defendants by the sale of the fish that they have caught. The plaintiffs cannot have any such right. It has not been shown that when they had gone there for fishing they had been prevented by the defendants or that they could not get ample fish in the bil to satisfy their right of fishery. An action like this does not lie. In that view we must allow the cross-appeal filed by the defendants and dismiss the plaintiffs' suit with costs in all Courts The defendants are also entitled to their costs in the cross-appeal. In the view we have taken it is not necessary to make any finding as to the share of the plaintiffs. That matter is left open between the parties.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 188

FLETCHER AND SMITHER, JJ.

Kusum Kumari Debi and *others*—Defendants—Appellants.

v.

Surendra Krishna Ghose and *others*—Pro forma Defendants—Respondents.

Appeal No. 418 of 1915, Decided on 23rd March 1917, from the Order of Sub-Judge, Nadia, D/- 23rd June 1915.

(a) Civil P. C. (1908), O. 6, R. 17—Order for amendment of pleadings in appeal—Second appeal is incompetent—Error in form of plaint is not fatal.

A Hindu family incorporated themselves into a Company under the provisions of the Companies Act under the name of "K P. Ghose, Property Improvement Association, Limited." The Company went into liquidation, and a suit for rent brought in the name of "K. P. Ghose, Property Improvement Association, Limited, His Liquidators' was dismissed by the Munsif on the ground that the plaintiffs named in the plaint were not entitled to recover the rent. On appeal the appellate Court made an order allowing the plaint to be amended by striking out the names of the association and of the liquidators and directing the suit to proceed as a suit brought by one of the persons described as a liquidator in the plaint, who was entitled to the rent:

Held: (1) that the order of the appellate Court was not open to second appeal;

(2) that the course adopted by the appellate Court was manifestly the right course, for a person entitled to this rent should not be deprived of his rent merely by an error in the form of the suit. [P 189 C 2]

(b) Companies Act. (1913), S. 162—Dissolution of company.

A Corporation does not become dissolved at the commencement of either a voluntary or a compulsory winding up. [P 189 C 1, 2]

Ship Chunder Palit and *Charu Chunder Bhattacharya*—for Appellants.

Mohendranath Roy and *Baranashibashi Mukerjee*—for Respondents.

Fletcher J—This is an appeal by the defendant against an order of the learned Subordinate Judge of Nadia dated the 23rd June 1915, reversing an order of the Munsif of Krishnanagar. The original plaintiff, who bore the following description "K. P. Ghose, Property Improvement Association, Ltd. His Liquidators" whether the word "His" represents K. P. Ghose or Association, I do not know.

"Surendra Krishna Ghose, Rajendra Krishna Ghose, sons of Kali Prasunna Ghose, by caste Kayestha, by occupation, zamindars"

brought the suit to recover rent. The learned Munsif held that "K. P. Ghose, Property Improvement Association, Ltd. His Liquidators" were not entitled to recover the rent sued for and, therefore, dismissed the suit although he also expressed the opinion that the defendant had paid the rent that was due in respect of the holding. The plaintiffs then appealed to the Court of the learned Subordinate Judge and the learned Subordinate Judge came to the conclusion that if "K. P. Ghose, Property Improvement Association, Ltd., His Liquidators" were not the proper plaintiffs, one of the liquidators, Surendra Krishna

Ghose, had become entitled to the property and that, therefore, leave to amend the plaint by striking out the names of the association and the other liquidator and allow the suit to proceed as a suit brought by Surendra Krishna Ghose, one of the persons described as liquidators in the plaint, ought to be granted. Against that order, the present appeal has been preferred. I am not at all satisfied that an appeal lies to this Court in a matter of this nature. But assuming that an appeal lies, I am not inclined to interfere with the order of the lower appellate Court. The learned Munsif was clearly wrong in holding that when the Company went into voluntary liquidation, it was dissolved. There is nothing left to liquidate if a Corporation becomes dissolved at the commencement of either a voluntary winding-up or a compulsory one.

The fact is that K. P. Ghose, Property Improvement Assoeiation, Ltd. consisted of a Hindu family that incorporated themselves under the provisions of the Companies Act and having incorporated themselves under the provisions of the Companies Act, they had the usual proceedings of a partition and apparently they had first to get rid of the company. But whether they got rid of the company or not, we are not called upon to consider. All that the learned Judge has found in this case is that Surendra himself stated in a certain partition proceeding between the members of the company that he became entitled to a portion of the property of the company. The mere fact that, acting under the advice, right or wrong, that a suit could be maintained in the name of the Company and its liquidators in respect of the rent that accrued due before liquidation, the present plaintiff brought the suit in the form in which it was instituted, ought not to deprive him of any right that he has to receive the rent. The decision of the learned Subordinate Judge is manifestly a correct decision. This defendant does not only object but she also says that she may be prejudiced if the name of K. P. Ghose, Property Improvement Association, Ltd. His Liquidators, be altered to the mere simple name of Surendra Krishna Ghose. If her statement is true that she has, in fact, paid her rent, I suppose she will be equally able to give evidence that she has paid the rent in the suit in which Surendra is the plaintiff as in the suit where the company is stated to be the plaintiff. The course adopted by the learned Judge of the lower appellate Court seems to be manifestly the right course, namely, that a person entitled to his rent should not be deprived of his rent merely by the error of the gentleman who advised him that a suit in the form in this case could be maintained In that view, though no appeal lies to this Court, I think we ought to affirm the learned Subordinate Judge's decision and dismiss the appeal with costs, three gold mohurs.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 189

FLETCHER AND SHAMSUL HUDA, JJ.

Kishore Lal Goswami—Plaintiff—Appellant.

v.

Tarapada Bhattacharjee — Defendant—Respondent.

Appeal No. 1496 of 1916, D/- 24th April 1918, from appellate decree of Sub-Judge, Second Court, Hooghly, D/- 4th April 1916.

Lease—Construction—Lease for carrying on shop—Lease providing for payment of rent and toll on stipulated rent in respect of goods sold in shop or on boat or on road—Lessee held liable to pay toll in respect of goods taken from shop to nearest boat or road.

The defendant took a lease of a certain property to which the provisions of the Transfer of Property Act, applied for the purpose of carrying on a shop. The lease provided for the payment of a certain amount of rent and also for the payment of a toll over the stipulated rent as part of the rent in respect of goods that should be sold in the shop or on boat or on road on certain terms:

Held: that on a reasonable construction of the lease the defendant was liable to pay the toll not only in respect of goods sold in the shop, but also in respect of goods which, having been taken from the shop to the nearest boat or road, would be sold there, but that his liability did not extend to the case of goods sold on boats and roads far away from the shop.

[P 190 C 1]

Sarat Chunder Basak and *Bepin Chunder Bose*—for Appellant.

Jadunath Kanjilal and *Hemendra Chunder Sen*—for Respondent.

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Hooghly, dated 4th April 1916, modifying the decision of the Munsif at Serampore.

The defendant took a lease of certain property to which the provisions of the Transfer of Property Act apply for the purpose of carrying on a shop—for the purpose of his aratdari business amongst other things. The lease provided for the payment of a certain amount of rent. It also provides that the lessee should pay dan or kor over the stipulated rent as part of the rent in respect of goods that should be sold in his arat or on boat or shop or road as aratdar on certain terms. Dr. Kanjilal at the conclusion of his argument was driven to admit that the judgment of the lower appellate Court, in so far as it refused to decree the commission in respect of goods sold in the shop as aratdar, could not be supported. That is obvious. The only question is with reference to the goods sold on boat or road. Dr. Kanjilal's view is that it would be extremely hard that the plaintiff, who is apparently a pleader, should be permitted to overreach the ignorant aratdar by having stipulated that whenever he should sell on any road in any country he should be liable to pay a commission to the plaintiff. That is not what the lease means, you must put a reasonable construction on the lease. What the plaintiff meant to provide against is this: Perhaps he knew the ways of the aratdars. He meant to provide that the aratdar should not be entitled to anchor a boat in the stream opposite or close to the shop and by taking the goods from the shop to the boat sell them there and say that that is not a sale within the meaning of the lease.

Similarly he should not be entitled to take the goods out of the shop on the road and instead of selling them in the arat sell them on the road and say that he is not liable to pay commission in respect of the goods sold on the road adjoining the shop. Such cases were intended to be covered by the lease. In respect of the goods so sold, there was nothing to prevent the lessee to stipulate that he should be liable to pay a commission. Nobody can ever likely suggest that this aratdar, when he is in his boat far away from his place of business and sells a maund of potatoes there, he is liable to pay to his landlord at Serampore a commission of one rupee per one hundred maunds in respect of goods sold at that distance. The lease has got a perfectly clear and reasonable meaning. The case must be remitted to the Court of first instance to find out what amount of additional rent by way of commission on things sold by the defendant as aratdar in the shop or on boat or on road, as I have already mentioned, is payable to the plaintiff. Costs of this appeal will be paid by the respondent.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal accepted.*

A. I. R. 1918 Calcutta 190

TEUNON AND CHAUDHURI, JJ.

Raj Kumar Kusari—Petitioner.

v.

Registrar of Joint Stock Companies, Bengal—Opposite Parties.

Criminal Revn. No. 1125 of 1916, Decided on 17th January 1917.

Companies Act (1913), Ss. 134 (4) and 76—Requisites of conviction—Before convicting officer of company it must be shown that officer was knowingly party to default in holding meeting.

Before an officer of a Limited Company can be convicted under S. 134 (4), Act 7 of 1913 for default in submitting to the Registrar of Companies the balance sheet laid before the company at a general meeting, in a case where no such general meeting was held, it is necessary in the first instance to show with reference to the provisions of S. 76 of the Act, that the officer was knowingly a party to the default in holding the general meeting: *Park* v. *Lawton* (1911) 1 *K. B* 588, *Ref.* [P 191 C 1]

Khitish Chandra Chakravarti for *Probodh Kumar Das*—for Petitioner.

Camell—for Opposite Parties.

Judgment.—In this case the petitioner, who was the Secretary and is also described as the Manager of the Darjeeling Press Company, Limited, has been convicted under S. 134 (4), Act 7 of 1913, that is to say, the Indian Companies Act, on the footing that he is an officer of the said company and had knowingly and wilfully authorized or permitted default to be made in submitting to the Registrar of companies the balance sheet laid before the company at its general meeting. The balance sheet in question is the balance sheet for the year ending on 31st March 1914; and part of the defence of the petitioner was or appears to have been that it was in fact impossible for him to comply with the requirements of S. 134, inasmuch as in fact there had been no general meeting before which any balance sheet for the year 1914 could be laid.

From the proceedings before the Fourth Presidency Magistrate it is impossible for us to say on what findings of fact the Magistrate has acted in convicting the petitioner, and it is also impossible for us to ascertain whether the defence of the petitioner as summarised above has at all been considered. Assuming that the defence was correct in fact, that no such general meeting had been held, and that would seem to be the case from the explanation submitted to us by the trying Magistrate, in order to bring the petitioner within the rule laid down in *Park* v. *Lawton* (1), it was necessary in the first instance to show with reference to the provisions of S. 76 of the Act, that the petitioner who was an officer of the company was knowingly a party to the default in holding the general meeting.

That question has not been inquired into at all. That being so, we cannot hold that this case has been properly tried. We, therefore, set aside the conviction and sentence and direct that the petitioner be re-tried under the provisions of S. 76 and S. 134 (4), Companies Act, and we further direct that the re-trial be held in the Court of the Chief Presidency Magistrate. In these terms this Rule is made absolute.

Criminal Revn. No. 1127 of 1916. This Rule is analogous to Revn. No. 125 of 1916 and the order made in that case will govern this also.

Criminal Revn. No. 1126 of 1916. In this case the petitioner, who was described as the Secretary and Manager of the Darjeeling Press Company, Limited, has been convicted under S. 32 (4), Companies Act. The default of which he has been convicted is alleged to be in respect of the list of share-holders and summary of capital. In all other respects it is similar to revision cases Nos. 1125 and 1127 of 1916 which we have just disposed of. The order made in those cases will govern this case also.

V.B./R.K. *Rule made absolute.*

1. (1911) 1 K B 588=80 L J K B 396.

A. I. R. 1918 Calcutta 191

SANDERSON, C. J. AND WOODROFFE, J.

Campbell and Co.—Appellants.

v.

Jeshraj Girdhari Lall—Respondent.

Appeal No. 24 of 1917 in suit No. 22 of 1916, Decided on 26th June 1917.

Letters Patent (Cal). Cl. 15—Order refusing to set aside award filed is appealable but not under Civil P. C. (1908), S. 104 (f)—Arbitration Act (1899), Ss. 11 (2) and 15.

The order of a Judge sitting on the Original Side of the High Court, whereby he refuses to take an award filed under the Arbitration Act from off the file is a judgment within the meaning of Cl. 15 of the Letters Patent and is, thereiore, appealable. There is no right of appeal against an order refusing to set aside award filed under S. 104 (f), Civil P. C., which has no application to the filing of an award under Cl. (2), S. 11, Arbitration Act. [P 192 C 1]

C. R. Das, A. N. Choudhuri and *R. N. Mitter*—for Appellants.

B. Chakravarti and *P. L. Buckland*—for Respondent.

Sanderson, C. J.—In this case a preliminary point has been taken that there is no right of appeal. An application was made before Greaves, J. by the present appellants, and they obtained a rule calling upon the opposite party to show cause why the award made in these matters should not be taken off the file and set aside, or why, in the alternative and without prejudice to the petitioners, the said award should not be remitted, and why an injunction should not be awarded against the opposite party restraining them and their assignees, servants and agents, until the further order of this Court, from executing the said award. As I understand, the award had been made against the petitioners, and it had been sent by the arbitrator to the Registrar, who, in accordance with the rules, filed it. I ought to have said that the arbitration was under the Arbitration Act, 1899, which applies to the Presidency Towns, and so to Calcutta. The rule which applies is R. 12, Chap. 23 of the Original Side Rules, which is as follows:

"Where the arbitrators or umpire have been requested to file the award, they shall cause the award or a signed copy thereof to be filed in Court in accordance with S. 11 (2) of the Act, by forwarding the same (together with the necessary court-fees for filing) under a sealed cover adressed to the Registrar with a letter requesting that the award be filed."

That, as appears from the rule, is done in pursuance of the provisions of S. 11, Cl. (2), Arbitration Act; and, that clause provides,

"the arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of the filing the award, cause the award, or a signed copy of it, to be filed in the Court; and notice of

the filing shall be given to the parties by the arbitrators or umpire."

The learned counsel for the appellant, has argued that there is a right of appeal either under the S. 104 (f), Civil P. C. or under S. 15 of the Letters Patent. I do not agree with the learned counsel that there is a right of appeal under S. 104 (f) in this case; that section provides that

"an appeal shall lie from the following orders.

"(f) An order filing or refusing to file an award in an arbitration without the intervention of the Court."

I do not think that Cl. (f), S. 104, applies to the filing of an award under Cl (2), S. 11, Arbitration Act, because an award under the latter clause can be filed in Court, and is in practice filed in Court without the intervention of an order by a Judge. In my opinion, Cl. (f), S. 104 obviously refers proceedings under S. 20 and perhaps other sections of the Sch. 2, Civil P. C., when the arbitration proceedings are under Sch 2 of the Code. Then if the party, under S. 20, wants to get the award filed, he has to apply to the Court, and an order of the Judge is required, and the Judge would make an order directing that the award should be filed or that the award should not be filed, as the case might be. S. 104 (f), therefore, would apply to such proceedings, and I do not think, as already stated, the section would apply to proceedings under Cl. 2, S. 11, Arbitration Act, under which an award can be filed without the order of a Judge. But I am clearly of opinion that we have jurisdiction to hear the appeal under Cl. 15 of the Letters Patent, and, I think that there is no doubt that the order of Greaves, J., in this case, whereby he refused to take the award off the file, was a judgment within the meaning of Cl. 15 of the Letters Patent. In a material sense, it finally decided the rights of the parties, because, by refusing to take the award off the file, the learned Judge in effect made the appellant liable for the amount of the award, for, if the award is put upon the file and remains upon the file, then, as pointed out by the learned counsel for the appellant, it is enforceable as if it were a decree of the Court under S. 15, Arbitration Act. For these reasons, I think that an appeal lies.

Woodroffe, J.—I agree.

V.B./R K. *Preliminary objection disallowed.*

A. I. R. 1918 Calcutta 192

RICHARDSON AND BEACHCROFT, JJ.

Jamila Khatun Choudhury and *others* —Appellants.

v.

Mahamud Khatun Chowdhury—Respondent.

Appel No. 714 of 1915, Decided on 8th February 1918, from appellant decree of Dist. Judge, Chittagong, D/-22nd December 1914.

Mortgage—Mortgagee undertaking to pay land revenue—Sale for arrears on default and subsequent sales collusive—Transferee from mortgagor held entitled to redeem mortgage —Rights of mortgagor held not affected.

Defendant, who was the mortgagee in possession of a share in a taluk and had undertaken to pay the Government revenue, made default in payment of the revenue, so that the taluk was sold for arrears of revenue and was purchased by *A*. *A* sold it to *B* who shortly afterwards sold it to the defendant. Plaintiff, who was purchaser from the mortgagor, sued to recover possession of the taluk from the defendant on redemption. It was found that the sale for arrears of revenue and the subsequent sales to *B* and the defendant were collusive transactions engineered by the defendant for the purpose of obtaining possession of the taluk as owner:

Held: that the sales did not affect the rights of the mortgagor or of the plaintiff, who was a transferee from the mortgagor, and that the plaintiff was, therefore, entitled to redeem. [P 193 C 1]

Probodh Kumar Das and *Ram Charan Mitra* and *Chandra Sekhar Sen*—for Appellants.

Dwarka Nath Chackerbutty, *Nur-uddin Ahmed* and *Khitis Chandra Sen*—for Respondent.

Richardson, J.—Defendant 1 in the suit out of which this appeal arises was the owner in her own right of a moiety share of the taluk to which the suit relates. As to the other moiety share she was the mortgagee in possession under a mortgage by way of conditional sale. As mortgagee, she had undertaken to pay the Government revenue due in respect of the share mortgaged. The taluk however, fell into arrears and was sold on 6th June 1897 at a revenue sale and purchased by one Abdul Bari. Abdul Bari sold the taluk in May 1899 to Basirulla and in November 1900, defendant 1 purchased it from Basirulla. In November 1911 the plaintiff in the suit purchased a 4-annas share of the taluk from defendant 5, the mortgagor of defendant 1. The suit was brought by the plaintiff to redeem the mortgage of defendant 1 and both the Courts below have concurred in making a decree in favour of the plaintiff.

In this appeal it is contended in the first place that defendant 1 was prejudiced at the trial by an amendment which was made in one of the issues. In our opinion, there is no substance in this contention. The amended issue and the original issue if properly understood raise the same questions of fact, the very questions to which evidence was directed. On that point we agree with what is said on the subject by the learned District Judge in the course of his judgment.

The two remaining contentions may be dealt with together. One of them is that the plaintiff purchased nothing under his conveyance from defendant 5, and the second is that the learned District Judge has not found expressly that defendant 1 was guilty of wilful neglect in not paying the Government revenue. What the Court below appears to have found is this, that the purchase of the taluk by Abdul Bari and the purchase by Basirulla were collusive transactions engineered by defendant 1 for the purpose of getting the estate into her own hands. If that is the meaning of the learned Judge's judgment, then there is an end of the case. Such collusive transaction could have no effect on the title of defendant 5 or on the title acquired by the plaintiff from that defendant. The findings of the District Judge appear to me sufficiently clear. In the first place, referring to the sequence of transactions he says this:

"The rapidity of these transactions is very suggestive. It has been argued for the respondent that the appellant being already the owner of half the taluk, wished to make sure of getting the other half and doing away with the rights of the mortgagors, and accordingly arranged a collusive set of transactions and was obliged to purchase herself from Basirullah when her estate was taken over by the Court of Wards, since the Court of Wards would not manage a benami property. These contentions are supported by the prices paid."

Then later on he sums up as follows:

"These facts alone, in my opinion, suffice to show that the transactions are not genuine."

As to wilful default on the part of the defendant in connexion with the payment of Government revenue the learned Judge says,

"there is no evidence at all to show that the tenants were seriously in arrears over paying their rents."

The suggestion made to day that if the defendant 1 had had an opportunity she might have shown that the inability to pay the revenue was due to a cyclone or something of that kind, cannot be accepted in face of the findings to which we have referred. The result is that this appeal is dismissed. The plaintiff respondent is entitled to his costs of this appeal from the appellant. We are now informed that pending the hearing of the appeal to this Court the appellant has died. Her two daughters have been substituted in her place. Her son claims no interest through her and appears to have been added as a party respondent. He now asks for costs. We see no reason why he should receive costs.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 193

FLETCHER AND SHAMSUL HUDA, JJ.

Saidunnessa—Plaintiff—Appellant.

v.

Tejendra Chandra Dhar and *others*—Defendants—Respondents.

Appeal No. 370 of 1915, Decided on 21st January 1918, from original decree of Offg. Addl. Sub-Judge, Chittgong, D/- 30th June 1915.

(a) Court-Fees Act (1870), S. 7 (iv) (c)—Suit for declaration of rights and for injunction restraining execution of particular decree—Court-fee payable is ad valorem.

The plaint in a case in which the plaintiff not only asks for a declaration of rights but also prays for perpetual injunction restraining the defendant from putting in execution a particular decree is chargeable with ad valorem court-fee under S. 7 (iv) (c). [P 194 C 1]

(b) Civil P. C. (1908), S. 149—Insufficient court-fee on memorandum of appeal—Deficiency cannot be allowed to be made up on day of hearing unless grounds for exercise of discretion exist.

Where insufficient court-fee has been paid on a memorandum of appeal, the Court will not in its discretion under S. 149 allow the deficiency to be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion; of these grounds the principal one is that a bona fide mistake was made. [P 194 C 1]

Probodh Coomar Das—for Appellant.

Rash Behari Ghose, *Dhirendra Lall Kastagir* and *Tarakeswar Nath Mitter*—for Respondents.

Fletcher, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that the appellant has not paid the appropriate court fee. The court-fee paid on the memo. of appeal was a Court-fee of Rs. 10 only and it was paid with a distinct statement on the memo. of appeal which the learned vakil for the appellant tells us was added subsequently—although the memo. does

not show on what date that addition was made — that the fee payable was under Act. 17 (iii) Sch. 2, Court-fees Act. Now Art. 17 (iii), Sch. 2, Court-fees Act, states that on a plaint or memo. of appeal to obtain a declaratory decree where no consequential relief is prayed for the fee payable is Rs. 10. The plaint in this case as amended in the Court below shows that that was not the nature of the present suit. Now only three declarations were asken for, but the plaintiff prayed for a perpetual injunction. It is quite clear that that is not a suit for declaratory decree where no consequential relief is prayed. Consequential relief was prayed in this case and it was the main relief, namely, an injunction restraining the defendants from putting in execution a particular decree of the Court. It seems to me quite clear, both on the authorities of this Court and on the wording of the article of the Court-fees Act that the memo. of appeal in the present case was chargeable with an ad valorem fee. The question is whether any ground has been shown on which we ought to permit the deficit court-fee to be paid now under the provisions of S. 149, Civil P. C. It is quite clear that the appellant has not got the right to pay it now because the words used in the section are that "the Court may in its discretion;" and, before the Court exercises its discretion, the appellant has got to satisfy us that some grounds exist on which the Court ought to exercise its discretion. Amongst those I take it that the principal ground is that a bona fide mistake was made. We have heard the statement of the learned vakil who appears for the appellant and we are not satisfied that a bona fide mistake was made. That being so, we are not prepared to exercise the discretion that Sec. 149, Civil P. C., confers on us to permit the payment of the deficit court-fee now. In that view the appeal is incompetent and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal rejected.*

A. I. R. 1918 Calcutta 194

CHITTY AND SMITHER, JJ.

Samiruddin and *others*—Appellants.

v.

Abdul Syed and *others*—Respondents.

Appeal No. 1503 of 1915, Decided on 18th December 1917.

(a) Transfer of Property Act (1882), S. 58—Suit on mortgage compromised—Mortgagor agreeing to pay decretal amount in specified instalments — On failure to pay mortgagee to get mortgaged property sold, and in case of deficiency, also certain other property — Payment not made—Botb properties sold and purchased by mortgagee—Mortgagor applying to set aside sale—Fresh compromise setting aside sale on mortgagor making payment within two months—Compromise not carried out—Mortgagor in meantime mortgaging portion of property sold for purpose of paying off decretal amount—Mortgagee under subsequent mortgage obtained no rights and interest—It was immaterial whether portion mortgaged was attached or not Civil P. C. (1908) O. 21, R. 64.

In a suit on a mortgage a compromise was effected, by which the mortgagor consented to a decree being passed against him on condition that if the decretal amount were not paid according to the instalments specified in the decree, the mortgagee would be entitled to recover it by sale of the mortgaged properties and in case of deficiency in the sale-proceeds by sale of certain other properties (lot No. 2 specified in the schedule to the compromise petition). Payments not having been made in accordance with the decree, the mortgaged properties as also the other properties (in lot No. 2) were put up to auction-sale and were purchased by the mortgagee himself, who was put in possession by the Court. The mortgagor applied for setting aside the sale, and again a compromise was made under which the sale was to be set aside on the mortgagor paying the full amount of the decree within two months. The mortgagor failed to carry out this compromise and the sale to the mortgagee was confirmed. In the meanime the mortgagor had mortgaged lot No. 2 to the plaintiff for the express purpose of paying off the decretal amount due to the mortgagee:

Held: (1) that, inasmuch as before the mortgage to the plaintiff lot No. 2 had been auction-purchased by the mortgagee, the mortgagor had no subsisting title, right or interest in those properties which he could pass to plaintiff by the mortgage; [P 196 C 1]

(2) that, as the auction-sale in execution of the mortgage decree was with the consent and at the request of the mortgagor, it was immaterial whether there was a formal attachment of lot No. 2 or not. [P 196 C 1]

(b) Transfer of Property Act (1882), S. 100—Valid charge held created.

Semble,—Though the consent decree could not affect the properties comprised in lot No. 2 which were not the subject-matter of the suit, yet a valid charge was created thereon outside the suit by the compromise petition of the mortgagor. [P 196 C 1]

(c) Transfer of Property Act (1882) Ss. 58, 100 Mortgage and charge—Distinction—In former there is transfer of property to creditor requiring registration—In latter there is no such transfer.

The distinction between a mortgage and a charge under S. 100 is that in case of the former there is a transfer of the property to the creditor which requires registration, while in the case of the latter there is no such transfer, the debto

only agreeing that the property shall be security for the re-payment of the debt. [P 196 C 1]

Jadu Nath Kanjilal—for Appellants.

Babus Shib Chander Palit, Nani Lal Dey and *Mohan Majumdar*—for Respondents.

Chitty, J.—The plaintiff brought this suit to establish his right under a Kat Kobala, dated 22nd February 1906, executed by Abdul Hakim, predecessor-in-interest of defendants 1 to 4. Defendants 5 and 6 were added as claiming the mortgaged property under a prior title. The suit was decreed by the Munsif, but on appeal the decree was set aside and the suit dismissed. The plaintiff has appealed to this Court. The facts found are as follows:—On 15th October 1895 Abdul Hakim and Abdul Sobhan mortgaged certain properties to Baroda Prosad De and Sasil Kumar De, defendants 5 and 6. The mortgagees brought a suit (No. 161 of 1902) to enforce their mortgage. On 27th January 1903 a petition of compromise was filed and the suit decreed in accordance therewith (Exs. A and C). By that the decretal amount was fixed at Rs. 447 and arrangement made for payment by instalment with the usual default clause. It was further provided that if the whole amount should not be recovered by sale of the mortgaged properties, the plaintiffs would be entitled to recover it by sale of certain other properties specified in the schedule to that petition. The mortgagors declared that they had created no other charge on those properties, and the petition went on to say:

"The aforesaid decretal amount Rs. 447 or any portion thereof shall be a charge on the mortgaged properties mentioned in the plaint and the properties described in the schedule to this petition, and the aforesaid Rs. 447 shall be recovered according to the instalments mentioned before and in default of payment it shall be recovered at once from the mortgaged property and the properties mentioned in the schedule to this petition. The money shall be recovered according to the terms mentioned above and so long as the whole amount is not realised it shall remain a charge thereon."

The instalments were not paid and the decree-holders, defendants 5 and 6, brought Execution Case No. 361 of 1903 to enforce payment. The properties comprised in the mortgage and also those which purported to be charged under the compromise were brought to sale on 12th January 1904 and purchased by the decree-holders themselves. The sale certificate was made out on 22nd February 1904 and possession was given to them by the Court on 26th July 1905. On 19th September 1905 Abdul Hakim applied to set aside the sale (Miscellaneous Case No. 177 of 1905,. In that case a solenama was filed on 17th March 1906 (Ex. B). By that it was agreed that if Abdul Hakim paid to the decree-holders the full amount of the decree within two months, the sale of the mortgaged properties and of the other properties under the terms of the previous compromise should be set aside. If he failed to pay then the sale of the mortgaged properties (lot No., 1, should be confirmed and for the balance due in excess of the sale-proceeds the properties included in the compromise (i. e, lot No. 2) should be put to sale again. It would appear from the order sheet of Execution Case No. 361 of 1903 that the Court allowed an adjournment of two months, presumably for the compromise to be carried out by payment by the judgment-debtors.

It is stated in the written statement of defendants 5 and 6 that the judgment debtor having failed to pay, the sale of the mortgaged properties remained confirmed and that of the remaining properties was cancelled. We adjourned the hearing of this appeal for the production of the order sheet in Miscellaneous Case No. 177 of 1905 that we might see exactly what orders the Court passed in that matter. It was apparent that the sale of the properties charged having been effected by the Court, could only be set aside by an order of Court. The appellant, however, failed to produce the document required. It appears, however, also from the written statement of defendants 5 and 6 that they again took out execution of the decree (Execution Case No. 191 of 1906) and brought the properties charged and other properties to sale and purchased them themselves on 16th January 1907. That sale was confirmed by the Court on 4th March 1907 and possession given to the decree-holders by the Court on 1st May 1907. The present suit was filed 5 years later on 27th May 1912. It is to be noted that the mortgage, which the plaintiff is now seeking to enforce, was executed on 22nd February 1906 about a month before the compromise petition in Miscellaneous Case No. 177 of 1905. It is expressed to be made, and the money borrowed for

the purpose of paying off defendants 5 and 6 the decree-holders in Suit No 161 of 1902. The plaintiff must, therefore, be taken to have had notice of the then existing state of facts. What then was the legal position of the parties at that time? It has been argued before us for the plaintiff-appellant that no valid charge was created upon the properties, lot No. 2 by the solenama (Ex. A) and the decree (Ex. C). It was urged that to create a valid charge registration of the document creating it was necessary. That is clearly not so.

The distinction between a mortgage and a charge under S. 100, T. P. Act, is that in the case of the former there is transfer of the property to the creditor, which requires registration; in the case of the latter there is no such transfer. The debtor only agrees that the property shall be security for the repayment of the debt. It may be conceded that the consent decree of 27th January 1903 could not affect the properties now in question, which were not the subject-matter of that suit, No. 161 of 1902. But there was nothing to prevent the judgment-debtors by agreement from creating a valid charge upon properties outside the suit and that they undoubtedly purported to do by the petition Ex. A. It is not, however, necessary to decide as to the validity of the charge. These properties (lot No. 2) were undoubtedly brought to sale by the Court in execution of that decree and sold to the decree-holders. Whether there was a formal attachment or not does not matter, as the sale was with the consent and at the request the judgment-debtors. This being so, it is clear that all right, title and interest of the judgment-debtors to and in those properties were extinguished on 12th January 1904. When, therefore, Abdul Hakim purported to mortgage these properties to the present plaintiff on 22nd February 1906, it is clear that he had no subsisting interest in them which he could transfer to the plaintiff. If the sale of these properties was subsequently set aside, and Abdul Hakim thus again acquired some interest in those properties, the plaintiff might have claimed that his mortgage should operate on that interest (see S. 43, T. P. Act). It is not, however, suggested that he even exercised any such option, and without his having done so the properties were again sold in execution of the decree in Suit No. 161 of 1902 as above stated. Further, defendants 5 and 6 were undoubtedly transferees in good faith for consideration without notice of the existence of the said option, for it is not suggested that they were at all aware of the plaintiff or of his mortgage. Their rights could not, therefore, in any way have been impaired. I am of opinion that in any view of the case the plaintiff cannot possibly succeed against defendants 5 and 6. I would accordingly dismiss the appeal with costs, one gold mohur extra being allowed for the second hearing caused by the adjournment.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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WOODROFFE AND BEACHCROFT, JJ.

Hari Prosunno Mookerjee, In the matter of.

Civil Ref. No. 13 of 1916, decided on 16th January 1917, made by S. J., Birbhum.

(a) Legal Practitioners Act (1879), S.13 (f)—Action under cl. (f)—Subordinate Court can proceed.

Proceedings can be taken by a subordinate Court against a legal practitioner practising in the Court in respect of an act which is found to come under Cl. (f), S. 13. [P 197 C 1]

(b) Legal Practitioners Act (1879), S. 13 (b) and (f)—Enquiry for charge under cl. (b) by subordinate Court—High Court can avail itself of enquiry though without jurisdiction.

Where a charge against a Mukhtear is under S. 13, Cl. (b) but as the result of an enquiry held by a subordinate Court it is found that the act of the Mukhtear comes under S. 13, Cl. (f) of the Act, it is open to the High Court to avail itself of the enquiry already made by the subordinate Court and proceed to deal with the case itself, even if the subordinate Court had no jurisdiction to make the enquiry. [P 198 C 2]

(c) Legal Practitioners Act (1879), S. 13—Mukhtear taking money for bribing police is guilty under S. 13.

The High Court dismissed a Mukhtear who was found to have received a sum of money from one of the persons against whom some police cases were pending for the purpose of bribing the police, and who acted as a go-between. [P 197 C 2]

Dwarka Nath Mitter and *Baranasibasi Mookerjee*—for Petitioner.

Ram Charan Mitra—for Opposite Party.

Woodroffe, J.—The Sessions Judge has reported that he thinks that it is clearly established that the police received a bribe from one Ismail Hajee through the Mukhtear Hari Prosunno Mookerjee, who acted as go-between in

the matter. Ismail and some of his friends had police cases pending against them and the object of the bribe was to secure that they should not be sent up for trial. The learned Judge was not prepared to find that the Mukhtear's conduct comes under Cl. (b), S. 13, but found that his action certainly furnished reasonable cause for punishment under S. 13 (f), Legal Practitioners Act, which says that a legal practitioner may be visited with suspension or dismissal for any other reasonable cause than those mentioned in Cl. (a) to (e), S. 13.

The first question is whether or not the charge has been established in fact against the Mukhtear. To ascertain this we have read and considered the whole of the evidence in the case. It appears on the evidence that the Mukhtear in the first instance attempted to deny receipt of the sum of Rs. 436, which Ismail Haji says that he had made over to him. This is now shown not to be true. It is admitted not by the Mukhtear that he did get Rs. 436, but he now says that the payment was made not by Ismail Haji but generally by the accused and that the money was not received by him in his official capacity as a Mukhtear but as a friend. As regards this, it appears that notwithstanding this he did claim some fee for his labour; I think the evidence warrants the conclusion that during the pendency of the case against Ismail Haji and his co-accused the sum of Rs. 436 was paid by Ismail Haji to the Mukhtear. The question is whether the money was received by the latter for illicit and unprofessional purposes, namely, as disclosed in the evidence, the bribing of the Police in order that the accused should not be sent up for trial. The suggestion made on his behalf is that the money was received for payment of the expenses of the criminal proceedings, including the fees of Rs. 100 to be paid to a Pleader named Missra. This I do not believe to be a fact. The money was not expended for any such purpose. On the contrary, as I have stated, the receipt of the money appears to have been denied when the demand was made for it. It is true that there is no direct evidence of payment of money to the police; nor is it likely that such evidence could, in such a case, be produced. Ismail Haji does not admit that he ever made the payment for any such purpose, as he would be in danger himself. Nevertheless it appears from these proceedings that he himself had admitted that the money was paid for the purpose of bribing the police. This, of course, is not evidence against the Mukhtear; but it is useful to show that no inference favourable to the Mukhtear can be drawn from the fact that Ismail does not say that it was paid for bribery. It is not necessary, however, to show that the money was in fact paid to the police, or the manner in which it was paid; but it would be sufficient, in order to establish the charge, to show that it was received by the Mukhtear for such purposes. There is, however, evidence by way of admission which goes to show that money was paid to the police, and the evidence of the Munsif is that he was visited by the Mukhtear, who stated to him that he was in difficulty and amongst other things he admitted to him that he had received Rs. 60 from the police by way of his share of the money which had been paid to him.

We further notice the circumstance that thereafter he paid Rs. 150 to the charitable dispensary. It is suggested that this sum was extorted from him. But this I do not believe. We have the fact that the sum of Rs. 436, which is a large sum of money, was paid to him at the time when the accused were not sent up for trial and before any charge had been framed and that it was not expended on purposes for which it was suggested that it had been received, namely, the expenditure of the prcceedings. It is admitted that the case is one of grave suspicion against the Mukhtear. But I think it is also more than this. I have no doubt on a consideration of the whole evidence that the Mukhtear received the money and that this money was received by him for the purpose of bribing the police and that he acted as a go between; whether his hand actually paid the money to the police or not. We have not any evidence before us as to the following point, but it is stated on his behalf that there were some proceedings in the Police Department against a police Officer who is said to have been implicated and that those proceedings have resulted favourably to the Police Officer. What these proceedings are, we do not know. In any case we are not concerned with them; but with the evidence on the

record before us, I am of opinion that the commission of the act charged has been proved against the Mukhtear.

Then there are two legal objections taken in the case. In the first place it is said that there is no charge against the accused. The facts with regard to this part of the case are that a statement was made in the first instance to the Sub-Divisional Officer by Ismail Haji, who said that Rs. 436 had been paid by him to the Mukhtear for making tadbir in the case and that he had not got back the money although the Mukhtear had done nothing for him and that this man seemed most unwilling to disclose for what purpose the money had been actually paid. This was recorded on 21st January 1916. On 1st February 1916 a note was made by that officer to the effect that the Mukhtear denies receipt of the money and that he has apparently made up the matter with Ismail Haji and the latter does not want to proceed with the case. From his letter to the District Magistrate it also appears that certain other facts came to his knowledge and on his report he was ordered by the District Magistrate to proceed with the investigation. It has been suggested on this that the Sub-Divisional Officer should not have himself tried the case, but the facts to which he refers in his report to the District Magistrate were facts which were subsequently deposed to in evidence before him. He had therefore, no source of information which was not in fact before the Court at the time of the trial. Further, the enquiry was directed by the District Magistrate doubtless upon the resort mate by the Sub-Divisional Officer. A charge was framed and proceedings were then instituted, so that the accused might know what the complaint was that was made against him. It is suggested that something more than this is necessary. In my opinion this is not so.

The second objection is that as the act charged against the Mukhtear is found to come under Cl. (f), S. 13, the enquiry should not have been by the lower Court but by an order of this Court and that in fact that enquiry is without jurisdiction. This objection, in my opinion also fails. In my opinion, the Court below had jurisdiction to make the enquiry which it did. We may point out, further that the case was started regularly as a case of professional misconduct. The enquiry, therefore was not irregular, though in the result the act disclosed is found to come under S. 13, Cl. (f), and not under S. 13, Cl. (b). Even therefore assuming (though not holding) that the High Court alone could enquire into the case and that the enquiry by the lower Court was not a proper one for the reasons stated, still it is open to this Court to avail itself of the enquiry already made and proceed to deal with the case itself. There is no reason why the enquiry by the lower Court, though not conducted under the orders of this Court should not be adopted for the purposes of a proceeding under S. 13, even if we took the view that this Court could proceed only under S. 13 and not on a report hy the Subordinate Court under S. 14, of the Act. In my opinion, as I have already stated, proceedings could be taken by a subordinate Court. This objection, therefore also fails.

The only other question that remains is the nature of the order that we should make in this case, having regard to the conduct of the Mukhtear. This is a very serious offence and I may observe that this is not the first time that this Mukhtear has got into trouble. Both the District Magistrate and the Sessions-Judge have considered that disbarring would not be an inappropriate punishment and I agree with them and order that this Mukhtear be dismissed.

Beachcroft, J.—I agree.

V.B /R.K. *Mukhtear dismissed.*

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RICHARDSON AND BEACHCROFT, JJ.

E. J. Delauney—Defendant—Appellant.

v.

Pranhari Guha and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 1711 of 1916, Decided on 7th February 1918, from appellate decree of Sub-Judge, Noakhali, D/- 25th April 1916.

(a) Hindu Law—Stridhan—Property purchased by Hindu lady alleged to be ayautuka property—Burden of proof is on person who asserts so.

The burden of proving that the property which a Hindu lady purchased long after her marriage was her yautuka property, because the purchase was made from a special fund obtained during her nuptial ceremony, is on the person who asserts it. [P 199 C 2]

(b) Hindu Law — Succession — Stridhan—Ayautuka property — Sons and maiden

daughters are entitled to equal shares — Married daughters are post-poned to sons.

To the ayautuka property left by a Hindu female the sons and the maiden daughters may be entitled in equal shares but the married daughters are postponed to the sons.

[P 199 C 2]

(c) Landlord and Tenant — Ejectment — Suit for — *D* under colour of title from *P* dispossessing plaintiff's tenants — Suit by plaintiff for ejectment of *P* and *D*—Possession of *D* held to be that of trespasser and he was liable for mesne profits.

Defendant 1, under colour of title from defendant 4 to whom he attorned, dispossessed the plaintiff's tenants who thereupon surrendered. Defendant 4 realised rents from defendant 1 for some years. In a suit by the plaintiff for ejectment of defendants 1 and 4:

Held: that whatever the relation might be between defendant 1 and defendant 4, the possession of defendant 1 as against the plaintiff was that of a trespasser, and the plaintiff was entitled to mesne profits as against him.

[P 201 C 1]

Tarak Chandra Chakraburtty, *Dhirendra Lal Kastgir* and *Tarakeswar Nath Mitter*—for Appellants.

Bhagirath Chandra Das — for Respondents.

Richardson, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Noakhali, dated 25th April 1916. The suit is a suit in ejectment and it was brought by the plaintiff against various defendants. The suit was dismissed in the trial Court but decreed in the lower appellate Court. The appellant before us is defendant 4 and there are also cross objection by defendant 1. The plaintiff traces his title to a lady named Nanda Kumari, wife of Sarat Chandra Guha. Sarat Chandra died in 1299 (B.S.). and Nanda Kumari in 1300 (B.S). The case made is that the land in dispute is included in the land purchased by Nanda Kumari from one Gourhari Guha under a conveyance, dated 17th Sraban 1296. On Nanda Kumari's death her rights in this property are said to have devolved upon her son Mohini, and on his death the property is said to have passed to the son of his sister Ganga Monee. That son died an infant and the property is then said to have devolved on his father, defendant 5, from whom the plaintiff obtained it under a shikmi taluki lease, dated 10th Aswin 1317. The learned Subordinate Judge has found that this title is established. It is contended in this appeal, firstly, that the Subordinate Judge has erred in law in the way in which he has dealt with the burden of proof on the question whether the property in the hands of Nanda Kumari was what is known as Yautuka or what is known as Ayautuka. The learned Subordinate Judge says this:

"There is no evidence that Nanda Kumari had any Yautuk property or she purchased the property of Ex. 2 with the proceeds of any Yautuk property. Hence if the disputed land belonged to Nanda Kumari it was her Yautuk property. Ayautuk property of a Hidu female governed by the Dayabhaga School is inherited by her son in preference to her daughter. Hence Mohini was the legal heir of Nanda Kumari."

It is argued that the learned Subordinate Judge has wrongly thrown the onus of proving that the property was Yautuka on the appellant. The "Yautuka" of a Hindu wife consists of the gifts made to her during the nuptial ceremonies. The particular property in question was purchased 17 or 18 years after the lady's marriage. If the purchase was made from any special fund, it would seem that the burden of proving that should fall upon the person who asserts it. But apart from that the Judge in another part of this judgement has found that the property did in fact descend from Nanda Kumari to Mohini and though apparenty at the time Mohini had two married sisters alive, no objection was taken by them and no claim was made by them to the whole or any part of the property. In the circumstances, therefore, it cannot, in my opinion be said that the learned Subordinate Judge has erred in the mode in which he has dealt with this part of the case. In this connection, it is further suggested that the learned Subordinate Judge was not entitled to say that the Ayautuka property of a Hindu female is inherited by her sons in preference to her daughters. The learned pleader has referred to a text the meaning of which he says is doubtful or ambiguous. But the proposition laid down by the Subordinate Judge, who is himself a Hindu, appears to represent the commonly accepted view of the order of succession to Ayautuka property. To such property the sons and the maiden daughters may be entitled in equal shares but the married daughters are postponed to the sons (Shastri's Hindu law, Edn. 3, p. 415). The second contention of the learned pleader is that the Subordinate Judge has not found that at the date of Mohini's death Ganga Monee's son was in existence. But the fact was not disputed. "There is no dispute" says the Subordinate Judge, "that the infant son of Ganga Monee and defendant 5 inherited the property of Mohini or

in other words, the son of Ganga Moni was the heir of Mohini and defendant 5 was the heir of the aforesaid son."

It is impossible to go behind a positive statement of this kind made by the Subordinate Judge in the course of a long and careful judgment.

The third point taken is that the learned Subordinate Judge has in some way neglected to deal with the case as put for the plaintiff in para. 1 of the plaint. That paragraph refers to a partition or exchange of properties which took place between Nanda Kumari and her husband. The para. 1 of the plaint, however, cannot be read by itself. It must be read with the rest of the plaint. There is no definite statement there that the property now in dispute was property obtained by Nanda Kumari in exchange for some property of her which went to her husband. A definite statement on the subject will be found in para. 5 of the plaint. The paragraph states:

"That the aforementioned Nanda Kumari Guha was owner in possession of the land of Schedule (Ka) by virtue of the aforesaid purchase under a deed of private sale and in right by adverse possession."

The plaint, therefore, specifically affirms that the land specified in the Sch. 1 or the land in dispute was purchased by Nanda Kumari from Gourhari; and there is the further assertion of a right by adverse possession to that land. Moreover, there is a clear finding in the judgment of the Subordinate Judge that the conveyance executed by Gourhari in favour of Nanda Kumari does inlcude the disputed land. There is therefore, in an appeal confined to questions of law no substance in this contention.

Then as to limitation, that turns on the question of possession. It is suggested that the learned Subordinate Judge has not sufficiently dealt with this question. What is it that the Subordinate Judge has found? He has found that this property descended from Nanda Kumari to Mohini. He has found that by the pattah and of 22nd Chaitra 1899 the property was leased by Mohini to Bisweswar Guha, the father of defendants 2 and 3. These defendants are the first cousins of defendant 1. In the year 1307 a portion of the land covered by the lease of 1893 was surrendered by or on behalf of defendants 2 and 3. The portion so surrendered was settled by Mohini with Nabin Chandra Guha, the brother of defendant 1, and apparently is now in the undisputed possession of Nabin. As I read the judgment of the Subordinate Judge, he has further found that the land in dispute continued in possession of defendants 2 and 3 as tenants of Mohini till the year 1908. In that year a Record of Rights was published. The Subordinate Judge's view, stated, if not expressly at any rate with sufficient clearness, is that subsequent to the publication of the Record of Rights the defendant 1, under colour of a title from the defendant 4, somehow continued to dispossess defendants 2 and 3 and that the possession of defendant 1 does not go back beyond the year 1908. The plaintiff had some difficulty in realising his rent from defendants 2 and 3 and he brought a rent suit against them and secured a decree. Thereafter they paid rent for one year, but finally surrendered the land to the plaintiff. The plaintiff says that he attempted to obtain possession after this second surrender, which occurred at the end of 1911 or beginning of 1912, and was unsuccessful and he dates his cause of action from the year 1913. On the facts as found by the Subordinate Judge it is quite clear that this suit is within the time allowed by the law of limitation.

Another objection taken by the learned Pleader is that the Subordinate Judge has not dealt with defendant's title. The defendant 4 is the owner of a 4-anna share of the Zemindari right, but that is not the title under which she claims in the present suit. She claims as a purchaser at a Court sale. The sale certificate is dated the 5th December 1908 and it purports to pass the taluki title. This title, however, is the very title which Nanda Kumari is said to have purchased long before from Gourhari, in whom according to the Subordinate Judge the title vested. Neither the plaintiff nor her predecessor-in-interest was a party to the rent suit in execution of the decree in which the sale was held. Therefore, neither the decree itself in the rent suit nor the sale in execution of that decree can bind the plaintiff. As to this title set up by defendant 4 and defendant 1 under him, the Subordinate Judge's view is perfectly clear. He has found that defendant 1's settlement is a fictitious one; and he adds that before 1308 he had no right in the land. He adds that

'defendant 4 was never in khas possession of the disputed land. She did not take delivery of possession of the disputed land through Court. She did not take amicably. Defendant 1, who either dispossessed the defendants 2 and 3 during their minority or was in collusion with them, attorned to defendant 4 who simply got rent for 1316 and 1317 (B. S) for the disputed land from the defendant 1 in 1909 and 1910. She as a talukdar had no concern with the disputed land other than the receipt of this rent."

It is obvious that, whether rightly or wrongly, the Subordinate Judge is of opinion on the merits that the title of defendant 1 as also defendants 4 was purely a paper and fictitious title.

Coming to the cross-objections filed on behalf of defendant 1, the first objection on his behalf is that he has been made liable for mesne profits. He says that mesne profits ought to be paid not by him but by defendant 4. Whatever the relation may be between defendant 1 and defendant 4, the possession of defendant 1 as against the plaintiff is that of a trespasser and the plaintiff is entitled to mesne profits as against him. The next objection raises the question of the possession of defendant 1 over again. That I have already dealt with and I need not repeat what I have said. It has also been argued for the defendant 1 that the Subordinate Judge has not definitely found that the lands in suit are identical with the land leased to the plaintiff by the document of the year 1317. That document is Ex. 1 on the record. The two plots of land to which Sch. 1 of the plaint refers are both found by the Subordinate Judge to be included in that document. He says that plot No. 2 of Ex. 1 includes the plaint land. There is no substance, in my opinion, in the cross-objections urged on behalf of defendant 1. The plaintff not being the appellant, I guard myself from being understood to express any opinion on the question whether it was open to the defendant 1 to take any of these cross-objections except the first.

The result is that the appeal and the cross-objections must be dismissed. The plaintiff is entitled to his costs of the appeal and the cross-objections from defendant 4 and defendant 1 respectively.

Beachcroft J.—I agree.

V.B./R.K. *Appeal dismissed.*

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TEUNON AND RICHARDSON, JJ.

Charles Henry Brooke—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No 558 of 1917, Decided on 12th June 1917.

(a) Calcutta Municipal Act (1899), S. 559 (18)—Bye-laws framed under, Bye-law 2—person having license depositing bricks on part of public street without fencing it off as required—He is guilty of breach of bye-laws and also of offence under Calcutta Police Act (1866), S. 66 (4) (a).

The petitioner, a building contractor who had undertaken the erection of a masonry brick building and who, under a license of the Calcutta Corporation under bye-law 2 of the bye-laws framed under the provisions of S 559, Sub-S. (18), Municipal Act, was authorised to make an enclosure on a portion of the public street for the purpose of depositing mortar, bricks, etc., thereon on condition of his fencing off the portion to be occupied with a temporary fence, unloaded and deposited during the course of his building operations bricks on a foot-path—part of a public street—without fencing it off by a temporary fence, and thereby caused obstruction in the foot-path for about six hours:

Held: that the petitioner had not only committed a breach of the bye-law under which his license was granted, but has also committed an offence under the provisions of S 66 (4) (a), Police Act [P 202 C 2]

(b) Calcutta Police Act (as amended by Act of 1910), S. 66 (4) (a)-Scope Quaere.

Quaere.—Whether Sub-S. (4) (a), introduced into S. 66, Police Act by the Amending Act of 1910, overrides or repeals the provisions regarding the regulation of obstructions to be found in the Calcutta Municipal Act. [P 202 C 2]

Manmatha Nath Mukherjee—for Petitioner.

Camell—for the Crown.

Judgment.—In this case the petitioner has been convicted under the Calcutta Police Act (Bengal Act 4 of 1866), S. 66, Sub-S. 4 (a), and sentenced to pay a fine of Rs. 20. It appears that the petitioner is a building contractor and has undertaken the erection of a masonry or brick building at premises No. 40/1 on the Strand Road. In the course of his building operations on 20th of March last the petitioner unloaded and deposited some 2,000 bricks on the foot path or pavement in front of the said premises and thereby, it has been found, caused obstruction in or on the foot-path for a period of some six hours or more. That the foot-path or pavement in question is part of a public thoroughfare and that obstruction was caused in the manner set out has not been disputed and the defence is that the acts complained of, having

been done in pursuance of and in conformity with a license granted by the Chairman of the Corporation of Calcutta, the petitioner had not thereby committed any offence. The present Rule was issued in order to the further examination of that defence. The license which we have now examined is one granted under the second of the bye-laws framed under the provisions of S. 559, Sub-S. (18), Calcutta Municipal Act and authorises the licensee "to make an encloser in (a) portion of the public street measuring 40 feet into 4 feet, equal to 160 square feet, for the purpose of depositing mortar, bricks, etc. . . . during the building . . . of premises No. 40/1 . . ."

We further find endorsed on the license a condition to the effect that the license is granted on condition that the portion to be occupied must be fenced off with a temporary fence. It is conceded that in this case there was no enclosure or surrounding fence, and the first contention before us then is that inasmuch as the Corporation had authorized the occupation by the petitioner of a certain specified area of the foot-path, it was immaterial whether he left the bricks lying loose on that space, or surrounded and enclosed the space and the bricks by means of a fence. In the alternative it is contended that the petitioner has at most committed a breach of the bye-law under which his license was granted and that proceedings should have been taken against him only under the Municipal Act and at the instance of the Corporation. On the other hand it is suggested by the Deputy Legal Remembrancer that in view of the provisions of S. 66, Sub-S. (4) (a), Calcutta Police Act, the license and bye-law under which it was granted should be held to be invalid and ultra vires of the Corporation. In support of the potitioner's contentions reference is made to he provisions of S. 336, S. 354 and of S. 559, Sub-S. 18. These sections and sub-section vest the public streets in the Corporation and authorise the General Committee to discontinue or close such streets, and to make bye-laws prohibiting or regulating the placing of obstructions or the depositing of materials thereon.

We are, however, unable to accede to either of the petitioner's contentions. The petitioner's license authorised him to obstruct the pavement or foot-path by a well-defined enclosure, but did not authorise him to obstruct or endanger the safety of persons using the foot-path by means of loose and unprotected heaps of bricks. The petitioner, therefore, it is plain, has committed a breach of the bye-law under which his license was granted, but his offence also falls clearly within the provision of S. 66, Sub-S. (4) (a), Police Act, and as he is not protected by his license there is no reason why those provisions should not be applied. The suggestion made by the Deputy Legal Remembrancer appears to involve the further contention that Sub-S. (4) (a), introduced into S. 66, Police Act by the Amending Act of 1910 (Bengal Act 3 of 1910), overrides or repeals the provisions regarding the regulation of obstructions to be found in the Calcutta Municipal Act. As in the present case the petitioner's conduct was not within his license on which he relies, we need not definitely decide the point, but we may say that as at present advised we are of opinion that if by the Amending Act of 1910, the Legislature had intended to repeal any portion of the Calcutta Municipal Act such repeal would have been effected by express provision. For the reasons given, this Rule is discharged.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 202

FLETCHER AND SMITHER, JJ.

Kali Prasad Chatterjee—Defendant—Appellant.

v.

Rash Behari Laik and *others*—Respondents.

Appeal Nos. 1957 and 3296 of 1915, Decided on 2nd May 1918, from appellate decrees of Sub-Judge, Burdwan, D/- 28th April 1915.

Bengal Land Revenue Sales Act (1859), S. 37, proviso—Raiyat holding at fixed rate have protected interest.

Raiyats holding at fixed rates are persons who have a protected interest within the meaning of the proviso to S. 37. [P 203 C 1]

Hara Prasad Chatterjee—for Appellant.

Jogesh Chander Roy—for Respondents.

No. 1975 *of* 1915.

Judgment.—This is an appeal by defendant 1 against the decision of the learned Subordinate Judge of Burdwan modifying the decision of the Munsif of Assansole. The suit was brought by the plaintiffs to recover khas possession of certain plots of land. The only plots we now consider in this appeal is plot No. 3 as the appeal is limited to that. Defen-

dant 1 purchased a Touzi at a sale for arrears of revenue under Act 11 of 1859, and the question is whether the plaintiffs in the present case have a protected interest within the meaning of the proviso to S. 37, Act 11 of 1859. Amongst the persons who have a protected interest are raiyats having rights of occupancy at fixed rents. An argument has been addressed to us that the right of occupancy must be ascertained with reference to the Bengal Tenancy Act and that, therefore, a raiyat at a fixed rate of rent cannot have a right of occupancy. We need not enter into a consideration of the matter, because there is a direct decision of this Court in the case of *Abdul Gani Chaudhury* v. *Makbul Ali* (1) which decides that raiyats holding at fixed rates are persons referred to in S. 37, Act 11 of 1849. It is sufficient if we say that we follow that decision. The present appeal, therefore, fails and must be dismissed with costs.

No. 3296 *of* 1915.

The judgment in Second Appeal No. 1957 of 1915 just delivered will govern this case also. It is accordingly dismissed with costs.

V.B./R.K. *Appeals dismissed.*

1. (1915) 42 Cal 745=31 I C 19.

A. I. R. 1918 Calcutta 203

FLETCHER AND RICHARDSON, JJ.

Kailas Chandra Sarkar—Creditor—Appellant.

v.

Kantiram Das Bania —Insolvent—Respondent.

Appeal No. 547 of 1915, decided on 9th January 1917, from the Appellate order of Dist. J., Rangpur, dated 27th May 1915.

(a) Provincial Insolvency Act (1907), Ss. 6, 16 and 46—Creditor obtaining decree against insolvent and also proving his debt—He can execute decree against property of insolvent on condition of handing over all money realised to Receiver.

A creditor who has obtained a decree and who has proved his debt in the insolvency proceedings, is at liberty to execute his decree against the property which he alleges to be the property of the insolvent upon his undertaking to hand over to the Receiver all moneys realised in execution for the benefit of the general body of creditors. [P 203 C 2]

(b) Provincial Insolvency Act. (1907), Ss. 6, 16, and 46—Property of insolvent concealed by benamidar or other person—Court has jurisdiction to permit executing creditor to enforce his decree against the property.

An insolvency Court has jurisdiction, and would exercise a wise discretion, in permitting an executing creditor at his own risk and at his own costs to enforce his decree against the property alleged to be the property of the insolvent that has been concealed by some benamidar or other person on behalf of the insolvent. [P 203 C 2]

Girija Prasanna Sanyal for *Atul Chunder Gupta*—for Appellant.

Fletcher, J.—This is an appeal against an order passed by the learned District Judge of Rangpur, dated the 27th May 1915. The appeal arises out of an application made in some insolvency proceedings. The appellant before us is a creditor who appears to have proved his debt in the insolvency proceedings. This creditor obtained a decree against the insolvent. He then applied to the learned District Judge for leave to execute the decree that was held by him. The District Judge was of opinion that he had no jurisdiction to do so. I am not satisfied that that is right. Many orders have been made under the Provincial Insolvency Act declaring that a creditor is at liberty to execute his decree against the property alleged to be the property of the insolvent upon his undertaking to hand over to the Receiver of the estate of the insolvent for the benefit of the general body of the creditors the sum so realised in execution. It seems to me that, in that view, the learned District Judge would have exercised a wiser discretion in permitting this executing creditor at his own risk and at his own costs to enforce his decree against the property alleged to be the property of the insolvent that has been concealed by some benamidar or other person on behalf of the insolvent. In that view, we ought to reverse the decision of the learned District Judge and, in lieu thereof, make an order that the creditor, the appellent before us, be permitted to execute his decree against the property which he alleges is the property of the insolvent upon his undertaking to hand over to the receiver all moneys realised in execution for the benefit of the general body of the creditors. The appellant is entitled to add his costs in this appeal to his claim. We assess the hearing-fee at one gold mohur.

Richardson, J.— I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 204 (1)

CHATTERJEA AND RICHARDSON, JJ.

Sultan Ahmad — Defendant—Appellant.

v.

Safra Khatun—Plaintiff and Defendant—Respondent.

Appeals Nos. 3111 of 1914, and 1603 1915, Decided on 5th July 1917, from Appellate decrees of Dist. Judge, Chittagong, D/- 24th July 1914.

Mahomedan law—Divorce—Kabinnamah executed before marriage entitling wife to divorce on breach—Breach of term—Wife exercising her power—Divorce is valid and wife can sue for dower.

Under the Mahomedan law, where by the terms of a kabinnamah executed before marriage, the wife is given the power to divorce herself if the husband fails to fulfil any of the terms contained in the kabinnamah, and the wife exercises that power on the husband's failure to observe those terms, the divorce is valid and entitles the wife to sue for her dower [P 204 C 1]

D. L. Kastgir—for Appellant.

Mohini Mohan Chackerbutty and *Jaitindra Nath Roy*—for Respondent.

Judgment.—*S. A. No.* 1603 *of* 1915. This appeal arises out of a suit for restitution of conjugal rights by a Mahomedan against his wife. It appears that before the marriage, there was a kabinnamah, some of the terms of the kabinnamah being that in case of quarrel between the wife and the members of the husband's family, he should build a separate house for her in the village, that he would give her some ornaments and pay her prompt dower on demand and that he would not marry a second wife without her consent. It was further agreed that on breach of any of the conditions, the wife would be entitled to divorce the husband. It is found that the husband did take a second wife without the consent of the defendant, his first wife, that there was quarrel between the members of the plaintiff's family and the wife and that, in spite of the latter having given notice to the husband to provide her with a suitable house, he did not comply with the request. Under these circumstances, the learned District Judge was right in holding that the wife was entitled to divorce her husband under the power given to her in the kabinnamah. The appeal is accordingly dismissed with costs

S. A. No. 3111 *of* 1914.

This appeal arises out of a suit for recovery of dower by the wife against the husband. Now, it has been found that the divorce is valid and there is no doubt, therefore, that the wife is entitled to her dower. This appeal, therefore must fail and is dismissed. We make no order as to costs.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 204 (2)

CHITTY AND WALMSLEY, JJ.

Edon Mollah and *others*—Defendants—Appellants.

v.

Badan—Plaintiff—Respondent.

Appeal No. 3001 of 1914, Decided on 18th June 1918, from appellate decree of Addl. Dist. Judge, Faridpur, D/- 7th August 1914.

Landlord and Tenant—Execution and registration of kabuliyat without landlord's sanction does not create tenancy.

The execution and registration of kabuliyae without the landlord's sanction or acceptance either before or after registration does not create a tenancy, even though there may have been some previous talk of a settlement. [P 205 C 2]

Prakash Chandra Mazumdar — for Appellants.

Hemendra Nath Sen, *Lal Mohan Ghose* and *Benayendra Prasad Begchi* — for Respondent.

Judgment.—This is an appeal arising out of a suit for khas possession brought by Sheikh Badan against the defendants, Edon Molla, Madan Molla, Mobarek Molla and Naban Molla. The question before the Court is whether the plaintiff or the defendants have the better title to the lands in suit. It is admitted that the proprietor of the land was one Sridhar Chatterjee. It is proved that in 1906 Sridhar Chatterjee gave a Miras lease to Sarat Kumar Mazumdar and Sasi Kumar Mazumdar. The defendants, in their written statement, pleaded that the Muzumdars were merely benamidars of Sridhar Chatterjee, but no issue was raised upon that point nor has it been decided by the lower appellate Court. The Munsif found that there was not sufficient proof of benami. On 3rd Bysakh 1315 defendant 1 executed a kabuliyat in favour of Sarat Kumar Mazumdar for the lands in suit. On 22nd Bhadra 1315 one Kader executed a kabuliyat (Ex. 3) in favour of Sarat Kumar Mazumdar and Sasi Kumar Mazumdar for certain other lands. On 10th Aghran 1315 Sheikh Badan the plaintiff executed a kabuliyat in favour of Sarat Kumar Mazumdar and Sasi Kumar Mazumdar for the lands in suit.

It will thus be seen that the defendant's kabuliyat is the first in point of date. It has been found by the learned District Judge—and as to this there is no dispute —that formerly Edon was in possession of the lands in suit as sub-lessee, Kadir being in possession of certain other lands.

There was a suit in ejectment by Sridhar Chatterjee in which he got a decree against both these men, the case having been carried up to this Court. In September 1907 he held the decree with Rs. 300 for costs and interest thereon but had up to that time failed to eject his judgment-debtors. There was some talk of settlement and it has been found that in September 1907 Sridhar Chatterjee, on a promise to settle the lands with Edon Molla and Kadir, obtained payment from each of those of Rs. 150 making up the amount of costs due to him. It is found that he did nothing further towards making settlement with those persons and particularly with Edon Molla with whom we are now concerned. In the following year Edon executed the kabuliyat (Ex. A) and had it registered on 23rd July 1908. It is found as a fact that neither Sridhar nor Sarat nor Sasi ever sanctioned that kabuliyat or accepted it either before or after registration. The question then arises—Have the defendants any title to the lands in suit? This appeal first came on for hearing before Fletcher, J. and Shamsul Huda, J. on 30th January 1918 : see *Edon Mollah* v. *Badan* (1). The plaintiff-respondent was absent and the appeal was decreed ex parte, the Court holding that though Sridhar Chatterjee might not have accepted the kabuliyat (Ex. A), still there was a tenancy created in favour of Edon Molla by the verbal arrangement of September 1907 and the payment af Rs. 150. That judgment and the decree based upon it were set aside on an application by the plaintiff-respondent and the appeal has now been heard before us in the presence of both the parties.

It now appears that Sridhar Chatterjee had no right to make any settlement with Edon Molla in September 1907. He was the proprietor of the land but had granted a lease of it (for what purpose it does not appear) to the Mazumdars. If he had no right to make the settlement, it follows that the defendants' case must fail. The defendants relied upon Ex. A as their document of title. They did not plead that there was a verbal settlement from Sridhar Chatterjee, and it appears from the judgment of the learned Additional District Judge that it was only put forward in argument before him in reply. If Sridhar had no right to make this settlement, it is a matter of no importance what he said or did. The defendants must necessarily fall back upon their document of title. Ex. A, as to which there is a clear finding that it was not a document which was accepted either by Sridhar Chatterjee who, on the facts found, would have no right to accept it or by the Mazumdars who were the Mirasdars lessees and who would be the people to accept it if it was to be accepted. In these circumstances it is clear that the decisions of the Courts below are correct. The appeal is accordingly dismissed. Under the circumstances, and having regard to the remarks made by the learned District Judge as to the conduct of Sridhar and the plaintiff, we make no order as to costs.

V.B./R.K. *Appeal dismissed.*

1. A I R 1918 Cal 20=45 I C 49.

A. I. R. 1918 Calcutta 205

FLETCHER AND SHAMSUL HUDA, JJ.

Gobinda Hota and *another* — Appellants.

v.

Kristapada Singha Babu and *others* —Respondents.

Appeal No. 1099 of 1916, Decided on 19th April 1918.

Alluvion and Diluvion Regulation (1825), S. 4 (4)—Accretion to Mukarari holding by formation of Chur in river—Land belongs to tenant subject to payment of additional rent —Landlord and Tenant.

Lands which have gradually accreted to a mukarari holding, forming a chur in a small shallow river cannot be claimed by the zamindar as a portion of his khas patit but belong to the tenant subject to the payment of additional rent in respect thereof. [P 206 C 1]

Narendra Nath Chowdhury—for Appellants.

Jogesh Chandra Roy and *Kshitish Chunder Neogy* —for Respondents.

Fletcher, J.—This is an appeal by defendant 1 against the decision of the learned District Judge of Bankura, reversing the decision of the Munsif of Khatra. The plaintiff sued for possession of certain chur lands. The defence of the tenant, defendant 1, was that these lands were gradual accretions to his holding and, therefore, although he might be

liable to pay additional rent, the plaintiff was not entitled to eject him. The case in the lower appellate Court quite clearly proceeded on the footing that defendant 1 had got a mukarrari holding. This is quite clear from the judgment of the learned District Judge. It is much too late now for the plaintiff to raise the case that the holding is not a mukarrari one. He ought to have raised it when the case was decided in the Courts below. The real point is this: The learned Judge of the lower appellate Court has found that these lands are gradual accretions to the lands of defendant 1 forming a chur in a small and shallow river and, therefore, according to the learned Judge's view on the words of S. 4, sub-S. (4), Bengal Alluvion and Diluvion Regulation (Regn. 11 of 1825), defendant 1 was not entitled to the accreted lands, but the same formed a portion of the khas patit of the zamindar. In support of that view the learned Judge relied on the decision of the Court of Holmwood and Chapman, JJ., in the case of *Ramjan Ali* v. *Maharam Ali Khondkar* (1).

That case, in my opinion, is clearly opposed to the decision of the Full Bench of this Court in the case of *Gourhari Kaiburto* v. *Bhola Kaiburto* (2). We notice in the case decided by Holmwood and Chapman, JJ., that the Full Bench decision was not cited to them. It seems to be quite clear that the view that the learned Judges took of sub-S. (4) of S. 4, Regn. 11 of 1825, where it mentions that the chur thrown up in a small and shallow river should belong to the proprietor of the bed of the river subject to the provisions stated in Cl. 1, S. 4, was that what was intended was not a protection only of the Government revenue, but that the zamindar or the proprietor acquired the chur subject to the rights of the tenure-holders and the subordinate tenure-holders as mentioned in sub-S. 1 to S. 4. I am unable to agree with the conclusion arrived at by the learned District Judge in this case. The appeal must, therefore, be allowed, the decree of the learned District Judge set aside and the decree passed by the Munsif restored with costs both here and in the Court of Appeal below.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal allowed.*

1. (1915) 26 I C 406. 2. (1894) 21 Cal 233.

A. I. R. 1918 Calcutta 206

CHATTERJEE AND WALMSLEY, JJ.

Sarat Chandra Ghose and *others*—Plaintiffs—Appellants.

v.

Entaz Sheik and *others*—Defendants—Respondents.

Appeal No. 1821 of 1914, decided on 10th January 1917, from Appellate Decree of Sub. Judge, Khulna, dated 25th March 1914.

Landlord and Tenant—Kabuliyat—Construction of—Rent held could not be increased or decreased.

Upon the construction of a kabuliyat in which it was stipulated that decrease or increase of jama shall not come into force for any reason (such as) inundation, drought, failure of crops, etc. :

Held: (1) that the intention of the parties was that the rent shall not be decreased or increased for any reason, although reasons for the decrease alone were given; (2) that the principle of ejusdem generis did not apply inasmuch as it applied only where there was no intention to the contrary in the context, and in this case the word "increase" was an indication of a contrary intention. [P 206 C 2 P 207 C 1]

Surendra Chandra Sen—for Appellants.

Brojo Lal Chakravarti and *Dhirendra Nath Bose*—for Respondents.

Chatterjee, J.—The main question in this case is whether the defendants are raiyats with a fixed rent. The decision depends upon the construction of the kabuliyat by which it is stipulated that...decrease or increase of jama shall not come into force for any reason (such as) inundation, drought, failure of crops, etc. It is contended on behalf of the plaintiff that the word...(increase) should be expunged as redundant because the reasons enumerated are reasons for decrease of rent only and the word...(etcetera) must be read on the principle of ejusdem generis. I think we cannot get rid of the word... (increase) in this way. The phrase... (decrease and increase) is a word of very common occurrence in leases which are given...i. e., with a liability to decrease and increase and...(there is no decrease or increase) or words to that effect, meaning without decrease or increase. Here the words are..."decrease or increase shall not come into force" and I think they clearly indicate the intention of the parties. I think that the meaning is that the rent shall not be decreased or increased for any reason and ordinary reasons for the decrease alone are given the reason for increase having to be

drawn from "any reason" and "etcetera." The principle of ejusdem generis applies only when there is no indication to the contrary in the context and I think the word...increase is such an indication. In this view of the construction of the kabuliyat, I agree with the trial Court and would allow this appeal and decree the suit with costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 207 (1)

CHITTY AND SMITHER, JJ.

Kulak Chandra Das and *others*—Plaintiffs—Appellants.

v.

Kula Chandra Das and *others*—Defendants—Respondents.

Appeal No. 3211 of 1915, Decided on 23rd March 1918, from Appellate Decree of Offg. Dist. Judge, Sylhet, D./ 18th September 1915.

Hindu Law—Alienation—Widow—Maintenance—Widow can alienate property for her maintenance.

A Hindu widow is not bound to incur debts for her maintenance. She may, if it is more to the benefit of her husband's estate, sell a portion of it, instead of mortgaging the whole, to defray her maintenance expenses. [P 207 C 2]

Jatindra Mohan Chaudhury—for Appellants.

Brojendra Nath Chatterjee—for Respondents.

Judgment.—The only question arising in this appeal is whether Sunaka, who sold the land in dispute by two sales in 1303 and 1306, had legal necessity for so doing. We are not prepared to accept the law as laid down by the learned District Judge. If his words be taken literally, they lead to the conclusion that a Hindu widow may sell where she has made no attempt to arrange for the cultivation of the land in her possession; in other words, that she may squander away the property left to her. But on the findings of the learned District Judge, with regard to the circumstances of this woman, there can be no doubt that there was legal necessity for her selling. The only sale which is really now in dispute is the first sale in 1303 of one-fourth of a keyar out of about three and a quarter keyars. It is found that she was left a widow in 1299 with two young children. There were some cattle which had to be sold off for the performance of her husband's sradh. The girl appears to have been married in 1304 or 1305. The jote land had to be surrendered in consequence of the difficulty of getting Bargadars and she had no one to cultivate or assist her in cultivating the land which was left. It was suggested by the learned pleader for the appellant that she might have borrowed and not sold. But to borrow at even 12 per cent. interest on the whole property would be far more ruinous than to sell a very small portion, as she did in 1303. We are not prepared to say that a widow is bound to incur debts for her maintenance or that she cannot alienate land until she has incurred such debts. It may obviously be more to the benefit of the estate to sell a small portion to defray maintenance expenses, which will be subsequently incurred. We accordingly dismiss the Appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 207 (2)

FLETCHER AND SHAMSUL HUDA, JJ.

Ganesh Chandra Mohajan and *others*—Defendants—Appellants.

v.

Beraja Sundari and *others*—Plaintiffs—Respondents.

Appeal No. 1509 of 1916, Decided on 12th June 1918, from Appellate Decree of Addl. Dist. Judge, Chittagong, D/- 15th April 1916.

Bengal Tenancy Act (1885), Sch. 3, Art. 3—Raiyat suing to recover possession of holding from auction-purchaser—Art. 3 does not apply.

The limitation prescribed by Art, 3, does not apply to a suit by a raiyat to recover possession of his holding from an auction-purchaser of the holding in execution of a rent decree. [P 208 C 1]

Chandra Sekhar Sen—for Appellants.

Khitish Chandra Sen—for Respondents.

Judgment.—This is an appeal by the defendants against the decision of the learned Additional District Judge of Chittagong, dated 15th April 1916, affirming the decision of the Munsif at South Rauzan. The suit was brought to recover possession on the allegation that the plaintiffs had a raiyati interest in the land. The plaintiffs alleged that they were raiyats under the Hagaris and that they and their predecessors had been in possession for more than 40 years and that in 1913 the defendants dispossessed them. The defence was that the defendants purchased the property in execution of a rent decree in August

1912. They also alleged that the present suit was barred by Art. 3, Sch. 3, Ben. Ten. Act. It is quite clear that the suit is not barred. In this case, it is found that the ouster of the plaintiffs was not by the landlord. The other cases cited were cases in which the real person ousting the tenant was the landlord acting in collusion with other persons. What is found in this case is that the defendants purchased in execution of a rent decree. That finding merely will not entitle them to the possession of the property. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 208
Special Bench

WOODROFFE, TEUNON AND BEACHCROFT, JJ.

Duli Chand Dalal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1188 of 1916, Decided on 12th February 1917.

(a) Penal Code (1860), S. 406—Complainant, handing over money to accused to make payment to firm—Accused appropriating it to himself and alleging it was paid to him on account of brokerage due to him—Money found to be due on account of brokerage—No proof as to account on which money was paid to accused — Conviction under S. 406 held bad.

Complainant handed over a sum of money to accused, it was alleged, for the purpose of paying a certain firm on account of the price of some grain purchased by the complainant from them through accused as broker. Accused appropriated the money himself and alleged that the sum was paid to him on account of brokerage due to him and not for payment to any firm. It was found that on the date of the payment some money was due by the complainant to the accused on account of brokerage, and it was not clearly proved on which account the money was paid to the accused :

Held : (*Beachcroft, J.*, dissenting) that the accused must be given the benefit of the doubt, and that his conviction under S. 406, I. P. C. was bad [P 209 C 1]

(b) Criminal P. C. (1898), S. 439—High Court can enter into questions of fact—Power should be sparingly exercised.

Per *Beachcroft, J.*—A High Court has power in revision to enter into questions of fact, but such power should be sparingly exercised. A High Court ought only to interfere in revision with findings of fact when it is demonstrated very clearly that they are wrong. [P 209 C 1, 2]

Satindra Nath Mookerjee and *Atindra Nath Mookerjee*—for Petitioner.

Woodroffe, J.—The accused has been convicted under S. 406, I. P. C. and fined Rs. 200. A Rule was obtained by him, which was heard by Teunon, and Beachcroft, JJ. Teunon, J. was of opinion that the conviction of the petitioner should be set aside and the fine, if paid, should be refunded. Beachcroft, J., was of opinion that the Magistrate had reason for coming to his findings and on the evidence he held that there was no sufficient ground for supposing that the Magistrate came to anything but a right conclusion, and Beachcroft, J. was, therefore, of opinion that the Rule should be discharged. The learned Judges composing the Bench which heard this case having differed in opinion, it has been referred to me. The issue is whether or not Rs. 140, the subject of the charge, were paid to the accused for himself on account of his brokerage or were paid to the accused for payment by him to the firm of Messrs. Seo Narain-Ram Narain. That the money was received by him is not in dispute. The question which is in dispute is the purpose for which that money was paid. It does not appear to me to be disputed that brokerage was not paid at the time of the contract but afterwards. And the case of the accused is this. That on the date on which this sum of money was made over to him, namely 18th April, there was then due and owing to him money on account of his brokerage. It is true that in the examination-in-chief of Beni Madhab Banerjee, he says

"that no money was then due from us to the accused. On the other hand the accused owed some money to us on another account."

If this evidence refers to 18th April, it appears to be in conflict with the statement made in the cross-examination. I say it appears to be, because the prosecution have not appeared at the hearing of this matter before me. Therefore, I have not had the advantage of knowing what explanation, if any, they have to make. But in cross-examination there is this statement "no brokerage was paid to the accused after Augrahayan last," that is, November 1915. Rs. 31-1-9 was due to the accused for brokerage up to the end of Chait last, that is the middle of April 1916. Rs. 47-15-6 was due for subsequent brokerage; up to 18th April the amount due for brokerage was Rs. 34-1-3. The evidence as it stands is not intelligible, because it does not appear clearly whether the sum of Rupees 47-15-6 is to be taken as additional to the sum of Rs. 31-1-9, nor how the figure

of Rs. 34-1-3 is arrived at. From that evidence, however, it would appear that something was at the date in question due and payable by Messrs. Kundu & Co. to the accused. Another partner says that the account has not yet been settled. Now, the accused says that there was some money due and owing to him, in fact the sum of Rs. 53 after giving credit for the sum of Rs. 140, and he has instituted a suit in the Small Cause Court to recover the sum. Something apparently being due to the accused there are circumstances in this case which support the petitioner's story that the money received by him was on this account and not for payment to Seo Narain-Ram Narain. Notably the fact of the howlat entry as also the circumstance that the entry merely shows an advance without giving particulars, though it is said, that in other instances in the account books the purpose of the account was noted. There are some other circumstances which are fully dealt with in the judgments of the learned Judges and I need not refer to them here. Beachcroft, J., in his judgment states that it is impossible to say that the Crown could not have been represented had it had clear notice that the findings of fact would be assailed. Whatever may be the state of facts before the case was heard by the learned Judges, it is sufficient here to note that at this hearing before me the Crown has not appeared although it had the opportunity to be represented. It cannot, I think, be said that the case is one which is free from doubt and I therefore think that in accordance with the ordinary rule, the benefit of that doubt should be given to the accused.

I accordingly agree with Teunon, J., and I am of opinion that the conviction of the petitioner should be set aside and the fine, if paid, should be refunded.

Teunon, J.— In this case the petitioner Duli Chand Dalal has been convicted under S. 406, I. P. C., and sentenced to pay a fine of Rs. 200. The present Rule obtained at his instance is directed against this conviction and sentence and is what is known as an "open" Rule at the hearing of which all questions arising, whether of fact or of law, may be urged. The petitioner, it appears, is a broker and for some two years prior to the transactions now in question had been employed in that capacity for the purchase of grain by a firm known as Kundu & Co. He was also, it appears, entrusted by the vendor firms with the realization of the moneys due to them. Sometime in the beginning of March 1915, acting as a broker on behalf of Kundu & Co., the petitioner bought 400 maunds of grain from a firm named Seo Narain-Ram Narain. The sum due to that firm was thus Rs. 1,281-13-6, and a sum of Rupees 7-6-0 was due as brokerage to the petitioner. The munib gomasta of the firm of Seo Narain, which had had dealings with the petitioner for some 15 months, has proved that on 11th or 12th March they handed over their bill to the petitioner for realization and that in the beginning of May he returned the bill saying that he had been unable to collect the money. The case of the complainant firm then is that on 18th April on the representation of the petitioner that the firm of Seo Narain required money for the purchase of gunny bags, they handed to the petitioner a sum of Rs. 140 for the express purpose of making a part payment to Seo Narain, and that he dishonestly appropriated this sum to himself. Their complaint, based on this case, was lodged on 21st June and the petitioner appeared in Court to answer to that complaint on 30th of the same month.

The case of the petitioner is that the sum of Rs. 140 was given to him as a personal advance, that is, a payment on account in respect of brokerage due to him, and that these proceedings have been instituted by reason of disputes over a loss of Rupees 440 odd sustained by Kundu & Co. over certain transactions in barley, and also by reason of their having lost their contract with the Corporation to Messrs. Hart & Co. by whom petitioner's cousin one Behari is employed. In a Small Cause Court suit instituted on 10th July and apparently still pending petitioner gives credit for the Rs. 140 and claims a sum of Rs. 53 as brokerage still due. Two of the partners in the firm of Kundu & Co., also their cashier and a broker or employee named Satkari Rai have deposed to the payment of Rs. 140 and its purpose. The last named, whose memory was refreshed by the discussion that followed upon the receipt by Kundu & Co. of Seo Narain's pleader's letter of 23rd May, is obviously a false witness. Neither of the partners in their depositions suggests that he was present.

It is next clear that there is a dispute between Kundu & Co. and the petitioner over transactions in barley which took place in January to March 1915. These transactions have in fact resulted in a loss of over Rs.400 and while the firm say that barley was bought by the petitioner on his own account, though with the firm's money, his case is that these were ordinary brokerage transactions, that the loss is theirs and that brokerage is due to him. In respect of these transactions the partners in Kundu & Co. have contradicted one another. Beni Madhab, cross-examined on 17th and 24th August, says that the accounts have not been adjusted and further in respect of at least one of these transactions speaks of accused as a "broker." On the other hand Bistu Narain cross-examined in September says that the barley accounts were settled and that the petitioner agreed to pay, though there is nothing under the petitioner's hand to show this or to fix him with liability for the loss. It is only by excluding these transactions that they can say that they owe nothing to the petitioner.

It has then been suggested, as strengthening the case for the prosecution, that on receipt of Seo Narain's letter of 1st June complainant searched for the petitioner and came into Court (21st June) because they could not find him. But petitioner, it appears, had gone to his country on 13th May, and that he had informed both Kundu & Co. and the firm of Seo Narain of his intention. His failure to present himself at Kundu's on his return some 15 days later is consistent with either the defence or the prosecution. In fact no real search was made for him. Bistu Narain admits that the petitioner had informed him of the English firms for whom the petitioner worked and yet at the place of business of no such firm was inquiry made. Again the complainant admits that this is the first and only instance of a part payment to a seller. In the present instance the goods had been delivered, and the second partner Bistu Narain says that bills are usually presented 10 or 12 days after delivery. The bill had in fact been with the petitioner from 10th March, and it seems strange that after such an interval the partners Kundu & Co, should suppose that the firm of Seo Narain would ask for only part payment. Further Seo Narain-Ram Narain are an old and well-to-do firm. Kundu & Co. had had dealings with the firm for ten months and though the complainant and his partner say so, they could not have been ignorant of the standing of Seo Narain. It is not likely that such a firm would ask for a small sum such as Rs. 140 to enable them to take delivery of a few gunny bags and the absurdity of such a statement, if made, would have been patent.

Smaller matters, such as the witness Bistu Narain's obscure reference to information received from one of the proprietors of Seo Narain apparently about the beginning of May, and the complainant's allegation that there was short delivery of about a maund, need only be referred to. It is perhaps somewhat significant that the munib gomasta of Seo Narain will not distinctly deny that this shortage was mentioned to him by the petitioner as one of the reasons why he had failed to realise the money due. Lastly the entry in the imprest account gives no particulars of the purpose for which the sum of Rs. 140 was handed to the petitioner while he by writing the words "howlat lya" distinctly takes it as an advance or part payment on his own account. This too is the explanation he gave when questioned by the munib gomasta on his return from his country. The entry supports the defence and appears to be inconsistent with the prosecution. For these reasons to my mind the probabilities are against the prosecution and in favour of the defence, and it seems to me that this is a case in which the Honorary Magistrate has overlooked the cardinal maxim that where reasonable doubt exists the benefit of that doubt should be given to the accused. I am therefore of opinion that the conviction of the petitioner should be set aside and that the fine, if paid, should be refunded.

Beachcroft, J.—The petitioner was a broker of the firm of Messrs. Kundu & Co., which carries on a general business as merchants, agents and contractors, and deals amongst other things in grain. In March last the petitioner purchased grain to the value of over Rs. 1,200 on behalf of Messrs. Kundu & Co. from the firm of Seo Narain-Ram Narain. On 18th April a sum of Rs. 140 was paid to the petitioner by one of the members of the firm of Messrs. Kundu & Co. An entry of the payment was made in the suspense account of the firm and

against that entry the accused wrote the words "howlat lya" and signed it. It is alleged on behalf of the prosecution that the payment made was to the petitioner for payment to the firm of Seo Narain-Ram Narain against the price of of the grain purchased in March, as the petitioner told his employees that the firm of Seo Narain-Ram Narain wanted money to buy gunny bags. The petitioner's case is that the money was advanced to him as part payment of what was due to him for brokerage.

The Honorary Presidency Magistrate who tried the case convicted the petitioner under S. 406, I. P. C., and sentenced him to pay a fine Rs. 200. Though he found that the accused's story was false, which involves the finding that the money had been obtained by false pretences, he was of opinion that the petitioner had no intention of permanently appropriating the money, but intended to pay it back in a few days. The points relied on in argument before us are: (1) the words "howlat lya" against the entry in the account book; (2) the fact that the entry merely shows an advance, without giving particulars—we were told that in every other instance in the account book the purpose of the advance was noted; (3) that after this date, viz., 18th April, the petitioner acted for the firm of Messrs. Kundu & Co. and might have cheated them of more; (4) that the complainant admits that he would have paid the whole bill if it had been presented to him, and the evidence is that the bill had been in the accused's hands for some time before 18th April; (5) that there is no other instance of part payment of a bill; (6) that the petitioner had a dispute with the firm which wanted to saddle him with the loss on a transaction in barley, which petitioner says should fall on the firm; (7) that the petitioner brought a suit in the Small Cause Court for his dues as brokerage in which suit he gave credit for the advance of this sum of Rs. 140.

The case in fact has been argued before us as if it were an appeal and not an application in revision. This Court no doubt, has the power in revision to enter into questions of fact, but it is a power which, in my opinion should be sparingly exercised, for there is a danger that the sense of responsibility of the subordinate Courts as ultimate Judges of facts will be blunted if our powers are freely exercised, and we ought only to interfere in revision with findings of fact when it is demonstrated very clearly that they are wrong. Obviously the two first points urged for the petitioner are the strongest. The words "howlat lya" are no doubt consistent with the petitioner's story, but they are also consistent with that of the prosecution. As regards the second point there would have been more force in the contention if there had been some cross-examination of the complainant on the lines of the argument. Not only was he not definitely asked to explain the omission of particulars, but his attention does not seem to have been drawn, even indirectly, to the desirability of giving an explanation. Nothing more seems to have been done than to ask him about particulars of three entries (Exs. B, C and D) so widely separated from each other as pp. 111, 211 and 302 of the account book. Then the witness Sailaja Kanta Roy says:

> "There are some entries in this book in which the purpose for which the money is paid is entered."

I find nothing in the evidence of any of the witnesses to justify the statement of the learned pleader that the purpose of the advance is always noted in other entries. If I misunderstood him and he did not intend to say that it was an invariable practice to enter particulars, the whole point of the argument is gone. There is obviously nothing in the argument that the petitioner might have cheated his employees of more, especially in view of the Magistrate's finding that he probably hoped to repay what he took. The fourth point is really part of the third to show that the petitioner might by presenting the bill have got over Rs. 1,200 into his hands. And the force, such as it is of the argument, is considerably discounted by the fact that the suggestion made in cross-examination to Bistu Narain Kundu, one of the partners, is that the petitioner did present the bill several times for payment, but the firm would not pay it. An obvious answer to the argument is that had the whole amount due on the bill been handed to the petitioner, the complainant firm would have at once demanded a receipt of the bill from Messrs. Seo Narain-Ram Narain.

That there is no other instance of part-payment does not strike me as of any im-

portance, when it is alleged to have been made in this case to oblige the firm of Seo Narain-Ram Narain on the petitioner's representation that they wanted to buy gunny bags. That the petitioner had a dispute with the firm, if the suggestion be true about a barley transaction does not to my mind go for much; that he instituted a suit in the Small Cause Court against the firm nearly three weeks after the complaint was lodged goes for nothing at all. These are all the points which were urged and I consider that the petitioner has entirely failed to show that the Magistrate's finding was incorrect. The Magistrate's language does not indicate any doubt: he has believed the evidence of the principal witnesses, the two partners, who say that the petitioner got the firm to make the advance on the representation that the firm of Seo Narain-Ram Narain wanted to buy gunny bags. There is evidence coming from the latter firm that they did not ask petitioner to get the money from them for gunny bags. There is further evidence that the petitioner told the firm of Seo Narain Ram Narain the false story that he could not collect the amount of their bill as the Babu was away. And there is this fact to support the story of the prosecution, that directly the firm of Seo Narain-Ram Narain wrote to the complainant firm about the bill with a demand for payment, the latter wrote that Rs. 140 had already been paid through the petitioner.

Apart from the facts there is a difficulty arising out of the form in which the rule was issued. It was issued "on the grounds set out in the petition." The first ground was a general one of mistake of law; the second, that dishonesty not having been found the conviction was bad in law; the third, that in view of the Small Cause Court suit the case was of the nature of a civil dispute; the fourth, that the entry in the account book smashed the prosecution case; the fifth, that on the Magistrate's findings the accused should have been acquitted. All except the fourth ground are grounds of law, but not one ground of law was urged at the hearing and the arguments advanced as to facts travelled far beyond the fourth ground. This may seem a technical objection, and it might perhaps rightly have been treated as such had the Crown been represented by anyone prepared to argue on the facts. But the Crown has not been represented at all. The learned Judges issuing the rule intended that the case might be argued on the facts, but unfortunately the terms of the rule did not make that clear. It is impossible to say that the Crown would not have been represented had it had clear notice that the findings of fact would be assailed. I am glad, however, that it is not necessary to base my opinion on a technisal objection, for the Magistrate had reason for coming to his findings; and on the evidence, I find no sufficient ground for supposing that he came to anything but a right conclusion. I think the Rule should be discharged.

V.B./R.K. *Conviction set aside.*

A. I. R. 1918 Calcutta 212

FLETCHER AND SHAMSUL HUDA, JJ.

Nagendra Nath Mazumdar and *others* —Defendants— Appellants.

v.

Banwari Lal Das and *another*—Plaintiffs—Respondents.

Appeal No 287 of 1917, Decided on 12th June 1918, from appellate decree of Dist. Judge, Burdwan, D/- 1st December 1916.

(a) Civil P. C. (1908), S. 91—Village pathway—Obstruction of—Suit for declaration of right to use—S. 91 does not apply.

The public at large are not affected by the obstruction of a pathway which only the inhabitants of a particular village have the right to use so that a suit for a declaration of the rights of the inhabitants of a village to the use of a pathway is not governed by S. 91. [P 213 C 1]

(b) Limitation Act (1908), S, 26—S. 26 does not apply to village pathway.

Section 26 has nothing to do with an ancient village pathway used by the inhabitants of a particular village from time immemorial. [P 213 C 1]

Dwarkanath Mitter and *Narain Chandra Kar*—for Appellants.

Bepin Behari Ghose and *Gopendranath Das*—for Respondents.

Judgment.—This is an appeal by the defendants against the decision of the learned District Judge of Burdwan, dated 1st December 1916, affirming the decision of the Munsif of Katwa. The plaintiffs sued on behalf of themselves and the other members of the village in which they reside for a declaration of the right of the inhabitants of the village to the use of the village pathway lying to the east of the defendants' premises. The pathway claimed is said to be an ancient one. Both the Courts below have decreed the suit. In this appeal, the following points have been urged: First of all it is

said that a suit relating to a village pathway is governed by the provisions of S. 91, Civil P. C. relating to public nuisances. A village pathway is obviously not a public nuisance nor are the public at large affected by the obstruction of the pathway which only the inhabitants of the particular village have the right to use. It is quit clear that S. 91, Civil P. C has nothing to do with the suit at all.

Then it is said that if it is not public it is private and that there is nothing else that the right can be excepting a public nuisance or a private easement and that therefore under S. 26, Lim. Act, the suit is barred by limitation. But the definitions of public right and private right are not absolutely exclusive. There are other sub-divisions of these rights: such as the right to a pathway used by the inhabitants of a particular village or town. Obviously, S. 26, Lim. Act has nothing to do with an ancient village pathway used by the inhabitants of a particular village from time immemorial. There is nothing in this point. The third point relates to the form of the decree. The learned Judge of the lower appellate Court said that the defendants were mistaken in the view they took with reference to what the decree passed by the learned Judge of the primary Court was. When one looks at the decree of the first Court in this case one finds that the learned Judge of the lower appellate Court was right. The decree drawn up by the Munsif strictly followed the words of the judgment which he pronounced in Court. There is nothing wrong in the form of the decree. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 213

FLETCHER AND SHAMSUL HUDA, JJ.

Ambika Charan Chakravarty and *another*—Plaintiffs—Appellants.

v.

Sarat Chandra Basu and *others*—Defendants—Respondents.

Appeal No. 1728 of 1915, Decided on 30th January 1918, from appellate decree of Sub-Judge, 1st Court, Dacca, D/- 19th April 1915.

Civil P. C. (1908), O. 23, R. 1—Judgment should not contain statement in respect of point not raised by parties—Plaintiffs held not entitled to withdraw suit with liberty to bring fresh suit—Practice, Judgment.

A suit brought to recover a jote on the footing that it was a kaemi jote was dismissed by the trial Court as well as by the appellate Court on the ground that the jote was not kaemi. The question whether the plaintiffs had acquired an occupancy right was left open by the trial Court but the appellate Court while affirming the decision of the trial Court, stated in its judgment that if the question of occupancy right had been before it the plaintiff's suit would be barred by limitation.

Held: that the question of limitation as well as of the right of occupancy should be left open, as the plaintiffs might be prejudiced by the statement in the judgment of the lower appellate Court in case they brought a suit to enforce the right of occupancy: that the plaintiffs could not be allowed to withdraw the suit with liberty to bring a fresh suit. [P 213, C 2; P 214C 1]

Dwarka Nath Chuckerburtty and *Trailokhya Nath Ghose*—for Appellants.

Jogesh Chunder Roy and *Upendra Lal Roy*—for Respondents.

Fletcher, J.—This appeal is preferred by the plaintiffs against the decision of the learned Subordinate Judge of Dacca affirming the decision of the Munsif at Manickganj. The suit was brought to recover a jote on the footing that it was a kaemi jote. Defendant 1 who is the landlord of 1.6th of the jote opposed the plaintiffs' claim. He denied that the plaintiffs had a kaemi interest and he stated that their predecessor had a temporary ordinary occupancy raiyati jote. The first Court held that the jote was not kaemi and left the question as to whether the plaintiffs had an occupancy right by recognition open. The lower appellate Court agreed with the primary Court and stated that the question of occupancy right was not before the Court and then proceeded to state that if it had been before the Court the plaintiffs' suit was barred by limitation. Only two questions are urged in this appeal. First of all that the plaintiffs should have liberty to withdraw the whole suit. That clearly cannot be assented to. The second point is that if the plaintiffs think fit to attempt to enforce in any subsequent proceeding this right of occupancy which was left open by the primary Court they will be seriously prejudiced by the statement made by the learned Judge of the lower appellate Court that if that question had been before the Court, the learned Judge would have held that the plaintiffs' claim was barred by limitation. I think that this contention is sound. The plaintiffs whether their

rights are well founded or not on that claim ought not to be prejudiced by a statement in this suit that if that case had been before the Court, the Judge would have decided it against them on the ground of limitation. That would depend on a variety of circumstances. It is not necessary for us to express any opinion one way or the other. That question of limitation just as much as the question of the right of occupancy by recognition will be left open between the parties. The present appeal fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 214

TEUNON AND CHAUDHURI, JJ.

Nibaran Chandra Kundu—Petitioner.

v.

Chairman of Corporation of Calcutta—Opposite Party.

Criminal Revn. No. 1134 of 1916, Decided on 9th January 1917.

Calcutta Municipal Act (1899), Ss. 408, 419, 574 and 598—Notice under S. 408, requirind certain constructions to be made within three months—Period extended on objection—Construction not made—Application for prosecution giving wrong particulars—Prosecution under S. 574 on amended application is not barred.

A notice under S. 408, Calcutta Municipal Act having been served upon the petitioner on 3rd January 1916, requiring him to make certain constructions in connexion with a bustee within three months, the petitioner served on 10th March a notice under S. 419 on the Corporation intimating that he proposed to remove the land from the category of bustee land, and on 20th March took certain objections under S. 598. At the hearing of the objections the period of three months was extended to six months. Nothing however, having been done by the petitioner the Corporation applied for summons, but the Magistrate declined to take action upon it, as it was eventually discovered that the period of the notice was therein erroneously stated to be three months; whereupon on a second application having been made on 31st July, the petitioner was prosecuted and convicted:

Held: (1) that the Magistrate's action on the first application was not a bar to the prosecution; (2) that the extended period of six months ran from 3rd January and not from 20th March (when the objections were taken); (3) that the negotiations and arrangements relating to the requirements of the notice between the petitioner and the Corporation that were going on pending the notice did not make the requirements of the notice unenforceable. [P 215 C 1]

Bepin Chandra Mullick—for Petitioner.

Manmatha Nath Mookerjee—for Opposite Party.

Judgment.—In this case the petitioner is the owner of a bustee known as No. 6, Creek Lane. He has been convicted and sentenced under S. 574 read with S. 408, Calcutta Municipal Act, in respect of his non-compliance with the repuirements of a notice served upon him on 3rd January 1916 under the provisions of S. 408. The notice directed him, inter alia, to construct a certain portion of a road or passage marked C. C. in the standard plan and an underlying 6 inches sewer, also to extend the unfiltered water-supply throughout the bustee, to construct cement surface drains, to build a connected latrine and thereafter to remove two privies. It is admitted in the affidavit that has been filed on behalf of the Corporation that on receipt of a certain sum of money and of an undertaking from one Sital Chandra Banerjee the owner of the adjoining bustee No. 6 (1) and of a further undertaking from the petitioner that he will pay the compensation awarded to tenants in respect of the removal of a certain hut, the Corporation has agreed to acquire the necessary land, to construct the road C. C., lay the 6 inches sewer, and an unfiltered water main, and generally do all the work connected with the road or passage C. C. It is also admitted that up to date nothing in this connexion has yet been done.

Now the notice served upon the petitioner required him to construct his surface drains as indicated in the plan, that is to say, as falling into the sewer underlying C. C. That not having been yet brought into existence by the Corporation, it is obviously impossible for the petitioner to comply with the requisition as regards surface drains. For connected privies a connexion both with a sewer and with an unfiltered water main is necessary. It appears that there is a sewered drain to the east of the bustee No. 6, but until the main has been laid by the Corporation along C. C., unfiltered water can be obtained only from the Sankaritolla Lane, say 115 feet from the site of the proposed latrine or from the eastern extremity of C. C. at a distance of some 90 feet. Now when the main is laid along C. C, the distance of the latrine from this main will be about 40 feet only and the contention of the petitioner is that he should not be required to construct the connected latrine until the

main along C. C. has been laid. But there is no such proviso in the notice, there is also no physical impossibility, and we cannot say that it is unreasonable on the part of the Corporation to insist on the abatement without further delay of the nuisance created by the two existing privies. We may now briefly notice the contentions in law advanced by the petitioner. It appears that in the first instance the notice under S. 408 was served on 11th March 1915, and that on receipt of this notice the petitioner on 22nd May 1915 served on the Corporation a notice under S. 419 intimating that he proposed to remove the land from the category of bustee land. The six months referred to in sub-S. (3) of that section having expired, the present notice was served on 3rd January 1916, the period allowed being three months. On this, the petitioner on 10th March served a second notice under S. 419, and on 20th March took certain objections under S. 598. At the hearing of these objections the period of three months was extended to six months.

On 27th July the Corporation applied for a summons, but when it was eventually discovered that the period of the notice was therein erroneously stated to be three months the Magistrate declined to take action upon it, and the application on which the conviction has ensued was made on 31st July. On these facts the petitioner contends that under S. 419 (3) he should have been allowed a second period of six months from 10th March, that the extended period of six months should be held to run from 20th March and not from 3rd January, and that the Magistrate's action on the application of 27th July was a bar to this prosecution. He further contends that by reason of the negotiations and arrangements regarding the road C. C. and the hut standing on the petitioner's land, it should be held that the requirements of the notice in respect of the connected latrine and the privies became unenforceable. In our opinion there is no substance in any of these contentions. We, therefore, affirm the conviction but having regard to the facts set out in the earlier part of this judgment, we reduce the fine from Rs. 20 to Rs. 10. The excess over Rs. 10, if paid, will be refunded.

V.B./R.K. *Fine reduced.*

A. I. R. 1918 Calcutta 215

FLETCHER AND SHMSUL HUDA, JJ.

Rasik Chandra Mukhopadhya—Plaintiff—Appellant.

v.

Shyama Kumar Tagore and *others*—Defendants—Respondents.

Appeal No. 480 of 1916, Decided on 12th March 1918, from appellate decree of Offg. Sub-Judge, Backergunge, D/- 24th August 1915.

Bengal Tenancy Act (1885), S. 105—Rent of tenure enhanced after sale—Purchaser is bound by enhanced rent but can have sale set aside.

The plaintiff bought a tenure at an auction sale. The sale proclamation mentioned the rent to be Rs. 64, but at the time of the plaintiff's purchase a proceeding under S. 105, Ben. Ten. Act, for enhancement of rent on the ground of excess in area was pending and the rent was enhanced after the plaintiff's purchase to Rs. 270 without making the plaintiff a party to the proceeding.

Held: (1) that as the plaintiff did not prove that he did not know of the proceeding for enhancement of rent at the time of his purchase, he was bound by the result of the proceeding; (2) that even if he had proved that he did not know of the proceeding to enhance the rent at the time of his purchase, his right would have been to have the whole sale set aside; but he could not hold the property and at the same time refuse to pay the enhanced rent.

[P 216 C 1]

Romesh Chandra Sen for *Brojendra Nath Chatterji*—for Appellant.

Ram Charan Mitter—for Respondents.

Judgment.—This is an appeal by the plaintiff against the decision of the learned Offig. Sub-Judge of Backergunge, dated 24th August 1915, reversing the decision of the Munsif at Patuakhali. The Court of Wards acting on behalf of a disqualified proprietor obtained a certificate under the Public Demands Recovery Act (I. B. C.) of 1895 in respect of arrears of rent of a howla. The tenure was thereupon brought to sale and purchased by the plaintiff. The sale was confirmed and it appears that, when the property was advertised for sale, there were, in fact, proceedings pending under S. 105, Ben. Ten. Act, for enhancement of rent on the ground of excess in area. The rent in the proclamation was stated to be Rs. 64. The proclamation of sale, although it has not been given in evidence in this case, apparently did not state that there were proceedings pending to enhance the rent. The rent was shortly after the sale to the plaintiffs raised from Rs. 64 to Rs. 270; and, in default of the

payment of the rent of Rs. 270, a certificate had been filed under the same Public Demands Recovery Act. The present suit was thereupon brought for the purpose of setting aside or modifying that certificate. The plaintiff, as the learned Subordinate Judge found, abstained from going to the witness-box. The learned Judge was, therefore, of opinion that the plaintiff has not shown that he was not aware of the proceedings for the purpose of enhancing the rent. Obviously, it was the duty of the plaintiff to satisfy the Court that he did not know of those proceedings to enhance the rent. If he knew and bought the property with his eyes open, there is no reason why the certificate should be modified. In addition to this, not only did he abstain from going to the witness-box but he put forward a witness whom the learned Judge considered to be an untruthful witness. So far as I can gather, the learned Judge was of opinion that the plaintiff had failed to establish that he did not know about these proceedings, and the natural inference is that the Judge came to the conclusion that he knew all about them and that the present suit was merely a way to try to get hold of this large piece of property at an inadequate rent.

As far as I can see, if the plaintiff had established the story that he wished us to believe, the plaintiff's right would be to have the whole thing set aside. He cannot hold the property of the ward sold by the Court of Wards at a rent of Rs. 64 when the state of facts shows that, on a proper measurement of the land that is in the possession of the tenants, he has got to pay a rent of Rs. 270. The learned Government Pleader on behalf of the defendant-respondent stated that he was quite willing, if the plaintiff so wished to return him the sum of Rs. 170 that he had paid for the tenure at the auction sale and that the plaintiff would then receive back his money and the Court of Wards would hold on behalf of the ward this howla or tenure. No case has been made for modifying the certificate and permitting the plaintiff to hold this large piece of land at this rent of Rs. 64 which was payable in respect of the land originally enjoyed by the tenant. The plaintiff wants to have the certificate set aside and is not in a position to accept the offer of the learned Government Pleader. The learned Subordinate Judge has found that he knew about these proceedings all along and he cannot have the certificate set aside or modified in the way he wishes. The appeal, therefore, fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 216

FLETCHER AND SHAMSUL HUDA, JJ.

Kalamua Khadim—Plaintiff—Appellant.

v.

Amir Ali Khalifa and *another*—Defendant and Plaintiff—Respondents.

Appeal No, 1101 of 1916, Decided on 23rd March 1918 from appellate decree of Sub-Judge, Assam, D/- 10th February 1916.

Landlord and Tenant — Ejectment—Suit for—Notice sent through registered post—Endorsement by addressee refusing to accept it—Although evidence as to service of notice not legally sufficient, plaintiff should be given opportunity to prove actual service of notice.

A notice to quit was sent through registered post. The posting was duly proved and the registered envelope was produced in Court with an endorsement purporting to have been made by the postal peon stating that the addressee refused to accept the letter.

Held: that though the evidence adduced as to the service of the notice was not legally sufficient, the plaintiff's suit for ejectment on notice to quit should not have been dismissed on the ground that the service of notice was not proved, but that the plaintiff should have been given an opportunity to prove the actual service of notice on the defendant. [P 217 C 2]

Babu Prakas Chandra Majumdar—for Appellant.

Maulvi Nur-ud-din Ahmad—for Respondents.

FACTS will appear from the following judgment of the lower appellate Court. "This appeal arises out of a suit for ejectment. The lower Court has passed a decree. It is assailed on several grounds. The first ground is that the service of notice to quit was not properly proved. It was proved by the production of the registered cover containing a notice to quit, with an endorsement on it of the postal peon that the addressee refused to receive it. It is argued that the mere production of this cover without calling the peon is not sufficient evidence of service as laid down in the High Court decision reported as *Gobinda Chandra Saha* v. *Dwarka Nath Patita* (1). It is, however, contended for the

1. (1915) 26 IC 962.

respondent, that this decision of the Calcutta High Court came out in the Weekly Notes of 15th March 1915 while the case under appeal had been decided on 15th February 1915 and the procedure then followed in serving notice was in accordance with the law laid down in the previous decision of the same High Court referred to in the judgment of the lower Court [*Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar* (2)] and that the case should under the circumstances be sent on remand in order to give the plaintiff an opportunity to prove the service of notice in accordance with the law as laid down in the more recent decision of the High Court.

Neither party could cite before me any decision of the High Court as to what course should be followed in a case like this. I am inclined to think that the subsequent decision is a legal adjudication that the prior one was not law at the time it was made and that it was a mere mistake upon which the plaintiffs acted at their period. I find, however, that the case of *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar* (2) does not lay down the broad proposition that the mere production of a registered cover containing a notice with an endorsement on it that the addressee refuse to receive it is sufficient service of notice, without proving the truth of the endorsement in any way. Then there is the evidence of defendant in this case that no registered cover was tendered to him. Under the circumstances I think that the plaintiff's suit must fail. It is not necessary to consider the other grounds of appeal. The appeal is accordingly decreed with costs and the plaintiff's suit will stand dismissed with costs."

Judgment.—This appeal must be allowed. The learned Subordinate Judge disagreeing with the Munsif has found that the plaintiff has failed to prove service of notice which was sent through registered post. The proof of the posting was duly given. The registered envelope was produced in Court with an endorsement said to have been made by the postal peon, staing that the addressee refused to accept the letter. On that, the learned Judge puporting to act on a decision of this Court came to the conclusion that the service of the notice was not duly proved. Even assuming that the decision on which the learned Judge has relied says that, it is quite clear that on a point like this, when the appellant has got an earlier decision of this Court in his favour which has been acted on on more than one occasion, he ought to have an opportunity of proving the service of the notice by producing other evidence. The case must go back to the Court of first instance to be reheard as regards the actual service of the notice on the defendant. Cost will abide the result of the rehearing by the Court of first instance.

V.B /R.K. *Case remanded.*

2. (1888) 15 Cal 681.

A. I. R. 1918 Calcutta 217

TEUNON AND SHAMSUL HUDA, JJ.

Radhanath Kaibarta — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn No. 709 of 1917, Decided on 6th July 1917, against the order of the Dy. Magistrate Mymensingh, D/- 14th March 1917.

Private Fisheries Act (2 of 1889), S. 3.—Conviction under—Bona fides of accused must be investigated—Rubkar of Commissioner showing possession—Copy of, is admissible in evidence.

The accused, a fisherman, acting under the authority and at the instigation of certain zamindars and their ijaradar, fished in a river which was claimed by the zamindars as belonging to their estate. On the complaint of the ijaradar under Government claiming that the river appertained to a Government khas mahal the accused was convicted under S. 3.

Held: (1) that there could not be any conviction unless bona fides of accused had been properly investigated and the question of the possession of the fishery had been enquired into; (2) that the Magistrate was wrong in holding that a rubakari issued by the Court of the Commissioner, showing that the fishery was not included within the Government khas mahal, was inadmissible in evidence on the ground that only a certified copy and not the original order was produced; (3) that there should not be a retrial of the accused in view of the fact that he was merely a fisherman acting under the authority and at the instigation of the zemindars and their ijaradar against whom no proceedings had been taken either by the complainant or by the Crown. [P 218 C 2]

Dasarathi Sanyal and *Bimal Chandra Das Gupta*—for Petitioner.

Camel—for the Crown.

Judgment.—This rule is directed against the conviction of the petitioner under S. 3 of the Private Fisheries Act 2 of 1889. It has been found and it

apparently is not disputed that the petitioner did, as a matter of fact, fish in a certain fishery spoken of as river Jaldiar. But the essential question in the case was whether this river Jaldiar appertained to a certain khas mahal spoken of as Banibala or whether it appertained to the adjoining mouza belonging to certain Chowdhuries of Sherpur, in other words, the question really was where should the boundary line between these two properties be drawn. We are of opinion that the question of the true boundary in the first place, and in the second place the question of the bona fides of this petitioner who, it appears, was acting under certain ijaradars who had obtained a lease from the Chowdhuries of Sherpur, have not been properly investigated. In the first place the Deputy Magistrate says that the parcha, which has been produced, proves conclusively that the river Jaldiar appertains to the khas mahal. We are informed that this parcha is an extract from or part of a Record of Rights prepared under the provisions of Ch. 10, Ben. Ten. Act. In that case it would seem that it at most raises a presumption in favour of the complainant who is an ijaradar under the Government. But the presumption thus raised may be rebutted. Now, in order to rebut that presumption the petitioner and those who were supporting him in this trial produced a certified or attested copy of a rubakari issued by the Court of the Commissioner of Dacca on 20th April 1854. From this it would seem that this question as to the boundary between the Government khas mahal and the petitioner's Taluk Pagla was adjudicated in 1854 and in preceding years. It further appears from the same rubakari that by an order of a Deputy Collector the jola was released or removed from the possession of the khas mahal authorities and that this order having been set aside by the Collector of the day, the Collector's order again was reversed by the Commissioner and as it would seem the order of the Deputy Collector restored.

It is not for us here to say without further enquiry what exact value is to be attributed to this rubakari. But it is quite clear that the Magistrate's order, holding that this document is inadmissible in evidence on the ground that only a certified copy and not the original order was produced is wrong. It may be that if this order is to be taken as one definitely fixing the boundary between the two mahals and if on evidence it can be shown that the Jaldiar referred to in that rubakari is identical with the Jaldiar now in question, and if no proceedings have been taken on the part of the revenue authorities to have the order of the Commissioner rectified and the Jaldiar again included within the khas mahal, it may be that it will be extremely difficult to say that the petitioner in the present case was not acting in good faith. Obviously these are questions that should have been investigated and possession since the date of the Commissioner's rubakari should also have been enquired into. In this view it is clear that there has been no satisfactory trial of the questions at issue in this case, and we must consequently set aside the conviction and sentence. The only remaining question is whether there should be a retrial of this petitioner. Now, it is clear, or at least from the papers put before us it appears to be clear, that this petitioner who is merely a fisherman is acting under the authority and at the instigation of the Zamindars of Sherpur and their ijaradars. So long then as the Crown or the present complainant does not feel himself in a position to take proceedings against these persons. we do not think that it is advisable to direct a further prosecution of the present petitioner.

We, therefore, make, this rule absolute and set aside the conviction and the sentence imposed upon the petitioner.

The fine, if paid, will be refunded.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 218

CHATTERJEA AND SMITHER, JJ.

Madhu Sudan Mullick and *others* — Plaintiffs—Appellants.

v.

Jamiruddin Sheik — Defendant — Respondent.

Appeal No. 3033 of 1915, Decided on 26th April 1917, from appellate decree of Sub. Judge, Rajshahi, D/- 30-8-1915.

(a) Bengal Tenancy Act (8 of 1885), S. 50, Cl. (2)—Change in area of holding does not bar presumption under Cl. 2 — When enhancement of rent can be granted stated.

The presumption under S. 50 (2), Ben. Ten. Act may arise even though there has been an alteration in the area of the holding. [P 219 C1]

Where there has been an increase in the area of the holding, but it is found from the landlord's papers that the tenant has held the holding at the same rate for twenty years immediately preceding the landlord's suit for enhancement of rent, the rent cannot be increased except for the excess area unless the presumption arising under S. 50 (2) is rebuted. [P 219 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 50 (2) — When landlord's papers show same rents for twenty years tenant need not produce rent receipts to avail of presumption.

If the plaintiff-landlord's own papers prove that the tenant-defendant was holding the land at the same rent for more than twenty years before the institution of the suit for enhancement of rent, it is not necessray for the tenant to produce his rent receipts to prove the same in order to avail himself of the presumption under S. 50 (2), Ben. Ten. Act.

Hemendra Nath Sen— for Appellants.

Hemendra Kumar Sen for *Atulya Charan Bose*—for Respondent.

Judgment.—This appeal arises out of a suit for enhancement of rent of a holding under S. 30, Ben. Ten. Act and and also for additional rent on account of additional area in the holding. The defendant had holding of 8 bighas and 5 cottas at a rent of Rs. 6-10-16 gandas. It has however been found that he is in possession of 2 bighas odd in excess of the area which he had been holding before. The Court of Appeal below gave a decree for additional rent for the excess area at the prevailing rate of rent, but refused to allow any enhancement with respect to the land included in the original holding, namely, 8 bighas 5 cottas on the ground that the defendant had held at the same rent for a period of twenty years before the institution of the suit, and that therefore the rent could not be enhanced. The plaintiffs have appealed to this Court and it is contended before us that as there has been an alteration in the area of the holding held by the defendant the presumption under S. 50, Ben. Ten. Act, does not arise and the plaintiffs are entitled to an increase of rent for all the lands held by the defendant. But that section lays down that

"where a tenure-holder or a raiyat and his predecessor-in-interest have held at a rent or rate of rent which had not been changed from the time of the permanent settlement the rent or rate of rent shall not be liable to increase except on the ground of an alteration in the area of the tenure or holding."

So that it is only an account of the excess area of the holding that the rent can be increased, and the section lays down that except that, there shall be no increase in the rent in such cases. It is next contended that the learned Subordinate Judge was in error in holding that there was any presumption under S. 50, Ben. Ten. Act, when defendant has not proved rent receipts showing payment of rent at a uniform rate for twenty years before the institution of the suit. The learned Subordinate Judge has however found:

"It is admitted that the old holding of Rs. 6 odd has been in defendant's possession at the same rate at least from 1290 up to 1317. Their chittas and the admission in the plaint combine to prove the facts."

Then he goes on to refer to the fact that the plaintiffs did not produce their collection papers and counter foils which were called for from them. In the first place it seems from the words quoted above that there was an admission by the pleader for the plaintiffs that the defendant held at the same rent from 1290 to 1317. However that may be, there are certain chittas produced by the plaintiffs and the learned Subordinate Judge relies upon the chittas in support of that fact. It is contended by the learned vakil for the appellant that the chittas cannot prove payment of rent and it was absolutely neceasary for the tenant to prove actual payment of rent and to produce his dakhilas in order to avail himself of the presumption under S. 50, Ben. Ten. Act. But all that was to be proved under the sections was that the tenant had held at a rent or rate of rent which had not been changed during twenty years immediately preceding the institution of the suit. Ordinarily in order to prove that the rent had not been varied for twenty years previous to institution of the suit the raiyat can give what is the best proof of non-variation, viz., that they had paid uniformly for the twenty years preceding the suit, and the best evidence of payment being the rent receipts, they are ordinarily filed to support the payment. If however the zamindar's own papers prove that the tenant held the land at the same rent or rate of rent for twenty years it is not necessary for the tenant to produce his rent receipts.

The chittas produced in this case, at any rate some of them, are not merely record of measurement of land but they record the rent and the rate of rent at which the tenant held the land. If the chittas prove that the defendant had been holding the land at the sam e rent,

namely, Rs. 6-10-16 gandas for twenty years before the institution of the suit, the defendant need not produce his rent receipts. The learned Subordinate Judge has found that the chittas proved the fact that the defendant had been holding at the same rent at least from 1290 to 1317. It has not been shown to us that this finding is incorrect, or is not supported by the chittas upon which it is based. That being so the appeal must fail and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 220 (1)

FLETCHER AND RICHARDSON, JJ.

Alimaddin—Defendant—Appellant.

v.

Alinaddin Majumdar—Plaintiff—Respondent.

Appeal No. 1272 of 1915, Decided on 25th January 1917, from appellate decree of Dist. Judge, Tipperah, D/- 10th December 1914.

(a) Landlord and Tenant—Ejectment—Suit for—Lessee cannot deny sole right of landlord—Evidence Act (1872), S. 116.

In a suit for ejectment on the expiry of a lease, it is not open to a lessee, who was inducted on the land by the plaintiff and has been holding under a lease granted by him, to say that the latter is not the sole landlord. [P 220 C 2]

(b) Bengal Tenancy Act (1885), S. 22—Raiyati interest in holding bought by landlord—Holding under-let to defendant before passing of Act—Defendant held to be under-raiyat liable to ejectment after expiry of lease.

Plaintiff, a cosharer landlord, bought up the raiyati interest in a holding and under-let the holding by registered lease to the defendant before the passing of the Bengal Tenancy Amendment Act:

Held: that the defendant was an under-raiyat and was liable to ejectment after the expiry of the lease: 32 *Cal.* 386, *Foll.* [P 220 C 2]

Upendra Kumar Roy—for Appellant.

Ram Dayal Das—for Respondents.

Fletcher, J.—This is an appeal from a decision of the learned Additional District Judge of Tipperah, dated 10th December 1914, reversing the decision of the Munsif of Comillah. The suit was brought by the plaintiff for ejectment of the defendant, the plaintiff claiming that he was a raiyat and the defendant was an under-raiyat who held the property on a lease for seven years, the term of which had expired. The learned Judge of the lower appellate Court in reversing the judgment of the Munsif found that the defendant was a raiyat and that his term had expired, and that, therefore, he was liable to ejectment. The points raised in this appeal are two. First of all it is said that the plaintiff is not a raiyat but that he has got the interest of a permanent tenure-holder. It appears from the facts found that the plaintiff along with others owns the tenure. The plaintiff himself bought up the raiyati interest in this holding. He then underlet it by this registered lease to the defendant for seven years. It is said that, under S. 22, Ben. Ten. Act, the plaintiff cannot be a raiyat in these circumstances. This case is covered by the law before it was amended by Act 1 of 1908, of the Eastern Bengal and Assam Council. Under the Full Bench decision of this Court in the case of *Ram Mohan Pal* v. *Sheikh Kachu* (1) it is clear that the position of the defendant was that of an under-raiyat.

The second point raised was that the plaintiff was not the sole landlord. The learned Judge in the Court of Appeal below held that, having regard to the fact that the lease in favour of the defendant had been executed by the plaintiff alone and that the defendant had been inducted on the land by the plaintiff, it was not open to the defendant, having regard to the provisions of S. 116, Evidence Act, to say that the plaintiff was not in fact the landlord of the defendant. With that view, I agree. The present appeal, therefore, fails and must be dismissed with costs.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1905) 32 Cal 386.

A. I. R. 1918 Calcutta 220 (2)

WOODROFFE AND MOOKERJEE, JJ.

Rajani Kanta Sarkar — Plaintiff—Appellant.

v.

Midnapur Zamindari Co. Ltd. and another—Defendants—Respondents.

Letters Patent Appeal No. 4 of 1915, Decided on 20th February 1917, against decree of Chapman, J., D/- 7th December 1914, in A. F. A. D. No. 1887 of 1911.

Civil P. C. (1882), S. 310-A—Acceptance of deposit—Effect of—Transferee of occupancy holding depositing money to set aside sale in execution of rent decree—Landlord taking money without disputing—Transferee is tenant—Evidence Act, S. 115—Landlord and Tenant.

A landlord who takes the money deposited by a transferee of an occupancy holding under S. 10-A, Civil P. C., 1882, to set aside its sale in

execution of a decree for rent obtained by the landlord against the old tenant without disputing the right of such transferee to make the deposit, cannot afterwards refuse to recognise him as a tenant of the holding. The acceptance of the deposit operates as a recognition of the transferee as a tenant. [P 221 C 1]

Satcowripati Roy—for Appellant.

U. N. Sen Gupta S. N. Ghosal and *Probodh Kumar Das*—for Respondents.

Woodroffee, J.—The plaintiff is a purchaser of a holding from a tenant of the Midnapur Zamindari Company. This Company refused to register the plaintiff, as he was unwilling to pay an enhanced jama and selami which were demanded. On three occasions suits for rent were brought by the Company against the original tenant and the property was sold. The plaintiff then applied under S. 310-A, Civil P. C. and deposited the rent sued for. No objection was taken by the Company, who took the money which the plaintiff had deposited in Court. Now, having done this the question is this, can the Midnapur Zamindari Company say that the plaintiff has no title when they have taken the money which was deposited under the provisions of S. 310-A? It seems to me clear that they cannot do so. S. 310-A, applies to applications by per one whose immovable property has been sold under the provisions of the chapter in which it appears. It was open to the Midnapur Zamindari Company to dispute the plaintiff's right to apply under that section and to point out, as they now contend, that he was not a person whose immovable property had been sold, because he had not acquired any right to the property by his purchase, as against them; they did not, however, do so. The learned Subordinate Judge says:

> "As the Court is bound under the section to set aside the sale if it accepts the deposit, the decree-holder cannot question under the section the right of the plaintiff to deposit the money."

The observation, however, will only apply on the assumption that the plaintiff was a person who was entitled to make an application under S. 310-A. The Company did not object to the applicability of that section, and has, therefore, in my opinion, recognised the plaintiff. The learned Munsif sets out in his judgment the reason why this is so. I am of opinion, therefore, that the judgment and decree appealed from should be reversed, and the decree of the Munsif should be restored with costs in all Courts.

Mookerjee, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 221

FLETCHER AND SHAMSUL HUDA, JJ.

Jagan Nath Marwari and *others* — Plaintiffs —Appellants.

v.

East Indian Railway Company — Defendants—Respondents.

Appeal No. 1354 of 1916, Decided on 19th April 1918, from appellate decree of Dist. Judge, Burdwan, D/- 18th March 1916.

Railways Act (1890), S. 54—Railway Company is not bound to re-weigh goods and give certificate of shortage—Refusal by consignee to take delivery—Damage to goods on refusal falls on him

A Railway Company is not under liability to re-weigh the goods and give a certificate of shortage on the demand of the consignee. If the consignee refuses to take delivery on the Company declining to re-weigh the goods and give a certificate of shortage, the goods remain at his risk so that any deterioration or damage caused to the goods after the date of his refusal to take delivery falls on him. [P 222 C 1]

Surendra Nath Ghosal — for Appellants.

Langford James and *Ambica Pado Chowdhury*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned District Judge of Burdwan, dated 18th March 1916, reversing the decision of the learned Subordinate Judge of the same place. The plaintiff sued to recover damages for breach by the defendant Railway Company of a contract to carry and deliver to him certain bags of grain. The goods were admittedly consigned to the Company and they arrived at the destination and apparently five bags were found in a stack in a torn condition. Thereupon, the plaintiff set up the case that he was entitled to have the goods re-weighed and to receive a certificate of shortage, and apparently he set up the case that he was entitled to have the goods re-weighed on his scales and not on the weighbridge of the defendant Company. The defendant Company through their servants refused to assent to the demands of the plaintiff. Thereupon, the plaintiff refused to take delivery and the goods were left in the custody of the Railway Company. After sometime, having served proper notices, the Railway

Company sold the goods by auction and having deducted their charges paid the balance into Court to the credit of the plaintiff. The first point that the plaintiff must establish in a case like this is that the Railway Company committed a breach of their contract by refusing to have the goods re-weighed and to give a certificate of shortage in the manner demanded by the plaintiff. No authority has been given to us by the plaintiff showing that the Railway Company were under a liability to re-weigh the goods or to give a certificate of shortage. On the other hand, two cases have been cited to us that are exactly in point, namely, the case of *Janki Das* v. *Bengal Nagpur Railway Co.* (1) and the case of *Ramjash Agarwala* v. *Indian General Navigation and Railway Co. Ltd.* (2), a very recent decision of Chatterjee and Newbould, JJ. Both these cases decide that the Railway Company is not under a liability to re-weigh the goods or to give a certificate of shortage. If that is so, then, when the plaintiff refused to take delivery except these conditions were complied with, he was in default and both under the terms of the contract and under the terms of the general law, the plaintiff being in default, the goods were at his risk and any deterioration or damage suffered to the goods after that date fell on the plaintiff.

That being so, it is quite clear that the plaintiff cannot sue to recover damages for that loss. The case, to my mind, is clearly covered by authority. It has been suggested by the Railway Company in their cross-appeal that the evidence does not support a partial award of damages that has been made by the learned Judge and that the only amount that the plaintiff can recover on the facts established in this case is the actual amount for which the goods were sold less the Company's charges for warehousing, and costs of sale and other similar matters. The Railway Company, however, at our suggestion, have not pressed their cross-appeal and we, therefore, need not consider whether the award made by the learned District Judge can or ought to be reduced. The plaintiff, in my opinion having regard to the decisions of this Court, has not been able to establish that the railway administration is liable for any larger amount than that awarded by the lower appellate Court. The present appeal, therefore, fails and must be dismissed. The cross-appeal is also dismissed. We make no order as to costs either in the appeal or in the cross-appeal.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1912) 13 I C 509.
2. (1917) 41 I C 387.

A. I. R. 1918 Calcutta 223

FLETCHER AND NEWBOULD, JJ.

Harinath Banerjee—Plaintiff—Appellant.

v.

Pramathanath Dey Chowdhury and *others*—Defendants—Respondents.

Appeal No. 1230 of 1916, Decided on 23rd July 1917, from appellate decree of Addl. District Judge, Jessore, D/- 30th March 1916.

(a) Registration Act (16 of 1908), S. 49—Agreement to grant lease unregistered—Effect—It is not wholly inadmissible—Personal liabilities can be fixed on its basis.

Although an unregistered agreement for the permanent demise of a land cannot be used in evidence for the purpose of affecting the land it is not inadmissible in evidence for any purpose whatsoever. It can be looked at for adjusting the personal liabilities of the parties in a suit for its specific performance. [P 223C 1]

(b) Decree—Specific performance—Agreement to lease—Decree does not affect land—Decree is personal.

A decree for specific performance of an agreement for a lease does not affect the land. It is an ordinary decree of the Court of equity which according to the ordinary rule acts in personam and the execution of the decree is not by affecting the land but by suitable process against the defendant if he is in contempt with reference to the decree of the Court. [P 223C 1]

Mohendranath Roy and *Mohini Mohan Chatterjee*—for Appellant.

Provash Chander Mitter and *Tarkeshwar Pal Chowdhury*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff from a decision of the learned District Judge of Jessore, dated 30th March 1916, reversing the decision of the Subordinate Judge of the same place. The suit was brought to specifically enforce a contract contained in a document called a bainapatra. A bainapatra is, as I understand from the slight knowledge that I have of the vernacular, a document evidencing a deposit and the deposit that was evidenced in this case was a sum of Rs. 785 that was paid for the grant of a permanent putni lease. The suit has been decided in the Court below on one and only one point and that is this: that the bainapattra is a lease or

an agreement for a lease within the meaning of the Indian Registration Act and it not having been registered having regard to S. 49 of the same Act, the document is inadmissible in evidence for any purpose whatsoever. The view of the learned Judge that the document cannot be admitted in evidence for any purpose whatsoever seems to me far beyond the decisions of this Court. It cannot be used for the purpose of affecting the land that is quite clear, and the document, if it is the actual demise clearly requires registration before it can affect the property itself. But there are cases in this Court that decided that in a suit for specific performance between the parties themselves to the contract the contract can be looked at for the purpose of adjusting their personal liabilities. A decree for specific performance does not affect the land. It is an ordinary decree of the Court of equity and the ordinary rule is that equity acts in personam and the execution of the decree is not by affecting the land but by suitable process against the defendant if he is in contempt with reference to the decree of the Court.

I do not think we ought to express a view in this case whether this bainapatra is or is not a lease or agreement for a lease. It seems to me to turn considerably on what was done under the terms of the document. I must confess that in this case the plaint is drawn exceedingly unfavourably to the plaintiff and the written statement is equally unfavourable to the defendants. I think it must have been done per incuriam, because my experience of the mofussil pleadings is that they are always drawn most favourably to the parties for whom they are intended and with slight regard to the actual facts of the case. In this case we ought to have the facts found in the first instance. The case turns largely on the facts as to whether this document is a lease, whether possession was given under it and whether a case has arisen for specific performance, namely, whether the plaintiff was ready to perform his part of the contract and the defendants were unwilling to perform theirs. Not a single one of these points has been considered in this case. All that the learned Judge says is that this document is inadmissible for any purpose whatsoever and the suit must therefore fail. But on the view he took he ordered the defendants to return to the plaintiff the deposit money of which the only evidence was as far as I can see this document that was held to be inadmissible in evidence. The case cannot be dealt with in that way. I think the case must be sent back to the learned Judge of the lower appellate Court to be properly and thoroughly determined on the facts and the issues arising in the case. It is not convenient in this class of cases that the Court should determine a case of this nature purely on the question of the admissibility of the evidence. My experience is that where the learned Judge does that in a large percentage of cases the case has got to be sent back to have the facts found. The suit cannot be disposed of in this way where questions of fact are involved without considering the evidence. I think that the view of the learned District Judge that this case could be decided on a mere consideration of the document itself without going into any question of evidence is wrong. We ought therefore to set aside the judgment appealed against and allow the appeal and the cross-objection and send the case back to the lower appellate Court to be thoroughly heard on the merits and to have proper findings of fact arrived at. Costs of the appeal and also of the cross objection will abide the result of the re-hearing by the learned Judge of the lower appellate Court.

Newbould, J.—I agree.

V.B./R.K. *Case remanded.*

✻ A. I. R. 1918 Calcutta 223

FLETCHER AND NEWBOULD, JJ.

Sarat Chandra Bose—Defendant—Appellant.

v.

Khararea Mesejula Zamindari Syndicate, Ltd. and *others*—Plaintiff and Proforma Defendants—Respondents.

Appeal No. 1577 of 1915, Decided on 19th July 1917, from appellate decree of Sub-Judge, Khulna, D/- 25th February 1915.

✻ Civil P. C. (1908), S. 11, Expl. 5 and O. 41, R. 33—Suit against defendants 3 and 4 for back rents alleging that they were due from them to defendant 1 who had assigned them to plaintiff—Alternatively plaintiff claiming them from defendant 1—Suit decreed against defendants 3 and 4 but on appeal suit dismissed on finding that rents

were paid to defendant 1—No cross objection against liability of defendant 1 and so liability left undecided—Subsequent suit against defendant 1 for same sum is not barred.

Where a suit claiming reliefs alternatively against several defendants is decreed against some of them, and an appeal is preferred by those defendants, it does not become incumbent upon the plaintiff-respondent to file a cross-objection against the other defendants in order to enable the Court of Appeal, if it allows the appeal, to settle the rights of the respondents inter se, nor does the mere omission to invite the Court to settle those rights amongst the respondents inter se give rise to a case of res judicata under S. 11. [P 225 C 1]

The plaintiffs sued defendants 3 and 4 for some back rents on the allegation that they were due and owing from them to defendant 1, who had for valuable consideration assigned them to the plaintiffs, and in the suit they also made defendant 1 a party claiming alternatively that in the event of the rents not being found due from defendants 3 and 4, defendant 1 might be ordered to pay the same. The suit was decreed against defendants 3 and 4, but on their appeal, it was dismissed as against them on the ground that they had paid the sum claimed to defendant 1, and there being no cross-appeal or cross-objection the liability of defendant 1 was left undecided. In a subsequent suit by the plaintiffs against defendant 1 for the same sum:

Held: (1) that the suit against defendant 1 was not barred on the principle of constructive res judicata under Expln. 5, S. 11, for although the appellate Court had power under O. 41, R 33, to decide the liability of defendant 1 in the former suit, it had left it undecided; (2) that limitation for the suit did not begin to run until after the decision of the appeal in the former suit as the case was one of fraud which was not discovered before the final decision of the Court of Appeal; (3) that the facts held to have been proved by the appellate Court in the former suit and its judgment could not be conclusive against defendant 1, who was therefore entitled to have the whole of the facts alleged in the present suit proved and proved properly against him with reference to the findings made by the Court of Appeal in the former suit. [P 224 C 2; P 225 C 1]

Dwarkanath Mitter and *Satyendranath Mitter*—for Appellant.

Dwarkanath Chukraburty and *Nagendranath Ghose*—for Respondents.

Fletcher, J.—This is an appeal by defendant 2 against a judgment of the learned Subordinate Judge of Khulna, dated 25th February 1915, affirming the decision of the Additional Munsif of the same place. The suit was brought by the plaintiff company to recover a sum of Rs. 400 and interest against defendant 1, who is now represented by defendant 2. The plaintiff company is entitled to a putni in 4-annas share in certain property. Before the grant of the putni, defendant 1 had obtained an ijara of certain of the property and as ijardar she let out a part of the property, namely, a jalkar, to two people named Chundi Charan Roy and Biswanath Roy, defendants 3 and 4 in the present case, who held this jalkar at a rent of Rs. 2,625 per annum. Defendant 1 under an agreement with the plaintiff company, surrendered the ijara and assigned to the company certain rents that were said to have been in arrear including, amongst others, a sum of Rs. 400 which is said to have been the rent in arrear and unpaid with reference to the jalkar and due from Chundi Charan Roy and Biswanath Roy. The plaintiffs then instituted a suit (that was in 1903) against Chundi Charan Roy and Biswanath Roy asking for rent and, in that suit, they also made defendant 1 a party claiming alternatively that, in the event of rent not being due from Chundi Charan Roy and Biswanath Roy, defendant 1 might be ordered to pay the same to them which had been assigned over by her on the surrender of the ijara. That case came on for trial. The Court of first instance found that Chundi Charan Roy and Biswanath Roy had not paid the same and the receipt they produced was not a genuine one.

Thereupon Chundi Charan Roy and Biswanath Roy preferred an appeal to this Court. There was no cross-appeal or cross-objection filed on behalf of the respondent. On the appeal of Chundi Charan and Biswanath, this Court, after stating that the only point for its consideration was whether the appellants had paid this sum, proceeded to allow the appeal. Nothing further was said. Although the proceedings were under the present Code, the learned Judges did not exercise the power that was given to them by O. 41, R. 33. That suit having ended that way, the plaintiffs instituted the present suit to recover from defendant 1—and now also from defendant 2 who represents her—the sum of Rs. 400 with interest and damages as already stated. The first point is whether the present suit is barred by res judicata. It seems to me quite clear that it is not. This Court under O. 41, R. 33, Civil P. C., had power either to decide the liability of defendant 1 in the former suit or to leave it undecided. The view that Dr. Mitter puts forward that whenever defendant appeals, the duty of the

plaintiff-respondent is to file a cross-objection as against the other defendant is one, so far as I know, not supported by any authority. I think the plaintiffs were clearly entitled to assume that the decree of the Court of first instance, specially as it was founded on a consideration of the facts, was a good decree and they were not bound to assume that that decree might or would be set aside on appeal and that they ought to prefer cross-objections in order to enable the Court, if it allowed the appellants' appeal, to settle the rights of the respondents inter se, nor do I agree that the mere omission to invite the Court to settle it gives rise to a case under S. 11, Civil P. C.

As a matter of fact, the Court could not have settled it unless the plaintiffs had filed a cross objection. As I have said, no case has been shown why the plaintiff, who is a respondent to an appeal in a case like this should not be content with the judgment of the Court of first instance. The next point is that the suit is barred by limitation because the alleged payment was made by Chundi Charan and Biswanath to defendant 1 as long ago as August 1906. The case, apart from any other question, is clearly a case of fraud, if the facts are established; because the plaintiffs' case is that, for valuable consideration, defendant 1, when she surrendered the ijara, assigned to them the back rents that were then due and owing and, they being so due and owing, the plaintiff company gave her the value of them. Again, the point was not decided until the final decision of this Court in the former suit, when it was held that defendant 1 had in her pocket Rs. 400 which represented these rents that she assigned to the plaintiffs. It is quite clear that a case like this, if established by proper evidence, is a case of fraud and time would not begin to run until after the decision of the appeal. The third point raised by Dr. Mitter is a good point and it has not been contested. The appeal in this Court was adjudicated on solely between the plaintiffs and Chundi Charan and Biswanath. The rights and liabilities of present defendant 1 were not adjudicated on in that case. The evidence that has been given in support of the plaintiffs' case is this judgment of this Court in appeal and the facts that were held to be proved as between Chundi Charan and Biswanath and the plaintiffs in that case have been held to be proved as against defendant 1 in this case, on the ground that she was a party to that appeal, although admittedly there was no adjudication on the rights of the present defendant 1 in that appeal at all. Of course, that cannot stand.

Those facts are not conclusive against defendants 1 and 2 in this case. There has been no adjudication on these facts by the Court of appeal and present defendant 2, as representing defendant 1, is entitled to have the whole of the facts alleged in this case proved and proved properly against him with reference to the findings made by this Court in appeal. The Court only adjudicated on the rights of Chundi Charan and Biswanath. That being so, it is the common ground of both the learned gentlemen engaged in this appeal that the case must go back to the primary Court to have a new trial. Both sides will be at liberty to adduce fresh evidence. Costs will abide the result.

Newbould, J.—I agree.

V.B./R.K. *Case sent back.*

1918 C/29 & 30

A. I. R. 1918 Calcutta 225

FLETCHER AND NEWBOULD, JJ.

Anila Debi and *another*—Plaintiffs—Appellants.

v.

Moni Mohan Mukerjee and *others*—Defendants—Respondents.

Appeal No. 820 of 1915, Decided on 8th June 1917, from appellate decree of Dist. Judge, 24-Parganas, D/- 6th April 1915.

(a) Registration Act (1908), Ss. 72 and 73—Refusal of Sub-Registrar to register document on executant's failure to appear—No appeal lies—Procedure is to apply under S. 73.

No appeal lies to the Registrar against the refusal of a Sub-Registrar to register a document upon the wilful failure of the executant of the document to appear before the Sub Registrar, as such failure amounts to a denial of execution within the meaning of S 72. In such a case the only procedure open to the party presenting the deed is to apply to the Registrar under S. 73 to direct registration. [P 226 C 1]

(b) Registration Act (1908), Ss. 73 and 76—Application under S. 73 dismissed for default can be restored.

When an application under S 73 has been dismissed for default, the Registrar has full power to restore the matter and to re-hear the case, at any rate before he has finally dealt with the matter under S. 76. [P 226 C 2]

Dwarka Nath Mitter, *Dwijendra Nath Mukerjee*, *Narendra Nath Bose* and *Sripati Ch. Chowdhury*—for Appellants.

Dwarka Nath Chakravarty—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs against a decision of the learned District Judge of 24-Parganas, dated 6th April 1915, reversing a decision of the Subordinate Judge of Alipore. The suit was brought by a Hindu widow to set aside a permanent lease which was alleged to have been granted by her. The document was presented to the Sub-Registrar for registration on 17th February 1910. The executant having been duly summoned failed to appear. Thereupon the Sub-Registrar held that there was a denial of execution by the executant and declined to register the deed. The authorities in this Court establish clearly that a wilful failure to appear before a Sub-Registrar amounts to a denial of execution within the meaning of S. 72, Registration Act. Therefore, no appeal lay upon the decision of the Sub-Registrar to the Registrar. The only procedure open to the party presenting the deed was to apply to the Registrar under S. 73, Registration Act to direct registration of the document. That appears to be the course which should be adopted in such a case. It is quite true that there is a document, on the record, called "Hazira of witnesses" in which the heading is Appeal No. 25. We have gone through the record and we have found that there are other documents which are headed as "applications." It seems, therefore, that perhaps a mukhtiar or a pleader headed this list of witnesses as an appeal. It cannot be held to be an appeal inviting a Court to exercise a jurisdiction that it has not got, instead of one that it has got. It is quite a novel way of stating that a person exercising judicial or quasi-judicial jurisdiction should assume that the document presented to him was presented to be acted upon under powers that he had not got rather than under powers that he had. However that may be, we must take it as an application presented to the Registrar which he could hear and determine, and the application which was made after the denial of execution was an application under S. 73. That application under S. 73 was dismissed for default on 20th September 1910.

There was an application for restoring the case. It was not an application for review. It was presented to the Registrar who directed on the application the case to be restored. It has been objected to by Dr. Mitra in this case that the Registrar had no power to restore the case. This is the only point in the case which caused us any trouble. Dr. Mitra wanted to show, after calling for certain records from the lower Court, that the Registrar had conclusively exercised his jurisdiction in dealing with the case under S. 76 by recording his reasons in Book No. 2. It is difficult to urge that the Registrar was not competent to restore the case. Book No. 2 is not given in evidence and in its absence we cannot assume that the Registrar, when he restored the case, had ceased to have any power to deal with the case after taking evidence. The presumption is the other way. The presumption is that the Registrar had acted in a regular and proper manner. Apart from that, there is no evidence that the Registrar when he restored the case had finally dealt with the matter under S. 76, and, therefore could not proceed to hear the case on the merits. We think that on the record as it at present stands we must take it that the Registrar had full power to restore the matter and re-hear the case. The fact that the Registrar did proceed to restore the case and re-hear it gives rise to a presumption that the Registrar had acted in a regular and proper manner.

The other points raised turn on the merits. The first point is that the learned District Judge had omitted to find that the consideration money of Rs. 100 for the grant of the land was paid. It is stated that that point was not dealt with by the learned District Judge in his judgment. That is so in so far as it is not stated directly, but the evidence shows that Rs. 100 was paid and we cannot read the judgment of the learned District Judge without coming to the conclusion from the facts placed before him that in his view this Rs. 100 was paid. In that portion of his judgment where he compares the terms of the two leases, he states that the fact of the plaintiff executing a patta subsequently in favour of another person for a higher salami and for higher rent may possibly supply the motive for this case. From

this we hold that the learned Judge must have come to the conclusion that this Rs. 100 had been paid. Otherwise his statement would be meaningless. I agree with Dr. Mitra that it would have been better if the learned Judge had added a statement in his judgment that this Rs. 100 had been paid. It is quite possible that the learned Judge having to write a lengthy judgment had, by an oversight, omitted to add this statement. But no one can suggest that he meant to find that Rs. 100 was not paid.

The next point raised by Dr. Mitra is that as the lady was a pardanashin lady, it was necessary to prove that she fully understood the transaction. The learned Judge remarked that it was very difficult for defendant 1 to prove that plaintiff 1 did understand what she was doing and that before entering into the transaction she had proper independent advice. I think, having regard to the express finding of the learned Judge, made about nine lines higher up the above sentence, that the plaintiff had fully understood the transaction, that this statement was only an unfortunate way of expressing that she fully understood what she was doing. I suppose what the learned Judge meant was that the defendant was pressed with an up-hill task and notwithstanding that he managed to reach the goal, namely, to convince the learned Judge that plaintiff 1 had fully understood the transaction.

Then as to the fiduciary relationship. There is no relationship established or appearing on the facts as to necessarily give rise to a fiduciary relationship. It may be that defendant 1 was a close friend of the lady's husband, but that does not mean that he was in a fiduciary relationship to the lady. A man might have collected rent on behalf of the lady's husband and not be in a fiduciary relationship to the lady. A case like this is not similar to that of guardian and ward or to that of guru and chela, in which the Court holds for various reasons that the relationship when established is fiduciary. No such relationship is established in this case. The appeal fails and is dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 227

WOODROFFE AND WALMSLEY, JJ.

Pran Krishna Das—Decree-holder—Appellant.

v.

Protap Chandra Dalai and *others*—Judgment-debtors—Respondents.

Appeal No. 106 of 1915, Decided on 24th January 1917, from order of Sub-Judge, 2nd Court, Midnapur, D/- 7th December 1914.

(a) Civil P. C. (1908), O. 41, R. 22—O. 41, R. 22 does not permit respondent to take entirely new ground.

Order 41, R. 22, Civil P. C., only permits a respondent to support the decree of the lower Court on any of the grounds decided against him or to take cross-objections; it does not entitle him to take an entirely new ground which was not decided against him and which was not in issue in the lower Court. [P 228 C 1]

(b) Civil P. C. (1908), O. 21, R. 22—Application for execution—Order to register application and issue notice passed—Notice duly served—Affidavit of service of notice filed in Court—Decree-holder's act of filing affidavit held equivalent to take step-in-aid—Limitation Act (1908), Art. 182.

On an application for execution an order was made by the Court to register the application and to issue notice under O. 21, R. 22, Civil P. C., fixing a date for hearing. The notice was duly served and an affidavit of the service of notice was sworn to and filed in Court. On the date fixed for hearing the application was dismissed for default:

Held: that the decree-holder's act of filing the affidavit of service of the notice was equivalent to applying to the Court to take a step-in-aid of execution, namely, whether on contest or ex parte, to order that the decree should be executed. [P 228 C 2]

Bipin Behari Ghose and *Joytish Chandra Hazra*—for Appellant.

Sarada Charan Maiti—for Respondents.

Woodroffe, J.—A preliminary objection which has been taken is to the effect that one of the respondents named Sarada Prosad Dalai is dead and no steps have been taken to have his legal representative, his minor son, brought on the record. This however, under the circumstances, is no bar to the appeal; and the only effect of it is this, that the appeal will operate as against the respondents other than the respondents Sarada Prosad Dalai and his representatives. Then it is objected that the present application for execution should, apart from the question of limitation, be dismissed on the ground that it is not in accordance with the forms required by the Civil Procedure Code, in that it does not set out the mode of assistance which is sought from the

Court; and it is said that the Court, having by an oversight admitted and registered the application which is not in form, cannot allow it to be amended into a valid application within the meaning of the provisions of the Code. This objection, I may point out, is not one which has been raised in any portion of the proceedings up to the present time. The objection which was raised in the lower appellate Court was that the application was time barred. It has been suggested that it is nevertheless open to the respondent to take this ground. But O. 41, R. 22, Civil P. C., does not assist the respondent. That only permits the respondent to support the decree on any of the grounds decided against him or to take cross objections. There is no question of cross-objection in this case, and the particular ground which is now taken was not decided against the respondent, nor was it in issue in the lower Court nor made the subject of adjudication at all. On these grounds this point fails.

The main question is that of limitation on which the lower Court has dismissed the application for execution. It turns upon the question as to whether the facts to which I am about to refer amount to a step-in-aid of execution of the decree. If the facts as recorded or said to have taken place on or after 29th May 1911 amount to a step-in-aid of execution, then it is admitted that the application is not barred. On behalf of the respondent it is contended that it does not constitute such a step. The facts are that on 10th May 1911 an order was made by the Court to register and to issue notice under O. 21, R. 22, Civil P. C., fixing 7th June 1911 for hearing. It is important to observe that this notice was directed by the Court. On 25th May the notice was served. An affidavit of the service of notice was sworn to by the decree-holder's nephew on 27th May 1911 and was filed on 29th May 1911. All this shows the intention of the decree-holder to proceed with the execution of the decree. The service was proved on 7th June 1911. That having been done the next order which the Court should have passed was an order that the service of notice having been proved, let the decree be executed. No such order appears on the record, although it is contended that we must assume that the Court had it in its mind, because otherwise it would not have dismissed the case for default. The judgment is appealed against on two grounds. It is stated that no order having been made by the Court that the decree should be executed, the proceedings were not brought to a legal termination and the present application should be regarded as one for revival of the previous application which was not properly dismissed.

It is next contended that the present application for execution, even if it were an independent application, was not barred by limitation, because the proof of service of notice would amount to a step-in aid of the execution of the decree. This has been contested, and it may be admitted that the point is one which is open to argument. But I am not myself disposed in the present case to take a narrow view of the facts, and from these facts we have it that notice was served in pursuance of a previous order of the Court: that the service was proved, and that may be taken to be an invitation to the Court to proceed to the next order which should have been made in these proceedings, namely, that the decree be executed. I am not prepared on these facts to say, therefore that the application is time-barred. I therefore set aside the order of the Court below and decree this appeal with costs, the hearing fee being assessed at five gold mohurs.

Walmsley, J.—I agree. In my opinion the decree-holder's act of filing the affidavit on 29th May 1911 is equivalent to applying to the Court to take a step-in-aid of execution, namely, whether on contest or ex parte, to order that the decree should be executed.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 228

FLETCHER AND SMITHER, JJ.

Pran Krishna Das and *others*—Plaintiffs—Appellants.

v.

Satibala Sen and *others*—Defendants—Respondents.

Appeal No. 1701 of 1916, Decided on 7th May 1918, from appellate decree of Additional Sub-Judge, Chittagong, D/- 25th April 1916.

Executor —He cannot grant permanent lease.

A power to lease by way of ijara conferred by a will upon the executor excludes by the very nature of it the power to grant a permanent lease. [P 229 C 2]

Dwarkanath Chackerbutty and *Bhagirathi Chandra Das*—for Appellants.

Nitish Chandra Lahiri—for Respondents.

Fletcher, J,—This is an appeal preferred by the plaintiffs against the decision of the learned Subordinate Judge of Chittagong, dated the 25th April 1916, modifying the decision of the Munsif of Patiya. The plaintiffs brought the suit to recover possession of a tank with its banks. The first Court decreed the suit in full. The lower appellate Court decreed it with regard to a twelve-anna share of the tank with its banks and dismissed it with regard to the remaining four-annas share. The plaintiffs have preferred the present appeal with regard to this four-annas share. There were two brothers, Naba and Pranhari. Pranhari died having made a will and appointing his brother Naba the executor. Having recited various terms in the will, he authorized the executor in these terms:

"For all these, it may be necessary to mortgage, sell or let in ijara any portion of the properties and my brother will do it."

The question is whether that was a power to mortgage, sell or let in ijara any portion of the properties for any of the purposes mentioned in the will, or whether it was a power to mortgage, sell or let in ijara to enable the executor to dig a pond for the testator's mother and to suitably dedicate that pond. I do not think there can be any doubt that the testator in conferring the power to mortgage, sell or let in ijara as mentioned in the will was not considering only that purpose of digging a pond for the benefit of his mother and dedicating that pond. I think the power to mortgage, sell or lease contained in the will was with reference to all the purposes mentioned in the will. What happened was this: Naba leased out his own share and the share of his brother to whose will he was the executor in perpetuity. The question now turns on S. 90, Probate and Administration Act. Under S. 90, an executor has power to dispose, if he thinks fit, of all or any of the properties vested in him under the terms of S. 4. Now the power of disposal of immovable property so vested in the executor is subject to any restriction which may be imposed by the will appointing him, unless the Court granting the Probate by an order in writing authorises the disposal notwithstanding the restriction. The question is whether this clause binding the power of the executor to lease by way of ijara is a restriction so as to prevent Naba from granting a permanent lease. I think the power to lease by ijara applies to the whole of the property, and that excludes by the very nature of it the right to grant a permanent lease. I think the conclusion arrived at by the learned Judge of the lower appellate Court, although I do not agree with the reasons given by him, is correct. The present appeal, therefore, fails and must be dismissed with costs.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 229

MOOKERJEE AND BEACHCROFT, JJ.

Sheodarsan Lal Bajpai and *others*—Petitioners.

v.

Joges Chandra Roy—Opposite Party.

Appln. in Letters Patent Appeal No. 100 of 1916, Decided on 30th March 1917, against decree No. 314 of 1914.

Civil P. C. (1908), S. 144—Auction-purchaser of property of which plaintiff obtained possession in execution of decree is representative of plaintiff for purposes of restitution.

The purchaser at an execution sale of the right, title and interest of the plaintiffs in a property of which they were placed in possession in execution of a decree against their judgment-debtor is bound to restore possession by way of restitution to the judgment-debtor on the reversal of that decree by the appellate Court. [P 230 C 2]

For the purpose of transference of possession from the plaintiffs to the judgment-debtor, such execution purchaser during the pendency of the judgment-debtor's appeal against the decree is unquestionably a representative of the plaintiff. [P 230 C 1]

Biraj Mohan Majumdar and *Probodh Kumar Das*—for Petitioners.

Dhirendra Lal Kastgir—for Opposite Party.

Judgment.—This is an application for restitution of property which formed the subject matter of a litigation between Mahammad Ramjan and others as plaintiffs on the one hand and Joges Chandra Roy as defendant on the other. The plaintiffs were out of possession at the date of the institution of the suit. They obtained a decree in the Court of first instance on 1st March 1912. That decree was executed and they were placed in possession. Meanwhile an appeal had been preferred by the unsuccessful da-

fendant. The appeal was decreed by the District Judge on 27th September 1913 and the decree for possession made by the trial Court in favour of the plaintiffs was thereupon discharged. The decree of the District Judge was confirmed by this Court on 6th April 1916, and an appeal therefrom under Cl. 15, Letters Patent, proved infructuous. In the in terval, the present petitioner, Sheo Dursanlal Bajpai, had purchased the disputed property in execution of a mortgage de cree obtained against the plaintiff. He was placed in possession of the purchased property in the Court, and as his judgment-debtors were in possession by virtue of the execution of the decree in this suit, he got actual possession of the property. On reversal of the decree of the trial Cout by the District Judge, Jogesh Chandra Roy applied to be restored to possession by way of restitution. This application was granted. The petitioner now contends that this order was erroneous and that as he is in no way bound by the decree of the District Judge, his possession should not have been disturbed. In our opinion there is no foundation for this contention.

It is needless for us to decide whether the petitioner is or is not bound by the decree of the District Judge in the events which have happened and which need not be set out in detail for the present purpose; that will probably form the subject of investigation in a separate suit between the parties. But one position is perfectly obvious. For the purpose of transference of possession from the plaintiffs to the present petitioner, the latter is unquestionably a representative of the plaintiffs. Indeed, if the plaintiffs had not recovered possession from the defendant Jogesh Chandra Roy by execution of the decree of the Court of first instance, which was ultimately reversed on appeal as erroneous, the petitioner would never have been in possession. Consequently, he cannot possibly maintain the position that notwithstanding the reversal of the decree of the trial Court by the District Judge, he is entitled to continue in possession as against the successful litigant. If his contentions were to prevail, the result would be that the doctrine of restitution might cease to be available to every successful litigant, as, during the pendency of the litigation, possession might be transferred by his opponent to a stranger. The view we take is supported by the decision in *Garurdhuj Prasad Singh* v. *Baiju Mal* (1). In that case the claim for possession was dismissed in the Court of the first instance, but was decreed on appeal to the High Court. During the predency of an appeal to His Majesty in Council, the decree of the High Court was executed, and the plaintiff was placed in possession. The property was then sold in execution of a money decree against the plaintiff and passed into the hands of a stranger. The successful appellant before the Judicial Committee then applied to be restored to possession by way of restitution and the question arose whether the purchaser of the right, title and interest of the plaintiff during the pendency of the litigation was not liable to the called upon to give up possession precisely in the same manner as to the plaintiff himself. The question was answered in the affirmative and the result was that the purchaser was deprived of possession by way of restitution in favour of the defendant, who obtained a reversal of the decree of the High Court before the Judicial Committe. This view is in accord with th decision in *Gulzari Lal* v. *Madho Ram* (2) and is completely destructive of the position taken up by the petitioner.

The result is that this application is refused with costs, one gold mohur.

V.B./R.K *Application refused.*

1. (1906) 28 All 337.
2. (1904) 26 All 447.

A I. R. 1918 Calcutta 230

CHATTERJEA AND RICHARDSON, JJ.

Nemai Charan De—Plaintiff—Appellant.

v.

Secy. of State—Defendant — Respondent.

Appeal No. 1990 of 1915, Decided on 12th June 1917, from appellate decree of Addl. Dist. Judge, Chittagong, D/- 10th May 1915.

(a) Bengal Public Demands Recovery Act (1895), Ss. 10 and 31—Notice under S. 10.

The service of a notice under S. 10 must be effected in strict conformity with S. 31 of the Act. [P 231 C 1]

(b) Bengal Public Demands Recovery Act (1895), Ss. 10 and 31—Suit for declaration that sale is void—Onus is on defendant to show that notice was properly served.

In a suit for a declaration that a sale held under the Public Demands Recovery Act was null and void and did not affect the plaintiff's

title to the property sold, the onus is on the defendant to show that there was proper servics of notice under S. 10 of the Act as required by law. [P 231 C 2]

Mahendranath Roy and *Khiteesh Chandra Sen*—for Appellant.

Ramcharan Mitra—for Respondent.

Judgment. — The plaintiff-appellant brought the suit, out of which this appeal arises, for a declaration that the sale held on 19th July 1912 under the Public Demands Recovery Act was null and void and did not affect the plaintiff's title to the lands in suit. The plaintiff also prayed for confirmation of possession and for other reliefs. This suit has been valued at Rs. 998 and the property was sold for 3 pies. The sale has been attacked on the grouud that no notice under S. 10, Bengal Act 1 of 1895, was served. The learned District Judge says:

"It is true that the peon's report of service of the notice under S. 10, Act 1 of 1895, does not show that there was no adult male member of the family present on whom he could have served the notice as he was bound to do. The person is unfortunately dead, so that he could not be questioned on this point. Had it been alleged that an adult member of the family was there at the alleged date of service, the witnesses might have been questioned on the point or witnesses might have been examined on the subject, but when no such question was raised, I think the defendants are entitled to the presumption that the peon did what he was legally bound to do. Undoubtedly he went to the village and there seems to be no reason why he should not have made a regular service, since it is clear that the appellant knew of the sale."

We think that the learned Judge has taken an erroneous view as to the onus of proof in such cases. He seems to have been of opinion that it was for the plaintiff to show that there were male members of the family on whom the notice conld be served. But as is pointed out in *Rakhal Chandra Rai Chowdhuri* v. *Secy. of State* (1):

"it is sufficient for him to deny any such service so as to put upon the defendant the burden of proving that proper service has been made."

The manner in which the notice under S. 10 is to be served is laid down in S. 31 of the Act; and it has been held in several cases that the service of notice under S. 10 must be effected in strict conformity with that section. If no attempt is made to effect the service as contemplated by that section, it cannot be said that there was strict conformity with the provisions of the section. That section provides in the first place that there must be an attempt at personal service. It then provides that:

"when such judgment-debtor cannot be found, the service may be made on any adult male member of his family residing with him."

The section then goes on to say:

"If no such adult male member can be found, the notice may be served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the Certificate Officer issuing the same and also in some conspicuous part of the land, if any, affected by the service of the notice."

As pointed out in *Joyeswar Sahu* v. *Debi Prasad* (2):

"the service therefore in this manner, that is, by fixing the notice on the outer door of the judgment-debtor's house is not sufficient compliance with the law unless it is shown that an attempt was made to effect service on the adult male members of the family of the judgment-debtor."

The onus therefore was clearly upon the defendant to show that there was proper service of the notice, as required by law. The peon who made the service is, no doubt, dead; but his return is in evidence and that return does not show that there was no adult male member of the family on whom he could serve the notice as he was bound to do. The learned District Judge was of opinion that there was a presumption depending upon a rule of evidence, namely, that it was for the plaintiff to show that there were male members of the family upon whom service could be made. As we have said, the onus does not lie upon the plaintiff. The presumption relied upon by the learned Judge therefore does not arise. The defendant must prove proper service of the notice and, as part of that, he has to show that no adult male member of the family could be found upon whom notice could be served. We are informed by the learned Government Pleader that there is some evidence, or admission on the point, to be considered. Under the circumstances, we think that there ought to be a decision on the point.

We accordingly set aside the decree of the lower appellate Court and send the case back to that Court in order that the question may be considered and the case decided in accordance with the finding arrived at on the point. Costs will abide the result.

V.B /R.K. *Case remanded.*

1. (1886) 12 Cal 603

2. (1907) 5 C L J 555.

A. I. R 1918 Calcutta 232

FLETCHER AND SHAMSUL HUDA, JJ.

Sripati Lal Dutt and *others*—Plaintiffs—Appellants.

v.

Sarat Chandra Mondal and *others*—Defendants—Respondents.

Appeal No. 1347 of 1916, Decided on 23rd April 1918, from appellate decree of Dist. Judge, Bankurah, D/- 21st March 1916.

Limitation Act (1908), Art. 132—Suit to enforce mortgage on loan of rice is money suit and is governed by Art. 132.

On the loan of a certain quantity of rice, the borrower executed a mortgage bond providing that if the rice was not repaid according to the kist in the bond, the lender may realise money at the rate of Rs. 6 per map of the rice by selling the mortgaged properties;

Held : that the suit to enforce the mortgage was one to recover money, and not rice charged on immovable properties and was therefore governed by Art. 132. [P 232 C 2]

Manmotho Nath Mukherjee and *Satindra Nath Mukerjee*—for Appellants.

Brojolal Chakraburty, *Bepin Behari Ghose*, II and *Bijoy Kumar Bhattacharjee*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs against the decision of the learned District Judge of Bankurah dated 21st March 1916, reversing the decision of the Subordinate Judge of the same place. The plaintiffs brought the suit to enforce a mortgage. The learned Judge in the lower appellate Court held on reading the mortgage-deed that the suit was barred by limitation. The question is one that has arisen in other cases in this Court. Every case must of course turn on the construction that the Court places on the mortgage-deed in that particular case. In the present case, the plaintiffs lent a certain amount of rice to the mortgagees and there was the usual covenant in the case of repayment and interest and the bond also provided that, if default was made in the kists, the mortgagees would be competent to realise the money which would be due at the rate of Rs. 6 per map and that the realization might be made by sale of the mortgaged property mentioned in the schedule to the bond and of all other moveable and immovable properties belonging to the mortgagors. The bond further recites that "as security for the payment of the said paddy" that means payment according to the value mentioned, namely, Rs. 6 per map:

"I do again mortgage by this document the properties which I mortgaged to you in the mortgage bond of the aforesaid year and date by keeping intact the title of said mortgage."

The point made is that there is no question of money in this case, that this is not a suit to recover money charged on the mortgaged properties but it is a suit to recover rice charged on the mortgaged properties. I very much doubt, if I may say so without disrespect, whether it is a suit to recover rice. The primary object of the suit is to recover money and I suppose that what the plaintiffs want in this case is money and not rice and what the Court will give them will be money and not rice, if they succeed in the suit. Whatever may be decided in the case which is generally referred to, namely, the decision of Sir Lawrence Jenkins, C. J., in the case reported as *Rash Bihari Das* v. *Kunjabihari Patra* (1), as I remarked the other day. Mookerjee, J., in the case reported as *Nilmony Singha* v. *Haradhan Dass* (2) took a different view on the ground that the case before him was distinguishable from the case before Jenkins, C. J., in that there was a certain amount of cash money in the mortgage which was the subject-matter of the case before him. The present case is also distinguishable from the case before Jenkins, C. J., on the ground that in this case the mortgage provides that money is to be recovered at the rate of Rs. 6 per map if any proceedings are taken to enforce the mortgage. It seems to me that that money is a charge on the mortgaged property. I do not agree with the view taken by the learned District Judge. In my opinion, the judgment and decree of the learned District Judge must be set aside and the case remitted to the lower appellate Court to have the appeal reheard on the other points not disposed of. Costs will abide the result of the re-hearing by the learned Judge of the lower appellate Court. This case was decided on Ex. 1 only. All other documents filed in the case will be considered at the time of the re-hearing.

Shamsul Huda, J.—I agree.

V.B/R.K. *Decree set aside.*

1. (1917) 37 I C 805.
2. (1909) 13 C W N 181.

A. I. R. 1918 Calcutta 233 (1)

FLETCHER AND SHAMSUL HUDA, JJ.

Brojonath Sarma—Appellant.

v.

Maheswar Gahani and *others*—Defendants—Respondents.

Appeal No. 743 of 1916, Decided on 14th March 1918, from appellate decree of Sub-Judge, Assam, D/- 23rd December 1915.

(a) Landlord and Tenant—Surrender of lease does not require written document.

In this country, in order to surrender a lease a document in writing is not necessary, much less a registered document. [P 233 C 2]

Where a person, having a periodic settlement of land under Government, makes it over toothers who thereupon from Government get a new lease in respect there of, the taking of the new lease operates as a surrender of the interest of the previous settlement holder by operation of law, and no outstanding interest in the land is left in him. [P 233 C 2]

Khitish Chunder Chuckerbutty, for *N. C. Burdalois*—for Appellant.

Narendro Kumar Bose — for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of the Assam Valley Districts, reversing the decision of the Munsif of Sibsagar. The suit was brought to recover land and for mesne profits. The facts are these: Originally a person named Kanakeswar had a periodic settlement of the property. He got into difficulties and made over the land to three persons, namely, the plaintiff, the defendant Moheswarand another named Chakari. Those persons then approached the Government and new pattahs were granted. The plaintiff now sues to recover the land in his pattah. When the land came to be partitioned, the Sub-Deputy Collector seems to have made a mistake and put the defendants in possession of a portion of the land covered by the plaintiff's pattah, and the present suit was brought by the plaintiff to recover that portion of the land covered by his pattah which the defendants were improperly put into possession of. The learned Judge of the lower appellate Court dismissed the suit, on the ground that the original pattah to Kannakeswar was an outstanding interest and that it had not been got over and, therefore, the defendants were entitled to set up the plea that the plaintiff had not got an immediate interest in the land entitling him to maintain a suit in ejectment.

I do not think that that is right. In this country, it has been held over and over again that in surrendering a lease no document in writing is necessary. The learned Judge seems to have assumed that in order to surrender a registered document was necessary. It was not a sale in this case, and a surrender to the landlord has been held over and over again in this country not to require any registered document. Therefore, when the parties took this new lease from Government, it operated as a surrender by operation of law, and the learned Judge's view that there was an outstanding interest cannot be supported. It is quite obvious in this case that success should be on the side of the plaintiff. The plaintiff offered to have an enquiry as to whether he was in possession of any portion of the land covered by the defendants' pattah and the defendants wisely, I think, refused to have such an enquiry. It is quite clear that there had been an error made by the Sub-Deputy Collector in having inducted the defendants into a portion of the land covered by the plaintiff's pattah. The decree of the learned Judge of the lower appellate Court is accordingly set aside and the decree of the Munsif restored with costs both in this Court and also in the lower Courts.

Shamsul Huda, J.—I agree.

V.B./R K. *Decree set aside.*

A. I. R. 1918 Calcutta 233 (2)

TEUNON AND CHAUDHURI, JJ.

Asrafulla Sarkar and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1103 of 1916, Decided on 23rd January 1917.

Criminal P. C. (1898) S. 222 (2)—Misjoinder of charges—Accused charged on three different counts with theft or misappropriation committed at different times and with misappropriation of aggregate of ten items of money—Trial is vitiated.

Where accused was charged on three different counts with the theft or misappropriation of specific articles committed at different times and with the misappropriation of the aggregate of ten items of money;

Held: that the trial was vitiated by a misjoinder of charges and should be set aside. [P 234 C 1]

Dasarathi Sanyal, Debendra Narain Battacharjee and *Jyotindra Narain Begchi*—for Petitioners.

Judgment.—In this case the petitioner Asrafulla was the Secretary. of the M. E.

School at Pirgunge from 20th February 1912 to 7th December 1914, while the petitioner 2, Tasiruddin, who is the son of Asrafulla, was the 3rd teacher therein. In the present proceedings the charge framed against them was that in the course of the year 1914 they had committed criminal breach of trust in respect of a sum of Rs. 177-14-9. This sum was the aggregate of 13 distinct items. In respect of nine of the thirteen items the prosecution failed in the trial Court, and in the appellate Court the prosecution further failed in respect of three items out of the remaining four. There is left an item of Rs. 12-14-6 said to have been misappropriated on 30th November 1914. It is clear that as regards this item the conviction cannot be sustained. Though on the face of the charge it appears to be one properly framed under the provisions of S. 222 (2), of the Code, yet on closer examination, it appears, that is not the case. Three of the items relate to articles of moveable property, viz., a tablecloth, two window frames and a bundle of fencing wire. No doubt what is charged purports to be the misappropriation of the cost price or proceeds of these articles, but examination of the evidence shows that what is alleged is the theft of the articles themselves. We have then three charges of theft or misappropriation of specific articles committed at different times, joined with the charge of misappropriation of the aggregate of ten items of money. There can be no question that this misjoinder has vitiated the trial and what we have then only to consider is whether in setting aside the conviction we should or should not direct a re-trial. The item of Rs. 12-14-6 represents the pay of a teacher named Fatik Chandra Adhikary for half the month of October 1914. This is shown in the acquittance roll and cash book as paid on the 30th November to the petitioner Tasiruddin. The explanation offered is that on his return after the puja vacation Fatik found that his place had been filled up, and being in need of money, he took this sum namely, Rs. 8 from Asrafulla through Tasiruddin and Rs. 4 odd from Lalit Kumar Adhikary, the Head Master. On the authority then given by Fatik the sum due to him was made over to Tasiruddin when the School was in funds.

As regards this item the prosecution rests on the evidence of Fatik Chandra Adhikary and Lalit Kumar Adhikary. These men are cousins and both have grievances against Asrufulla, Lalit having been superseded as Head Master by one Basir Mohammed and Fatik having been similarly deprived of his appointment. Lalit admits that before he could return to his home Fatik had to borrow from some individual whom he cannot name and Fatik himself made no complaint until 9th March 1916, that is, three months after Asrafulla had been removed. Both again appear to be under the influence of the Local Officers of the Tagore Estate, who are hostile to the petitioner Asrafulla, because of his opposition to their demands upon the tenantry for enhanced rents. Further there appears to have been no attempt to conceal the fact that on the 30th November, payment was made not to Fatik but to Tasir, and to the irregularities in the matter of accounts Lalit appears to have been a party. Further the defence is supported by 4 witnesses, of whom one Basir Mohammad, now a Sub-Inspector of Schools, appears to be superior in position to the prosecution witnesses Lalit and Fatik. In this state of things, having regard also to the failure of the prosecution as regards all but this one small item, and to the fact that these criminal proceedings were begun so long ago as 15th February 1915, we are of opinion that this is not a case in which we should direct a re-trial. The petitioners are accordingly acquitted. The fines, if paid, will be refunded.

V.B./R.K. *Convictions set aside.*

A. I. R. 1918 Calcutta 234

FLETCHER AND NEWBOULD JJ.

Raj Chandra Mandal and *others*—Plaintiffs—Appellants.

v.

Raghunath Dafadar and *others*—Defendants—Respondents.

Appeal No. 908 of 1914, Decided on 2nd March 1917, from appellate decree of Addl. District Judge, 24 Parganahs D/- 6th January 1914.

Arbitration —Award— Proceeding to set aside execution sale—Matter referred to arbitration—Judgment-debtor directed to pay certain sum within certain time to have sale cancelled—Suit for possession by representative of judgment-debtor—Condition stipulated must be proved to have been complied with.

A proceeding for the purpose of setting aside an execution sale was compromised and the matter in dispute was referred to an arbitrator, who

made an award by which he directed that the judgment-debtors, whose property was sold, should pay a certain sum in cash to the other party within twenty days of the date of the award to have the sale cancelled. In a suit for possession of the property by the plaintiffs, who acquired it from the judgment-debtors subsequent to the award:

Held: that in order to get the benefit of the award the plaintiffs must prove that the condition which the arbitrator stipulated had been complied with. [P 235 C 2]

Ram Chunder Mazumdar and *Probodh Chunder Ghose* and *Nil Kant Ghose*—for Appellants.

Ramgati Sirkar—for Respondents.

Fletcher, J.—This is an appeal from a decision of the learned Additional District Judge of the 24-Pergannahs, dated 6th January 19.1, modifying the decision of the Additional Munsif of Basirhat. The plaintiffs brought the suit for possession of two plots of land, each measuring about 7 cottas. One of these two plots, it is alleged, has been acquired by purchase in execution of a mortgage decree and the other plot has been acquired by a private sale from the defendant 5. The only question in this case is:

"Had the defendant 5 a title to the property that could be passed to the plaintiffs?"

The primary Court decreed the plaintiffs' suit in full. The learned Judge in the lower appellate Court had reversed the decision of the primary Court on appeal with regard to the plot acquired by private purchase by the plaintiffs from the defendant 5. The case has been argued with great ability by Mr. Mazumdar on behalf of the plaintiffs-appellants; but I am not satisfied that, on the materials on the record, the decision of the learned Judge of the lower appellate Court is wrong. It appears that defendant 5 was originally a cosharer in the jote. The jote itself was brought to sale in execution of a rent decree and purchased by the defendant 1. The predecessor of defendant 5 then made an application to have the sale set aside; but he died before the application was disposed of and that application appears to have been abandoned. Subsequently, the other cosharers instituted proceedings for the same purpose and an agreement was come to between those other cosharers and the defendant 1, by which the matter in dispute was referred to the arbitration of a particular named arbitrator. The arbitrator made an award by which he directed that the applicants, that is the other cosharers, should pay a certain sum in cash to the defendant 1 within twenty days of the date of the award to have the sale cancelled. The plaintiffs claim to have the benefit of that award and of the order passed on the award being filed in Court. I am not satisfied that the plaintiffs are entitled to the benefit of the award. I think the ordinary rule is to apply to an award just as much as to a contract. But whether that is so or not, the plaintiffs must prove before they can get the benefit of the award that the condition which the arbitrator stipulated had been complied with, and the condition was that the payment should be made within twenty days. There is not a word to be found in the judgment of either of the Courts below that the payment was made within twenty days, nor is it admitted in the defence that any such payment was made.

It was clearly the duty of the plaintiffs if they meant to claim the benefit of the award, to show that the condition imposed by the arbitrator had been strictly complied with. Then the learned Judge in the lower appellate Court says that the subsequent conduct is the only evidence as to what was done under the terms of the award; and the subsequent conduct shows that the sale had not been set aside in toto, because the evidence that we have got on the record led the learned Judge of the lower appellate Court to the conclusion that defendant 1, at some time in the year 1910, was in possession of the share of defendant 5. The learned Judge found that, in that view at any rate, the whole sale could not have been set aside. Whether the condition in the award was strictly complied with or whether there was a future agreement arrived at between the defendants, the evidence shows that the whole sale was not set aside because the defendant 1 continued to be in possession of the share of defendant 5. I think on the facts that the plaintiffs could not satisfy the Court that they were entitled to the benefit of this award and that the evidence shows that the defendant 1 continued to be in possession of the share of defendant 5. In that view, the judgment of the learned Additional District Judge cannot, in my opinion, be disturbed. The appeal is, therefore, dismissed with costs.

Newbould J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 236

FLETCHER AND SHAMSUL HUDA, JJ.

Gosta Behari De and *others*—Plaintiffs—Appellants.

v.

Gosta Behari Lumanta and *others*—Defendants—Respondents.

Appeal No. 818 of 1916, Decided on 22nd April 1918, from appellate decree of Sub Judge, First Court, Burdwan, D/- 22nd December 1915.

(a) Registration Act (1908), S. 17—Compromise petition in money suit hypothecating immovable property should be registered.

A suit to recover money on a hatchitta was compromised, the compromise petition providing that a decree should be passed in favour of the plaintiff. The defendant also hypothecated certain immovable properties to secure the payment of the decretal amount;

Held: that as the mortgage was altogether outside the scope of the money suit and was given by the defendant and not by any judicial decision of the Court the document creating it required registration under the provisions of the Registration Act. [P 237 C 1]

(b) Registration Act (1908), S. 17, Cl. (i)—"Composition deed."

A composition deed does not mean a deed composing differences; it is a deed by which a debtor compounds with his creditors. [P 237 C 1]

Jyotish Chunder Hazrah and *Mohesh Chunder Banerji*—for Appellants.

Dwarka Nath Mitter and *Sarat Chunder Mitter*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs against the decision of the of the learned Subordinate Judge of Burdwan, dated 22nd December 1915. The suit was brought to enforce a mortgage security; so the plaint states; and the way in which the plaintiffs say they got their mortgage security is this: The plaintiffs 1, 2 and 3 are brothers and defendant 4 and the father of defendants 5 and 6 are their half-brothers. Defendant 4 was the karta of the family. He brought a suit to recover money on a hatchitta against defendant 1. That suit was compromised and the compromise petition provided that a decree should be passed in favour of defendant 4 but that the amount should be paid by instalments and in default of payment of two instalments, the whole amount would be recoverable; and defendant 1 hypothecated certain immovable properties by way of security to secure the repayment of the amount decreed by consent. The present plaintiffs, therefore, brought this suit for the purpose of enforcing that charge and for obtaining a 3/5th share of the mortgage money. The learned Judge in the lower appellate Court held that the mortgage, not having been created in the manner provided by the Transfer of Property Act and the Registration Act, could not be enforced and he relied upon the decision of this Court in the case of *Gurdeo Singh* v. *Chandrika Singh* (1); and the view that the learned Judge took was this, that the mortgage given in the suit on the hatchitta was altogether outside the scope of the suit. It was not one of the matters in dispute and the mortgage in that case was not given by any adjudication of the Court at all. The defendants in that case hypothecated the property to the karta and, therefore, the document required to be executed in the manner provided for by the Transfer of Property Act and to be registered under the provisions of the Registration Act.

It seems to me quite clear that if we agree with the decision of *Gurdeo Singh* v. *Chandrika Singh* (1) then the view taken by the learned Judge is correct. On the other hand, there is another decision of this Court which has been referred to, namely, the case of *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (2). It may be admitted that that decision cannot be reconciled with the decision in *Gurdeo Singh* v. *Chandrika Singh* (1). That case of *Gobinda Chandrika Pal* v. *Dwarka Nath Pal* (2) was followed by Mitra and Bell, JJ., in the case of *Smith* v. *Smith* reported in 8 *C. L. J.*, (short notes), p. 2. The view taken by the learned Judges in that case in 8 *C. L. J.* (short notes), p. 2, seems to me not to be right; and the reason is this: In the case of *Smith* v. *Smith*, the suit had been brought for restitution of conjugal rights by the husband and the wife; the defendant, agreed to the restitution of conjugal rights on terms that her husband would give her some property. Mitra and Bell, JJ., held, so far as we can gather from the notes, that that arrangement was subject to the provisions of the Registration Act, but that, under S. 17, Cl. (i) of the Act, it was a composition deed and, therefore, was excluded from the provisions of the Act requiring registration. Of course, that is not what is meant by a composition deed. It may be that a consent decree composes the differences between the plaintiff and de-

1. (1909) 36 Cal 193=1 I C 913.
2. (1908) 35 Cal 837.

fendant. A composition deed does not mean a deed composing differences but it is a deed by which a debtor compounds with his creditors. If that was the foundation of the decision in *Smith* v. *Smith*, all I can say is that this decision does not commend itself to me, and that this document clearly did not come within the terms of S. 17, Cl. (i), Registration Act, as being a composition deed. I agree with the decision reported as *Gurdeo Singh* v. *Chandrika Singh* (1). The mortgage sought to be enforced in the present case was altogether outside the scope of the money suit brought by the karta, defendant 4, on the hatchitta. The mortgage was given by the defendant in that suit not by any judicial decision of the Court and, that being so the document required registration under the provisions of the Registration Act. In that view, the present appeal fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 237

CHITTY AND SMITHER, JJ.

Emperor

v.

Rajendra Roy—Accused.

Criminal Ref. No. 46 of 1917, Decided on 9th January 1918, made by Addl. Sess. Judge, Hooghly, D/- 18th October 1917.

Criminal P. C. (5 of 1898), Ss- 234 and 235—Misjoinder of charges, illustrated.

Where to three charges of criminal misappropriation, alleged to have been committed by the accused within a year ,was added another charge of an offence under S. 210, Penal Code, not committed within the same year:

Held: that there was a misjoinder of charges, as the last offence charged did not form one transaction with the other three offences.

[P 237 C 2]

Manmathanath Mukerjee, *Narendra Kumar Bose* and *Jatindra Nath Sen*—for Accused.

Orr—for the Crown.

Judgment.—This case comes before us on a reference by the Additional Sessions Judge of Hooghly under S. 307, Criminal P. C. On 23rd July 1917 the accused Rajendra Roy was committed for trial in the Court of Session on three charges of criminal misappropriation committed on different dates in the year 1915. In the Sessions Court on 1st October 1917, an additional charge was added of an offence under S. 210, I. P. C., in respect of a sum which was connected with the first of the three charges of criminal misappropriation. At the trial the jury disagreed, a majority of three being in favour of an acquittal. Disagreeing with that majority and thinking their verdict to be perverse, the Additional Sessions Judge has referred the matter to this Court. On reading the letter of reference it appears to us that there was in this case a misjoinder of charges. In that view, it is unnecessary to go into the merits of the case, as the only fair course will be to direct a retrial of the accused on charges properly framed and properly joined. The three charges of criminal misappropriation related to three separate sums. The accused was the manager appointed by the District Judge of Hooghly of an idol, Brindaban Chandra Thakur, of Guptipara and was as such manager entrusted with the funds belonging to the idol. It is of portions of these funds that the alleged misappropriations took place. The first item was one of Rs. 1,441-9-3 said to be costs of the High Court decree in Regular Appeal No. 290 of 1909, to which the idol was a party. The second item was of a sum of Rs. 135 said to have been improperly retained by the accused on 23rd July 1915. The third was one of Rs. 5-12-3 also misappropriated by the accused as such manager between 14th December 1915 and 8th January 1916. These three charges could, no doubt, have been properly tried together in one trial. The added charge was that the accused, on or about 10th December 1914, fraudulently obtained an order from the District Judge of Hooghly for a sum of Rs. 1,841-9-3, which sum was not due to him or which was larger than was due to him from the estate of the idol.

The date of this offence, it will be seen, was not within the year within which the three alleged offences of criminal misappropriation fell. We are of opinion that the accused could not legally be tried on this fourth charge along with the three charges of criminal misappropriation. It was not an act forming one transaction with them. It had some relation to one of the three charges of criminal misappropriation but not to the other two, and, in part, it referred to matters not included in any of those three charges, because it appears from the letter of reference that the accused

was said to have committed criminal misappropriation of a further sum of Rs. 200 out of the Rs. 1,841-9-3. This being so, we think that the case must go back to the Court of Session for a retrial of the accused. We need not here specify exactly on what charges he should be tried. That will be for the prosecution to consider and the Court to decide. We need only say that they must be charges which can be properly dealt with in one trial. The accused will remain on the bail at present subsisting.

V.B./R.K. *Rettrial ordered.*

A. I. R. 1918 Calcutta 238 (1)

TEUNON AND SHAMSUL HUDA, JJ.

Natabar Dutta and *others*—Petitioners.

v.

Biseswar Bakhit and *others*—Opposite Parties.

Crimlnal Revn. No. 557 of 1917, Decided on 8th June 1917, against order of Sub Divl. Magistrate, Khulna, D/- 2nd and 5th March 1916.

Criminal P. C. (1898), S. 145—Proceeding under—Magistrate cannot supplement final order without notice to other party.

In a proceeding vnder S. 145, Criminal P. C., in respect of certain premises consisting of a dalan, a hotel and a privy, the Magistrate at the close of the case made his final order in respeet of the dalan and the hotel but made no order with regard to the privy. The omission in respect of the privy having been afterwards pointed out to him by one of the parties he made an ex parte order in favour of that party without giving notice to the other party:

Held: that having in the first instance omitted to make any order with regard to the privy, the Magistrate should not have proceeded to supplement his first order without giving the other side an opportunity of being heard.

[P 238 C 2]

Bhudhar Haldar—for Petitioners.

Judgment.—In this case proceedings uuder S. 145, Criminal P. C., were taken in respect of certain premises which are spoken of as consisting of, first, a dalan, secondly, a hotel, and thirdly a privy. Evidence was gone into and at the close of the case the learned Deputy Magistrate made his final order in favour of the second party in respect of the dalan and in favour of the first party in respect of the hotel. He made no order with regard to the privy. His final order is dated 2nd March 1917. The omission in respect of the privy having been pointed out to him by the second party on 5th March without giving notice to the first party, he makes this ex parte order:

"There is evidence that the privy goes with the dalan, so that this privy remains in the possession of the second party."

Now it is quite obvious that having in the first instance omitted to make any order with regard to the privy, he should not have proceeded to supplement his first order by this subsequent other of 5th March without giving the order side an opportunity of being heard. It however is stated to us that as regards the privy evidence was in fact led, and that being so, while we set aside the order of 5th March in respect of the privy, we also direct that the Magistrate do re-open the proceedings in so far as the privy is concerned at the stage reached when the evidence was completed, and after hearing both parties he will then proceed to pass such order as on the evidence and all the circumstances of this case he may think proper.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 238 (2)

CHITTY AND RICHARDSON, JJ.

Aslam Mea and *others* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 906 of 1917, Decided on 24th August 1917, against order of Hony. Magistrate, Noakhali, D/- 21st May 1917.

Criminal P. C. (1898), S. 345—Compromise petition presented when judgment was being written cannot be refused.

A case can be compounded under S. 345, at any time before the sentence is pronounced. A Magistrate cannot therefore refuse to aecept a compromise petition on the ground that it was presented when the judgment was actually being written.

[P 238 C 2]

Santosh Kumar Bose—for Petitioners.

Judgment.—In this case the opposite party, on whom the Rule was served, does not appear to show cause. In his explanation the Magistrate, before whom the case was tried, states that he does not think that the compromise petition could be accepted at such a late stage, when the judgment was actually being written but a case may be compromised under S. 345, Criminal P. C., at any time before the sentence is pronounced. We accordingly make the rule absolute and set aside the conviction and the sentence passed on the petitioners. The fines, if paid, will be refunded.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 239

FLETCHER AND SHAMSUL HUDA, JJ.

Rajlakshmi Dasya—Defendant—Appellant.

v.

Prodyot Kumar Tagore and *another*—Plaintiffs—Respondents.

Appeal No. 1349 of 1916, Decided on 18th April 1916, from appellate decree of Dist. Judge, Rungpur, D/- 26th April 1916.

Pleadings—Case not set up in pleadings put forward in cross examination of witnesses should be objected to at once—Practice, evidence.

In a suit for arrears of rent the defendant pleaded a suspension of the rent because he had been ousted by the plaintiff from a portion of the holding. The Munsif, on the evidence and the Commissioner's report, that as the plaintiff had dispossessed the defendant from a portion of the holding, there ought to be an abatement of rent. On appeal the District Judge reversed the decision of the Munsif, on the appellant's contention that it was not proved that the lands from which the defendant had been dispossessed formed a portion of the holding for which rent was claimed:

***Held*: that the defendant could not challenge the decision of the appellate Court on the ground that he was taken by surprise by the plaintiff's setting up a new case in appeal, as the case put forward, though not specifically raised in the pleadings, was definitely put in the cross-examination of one of the defendant's witnesses in the trial Court and was not objected to. [P 239 C 2]**

Mohendra Noth Roy and *Atul Chunder Gupta*—for Appellant.

Ramchurn Mitter, *Mukund Nath Roy* and *Permanund Lahiri*—for Respondents.

Fletcher, J.—This is an appeal by the defendant against the decision of the learned District Judge of Rungpur, dated 26th April 1916, reversing the decision of the Munsif of Gaibanda. The plaintiff brought the suit for arrears of rent. The defendant set up the case that he was entitled to a suspension of the rent because he had been ousted by the plaintiff from a portion of the holding. The case went to trial. The Munsif appointed a civil Court Amin and there seems to have been a considerable body of evidence before the Court. The Munsif held that the plaintiff had dispossessed the defendant of a portion of the land and that therefore there ought to be an abatement of the rent. An appeal was then preferred to the Court of the learned District Judge and the learned District Judge came to this conclusion. First of all, he held that the defendant had, in fact, been dispossessed by the plaintiff of these plots of land. But he said that it had not been shown that these plots formed a portion of the jama of Rs. 21 for the rent of which the plaintiff brought the suit. It is said that that point took the defendant by surprise. This case was definitely put in cross-examination to one of the witnesses. We do not in second appeal look through the record, but the learned vakil who conducted the appeal on behalf of the defendant read an answer in the cross-examination of one of his own witnesses which showed quite clearly that the point was then being urged before the Munsif, because it was put definitely to the witness as to whether the defendant did not hold another jote under the plaintiff. The legal adviser of the defendant must havs known from the line of cross-examination that the plaintiff as part of his case intended to assert that there was another jote held by the defendant under the plaintiff. Otherwise, the cross-examination was wholly irrelevant. The plaintiff has also given in evidence as a portion of the documentary evidence two books of counter-foil receipts, and two of those receipts show that the predecessor of the defendant held another jote, a jote of Rs. 8, under the plaintiff.

I do not know whether those counter-foil receipts were specially referred to in the Court of first instance. The books must have been marked as containing relevant documentary evidence. They could not have been marked simply as books in the possession of the plaintiff but as books in his possession that went to contain relevant matters with reference to the decision of the suit. Mr. Mohendra Nath Roy's argument is that the judgment of the lower appellate Court must be set aside and the case should be sent back to be re-heard by the lower appellate Court, on the ground that his client was taken by surprise by the line of argument put forward in the lower appellate Court on which the learned Judge found against him. I see no reason for setting aside the judgment in a case like this. I think that the defendant must have had notice from the time of the trial in the Court of first instance that such a question was or might be raised, and no application seems to have been made in the first Court, when this question certainly was put to his witness as to whether the defendant held another jote under the plaintiff, that evidence of

that sort should be excluded as being irrelelant to the issue. In my opinion, there are no grounds for interfering with the judgment of the learned Judge of the lower appellate Court. The present appeal therefore fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B., R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 240

FLETCHER AND CHATTERJEA, JJ.

George Burgh McNair—Petitioner.

v.

J. D. Campbell and *others*—Opposite Parties.

Rule Nisi No. 556 of 1917, Decided on 20th August 1917, against order of Sub-Judge, Third Court, Mymensiogh.

(a) Evidence Act (1872), S. 126—Solicitor summoned to produce letter from his client cannot be compelled to produce it, but he is bound to attend and depose that he has received letter.

A solicitor is not bound to produce before a Court or Commissioner appointed by the Court to take evidence, a letter written to him by his client, but he is liable to attend before the Court or the Commissioner and state whether he has received such a letter, without reference to its contents. [P 241 C 1]

(a) Penal Code (1860), S. 174—Solicitor called upon to show cause for not attending Court to give evidence when called upon to produce letter—Circumstances held did not justify action.

A solicitor of a well-known position in Calcutta, having been served with a notice by a Commissioner to attend before him to give evidence and produce a letter written to him by his client, did not appear before the Commissioner, but wrote a letter saying that he could not produce the letter, as it was a privileged one, being under the mistaken notion that his attendance was required only for the production of the document. Thereupon the Commissioner returned the commission unexecuted, and the Court, which was in a district far off from Calcutta, called upon solicitor to show cause why he should not be prosecuted under the provisions of S. 174, I. P. C.

Held: that having regard to the position of the solicitor and the circumstances of the case, the procedure of the Court was not justifiable. [P 241 C 1]

B. C. Mitter and *Ambikapada Chaudhury*—for Petitioner.

Atulya Charan Bose and *Atul Chander Dutt*—for Opposite Parties.

Fletcher, J.—This is a Rule obtained by Mr. McNair calling on Messrs. Donald Campbell & Company, who are the decree-holders in claim case No. 4 of 1917 of the third Court of the Subordinate Judge at Mymensingh and also on the Subordinate Judge to show cause why the notice issued by the said Subordinate Judge on 9th July 1917 should not be cancelled. The facts so far as material are very short. This firm of Messrs. Donald Campbell and Company sued a gentleman of the name of A. K. Gaznavi in the Original Side of this Court and obtained a decree for about six lacs of rupees. That decree of this Court was sent for execution to the Court at Mymensingh and presumably, Messrs. Donald Campbell and Company had given credit to Mr. A. K. Gaznavi on the footing that he was a person of wealth and was able to meet any sum that might become due to them from him on the agreement on which he entered into these transactions. The decree-holders then proceeded to attach certain properties that apparently ostensibly belonged to Mr. A. K. Gaznavi and Mr. A. K. Gaznavi put in a claim that the properties were not his, but had been dedicated to religious and charitable purposes by some document and, therefore, the decree-holders Messrs. Donald Campbell and Company could not recover their money out of these properties because they did not, in fact, belong to Mr. A. K. Gaznavi.

It may be unfortunate that that position, if true, was not disclosed at some earlier stage so that this firm of merchants in London, Messrs. Donald Campbell and Company, might have known before they entered into this transaction that the properties which they sought to attach had been dedicated to religious and charitable purposes. But the case having passed from the hands of the firm of solicitors who conducted the case in this Court, the gentleman in Mymensingh who conducted the business of the decree-holders did not accept this case of Mr. Gaznavi that this was a genuine dedication, but he alleged that the whole thing was a sham to withdraw the properties from the diligence of the creditors of Mr. Gaznavi. It appears that, in the course of certain proceedings, the firm of Messrs. Morgan and Company of which the senior partner is Mr. McNair had acted on behalf of Mr. Gaznavi. By some means or other—it is not necessary for us to inquire how—a document purporting to be a copy of a letter written by Mr. Gaznavi to Mr. McNair came into the possession of the gentleman conducting the proceedings in the Court at

Mymensingh. What that letter contains we do not know; we have not seen it. But the decree-holders wished to get that letter in evidence and, therefore, they took out a commission to examine Mr. McNair. A notice of the appointment before the Commissioner was served on Mr. McNair on 27th June and he was directed to attend before the Commissioner at 4-45 p m. that day.

Mr. McNair took the view, and a proper view I may say, that the letter that he was required to produce having been given to him as the solicitor of Mr. Gaznavi, he should not produce that document without the consent of Mr. Gaznavi. That course was obviously right, although I think that the view put forward on the other side, that Mr. McNair was liable to attend before the Commissioner and state whether he had received a letter without reference to what were the contents of that letter, is accurate. A solicitor can only take objection to produce a privileged document before a Court or a Commissioner appointed by the Court to take evidence. He cannot say that he declines to come to Court because the document is, in fact, a privileged document. However, it appears, although apparently Mr. Mc Nair was not aware of that, that the decree-holders required his evidence for other purposes besides the production of this letter. Mr. McNair did not attend before the Commissioner and he wrote a letter to the Commissioner saying that he could not produce the document as it was a privileged one. He heard nothing more about the matter after that. The Commissioner returned the commission to the Court at Mymensingh and the next thing that Mr. McNair heard was that he was called upon to show cause before the Court at Mymensingh why he should not be prosecuted under the provisions of S. 174, I. P. C. That of course, is a procedure that nobody will seek to justify. Mr. McNair is well-known both in this Court and in Calcutta.

There is no reason to put him to this treatment of having to go down to Mymensingh and show cause why he should not be prosecuted under S. 174, I. P. C., because he wrote a letter to the Commissioner on 27th June 1917 stating that he could not produce the letter which he was asked to produce.

The Commissioner ought to have written back to Mr. McNair making a suitable appointment and giving him a proper notice to appear and have his deposition taken. There is no reason to think that Mr. McNair was not willing to appear before the Commissioner, in fact, he was quite willing. Mr. McNair was not at all in fault except that he was under a mistake that he anticipated that his evidence was required for, as he had already stated to the Commissioner in writing, that he would not be able to produce the document wanted from him. The present Rule must be made absolute. The only other question that is to be considered in this case is the question of costs.

There does not seem to be any reason to think that the decree-holders are responsible for the course adopted by the Commissioner in sending the commission back to Mymensingh, because Mr. McNair did not appear before him 2 hours 45 minutes after the Commissioner had written that letter to him on 27th June 1917. It is, however, as the learned Advocate-General has remarked, a strong case that an application should have been made by the decree-holders for a warrant or proclamation against a gentleman in the position of Mr. McNair because he should have appeared before the Commissioner within this limited time of 2 hours 45 minutes without regard to any other business that Mr. McNair might have had at that time.

That case, of course, cannot stand and as already stated, we must make the Rule absolute. I am afraid that this is not a case in which we can order the decree-holders to pay the costs. They do not seem to be responsible for initiating these proceedings. The Commissioner who returned the commission to the Mymensingh Court seems to be really responsible. The proper course ought to be that the commission should be sent back or a fresh commission issued to take the evidence of Mr. McNair and a suitable appointment must be made for Mr. McNair's attendance before the Commissioner. It is quite clear that a notice served 2 hours 45 minutes before without any reference to what Mr. McNair's engagements, however, pressing they may be, are, is not a suitable and proper notice. The Rule is

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accordingly made absolute. We make no order as to costs.

Chatterjea, J.—I agree.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 242

FLETCHER AND SMITHER, JJ.

Sarpat Singh and *another* — Petitioners.

v.

Budh Singh Dudheria — Opposite Party.

Rule Nisi No. 3 of 1917, Decided on 29th March 1917, against order of District Judge, Murshidabad, in case No. 46 of 1904.

Civil P. C. (1908), S. 115—District Judge ordering on condition payment of allowance to guardian of person of minor—Condition subsequently superseded — Subsequent application for allowance refused for guardian not having complied with condition—Order can be set aside in revision.

A District Judge made an order directing the guardian of the property of a minor to pay to the guardian of his person a certain allowance on condition of the latter removing with the infant to a certain house that had been provided for the residence of the minor. This condition was however superseded by some other orders but a subsequent application for the allowance was refused by the District Judge on the ground that the guardian of the minor's person had not complied with the condition:

Held: (*Fletcher, J.*, hesitating), that the order of the District Judge refusing the application should be set aside by the High Court in revision under S. 115. [P 243 C 1]

B. C. Mitter, Brojolal Chakravarty and *Gurudas Sinha*—for Petitioners.

Dwarkanath Chuckerbutty Hamendra Nath Sen and *Dhirendra Nath Sen* —for Opposite Party.

Fletcher, J.—This is a rule calling upon the opposite party to show cause why the order complained of in the petition should not be set aside. The order complained of was passed on an application which is stated in the order-sheet to be application for review of judgment. As a matter of fact it was not such. It was a renewal of an application that had been dismissed in May 1916. The application was made for a direction upon the guardian of the property of a minor to make certain payments that had been directed to be made by the District Judge, the amount being Rs. 300 per mensem, for the minor's maintenance. The question turned upon the consideration of a condition that the District Judge had imposed by an order dated 8th May 1912, the District Judge having by that order directed that no payment should be made to the guardian of the person of the minor, that is the mother until she went with the infant to live in a house provided for the residence of the infant. Then on 22nd May 1912, an order was made that is said to have superseded the order of 8th May of the same year, by which the District Judge is said to have set aside the condition as to the removal of the guardian with the infant to the house provided for their residence. The words of the order are these:

"Having regard to the certificate of the Civil Surgeon on the subject of the condition of the health of the minor's mother I am unable for the present to make any order for her to remove into the house that has been provided for the minor's use."

The matter, if it rested there, might have occasioned some difficulty. Speaking for myself, I am not at all sure that the Judge made that order permanently superseding the order of 8th May 1912. I think it was simply meant prima facie as a temporary measure during the then exciting illness of the minor's mother. But the subsequent orders made by the District Judge show that the allowance was to be paid to the minor's mother notwithstanding her failures to reside in the residence provided for her use. There was an order when the mother was living at Madhupur—although apparently the Judge did not view with favour her residence at that place which clearly recognized that Rs. 300 a month was to be paid to the mother. The mother is now dead. The District Judge dismissed the application that was made to him on the ground that the mother of the infant never complied with the condition imposed by the order of 8th May 1912. This rule has been obtained against that order.

It has been urged that this Court cannot interfere under S. 115, Civil P. C. I must confess I am considerably impressed with that argument. I feel considerable hesitation in interfering in a case of this nature. However, the other learned Judge on the Bench does not feel that difficulty and I do not think that in a case like this, where all the merits are on the side of the guardian who maintained the infant, I should press my doubt so far as to dissent from the order that is going to be made. The amount of the arrears of maintenance

claimed stands in two parts. First of all, the part that accrued due on the date of the order of the learned District Judge, that is, 22nd April 1912. As regards that it could not matter whether the mother resided at the house provided for her or in any other place. All that money has been spent and laid out for the benefit of the infant and the condition as to the residence was imposed as regards the future payment and not as regards the amount that became due for past years. The learned Judge obviously ought not to have deprived the guardian of the person of the minor of that money. The other part, that is, as regards the arrears that accrued due after that order of 22nd April 1912 stands on a different footing. On the whole, I am not prepared to say that the learned Judge by his order of 8th May 1912, did mean that the payment of the allowance should be made only in the event of the guardian of the person of the minor removing to the house that had been provided for the residence of the minor. The subsequent orders passed by the learned District Judge seem to recognize the fact that the mother and guardian of the person of the minor was entitled to receive an allowance of Rs. 300 a month without residing at the house that had been provided for their use. On the whole, I think the order of the learned District Judge ought to be set aside and, with regard to the allowance of Rs. 300 per mensem that accrued due prior to 22nd April 1912, the petitioner is entitled to receive it and with regard to the allowance subsequent to that date, he is entitled to receive it upon satisfying the learned Judge that the minor was suitably and properly maintained by the mother during the period between that date and up to her death. The rule is, therefore, made absolute on these terms with costs, one gold mohur.

Smither, J.—I agree.

V.B./R.K. *Rule made absolute.*

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CHITTY AND SMITHER, JJ.

Joyenullah Bepari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revns Nos. 1337, 1338 and 1339 of 1917, Decided on 4th January 1918, against order of Subdivl. Officer, Gaibanda, D/- 24th September 1917.

(a) Penal Code (1860), S. 411—Stolen property found after long time—Presumption as to guilty knowledge does not arise—Evidence Act (1872), S. 114, Illus. (a).

Properties of an ordinary kind alleged to have been stolen on 28th April having been found in the possession of the accused on 4th August following:

Held: that there was no ground for a presumption under S. 114 that the accused received the goods knowing them to have been stolen, having regard to the facts that the properties were of an ordinary kind and of small value and the evidence of their identification was weak. [P 243 C 1]

(b) Criminal P. C. (1898), S. 35—Magistrate cannot pass concurrent sentences on accused in separate trials.

A Magistrate has no power to make an order that the sentences of imprisonment passed by him on an accused in two separate trials should run concurrently. [P 243 C 1]

D. N. Bagchi—for Petitioners.

Nos. 1337 *and* 1339 *of* 1917.

Judgment. — There are two rules granted to Joyenullah Bepari who was convicted in two trials under S 411, I. P. C., and sentenced in each case to two months' rigorous imprisonment. The Magistrate directed that the sentence in the second case was to run concurrently with the sentence in the first. We may mention that the Magistrate had no power to make any such order, the trials being separate trials for two distinct offences. The evidence however against the accused in both cases seems to be so unsatisfactory that it is impossible to uphold the conviction and sentences. In the first case the petitioner is charged with being in possession of certain keys knowing them to be stolen. It may be that the keys were stolen on 28th April as stated. It may be also that those keys were found in the house of the accused on 4th August following. That however would not be sufficient to prove a dishonest intention on the part of the accused. There is no ground for presumption under S. 114, Evidence Act, as the property was discovered so long after the theft and the keys were very ordinary keys, which might happen to be of the same pattern, or might have been brought to the accused's house quite innocently. The accused disclaimed all knowledge of these keys and there does not appear to be anything in the evidence to fix him with the knowledge of the keys or how they came there. It appears also that the accused is a man of substance and would hardly be a receiver of stolen property of insignificant value.

The keys are said to be valued at Rs. 2-8-0; and they would hardly be worth as much as that except in connexion with the safe the lock of which they fitted.

In the other case against this accused, he is said to be in possession of some cloths stolen from the shop of one Prail Chand on 29th July. In this case the identification of the cloths seems to be weak and it is to be noted that the complaint of the theft was not made until after the property was said to have been found in the house of the accused, that is to say on 4th August. These cloths were said to have been found hidden under a heap of paddy, the accused being a dealer in jute and paddy. It is stated in the petition of the accused, but we do not find it in the evidence, that the house consists of a number of rooms occupied by a number of people—some 40 or 50. There is nothing on the record to show precisely in which apartment the stolen property was found or whether that would necessarily connect the stolen property with the accused. It may have been in a part of the house occupied by somebody else. We think that it would not be safe to maintain the conviction and the sentences. The Rule is made absolute, the conviction and sentences passed on the petitioner, are set aside and his bail-bond will be discharged.

In No. 1338 *of* 1917.

This Rule is connected with Rules Nos. 1337 and 1339, the petitioner in this case, Moniruddin Sheikh, having been convicted under S. 411, I. P. C., for being in possession of a biridani worth Re. 1-8-0 knowing or having reason to believe that it was stolen. This biridani is said to have been stolen on the same day as the keys said to be found in the possession of Joyenulla Bepari, that is to say on 28th April. The biridani was found on 4th August. Having regard to the length of time, there is no presumption that Moniruddin knew or had reason to believe this biridani to be stolen. He said that the biridani found with him had belonged to his deceased wife and had been in his possession for a long time. The evidence as to the identity of this biridani appears to be unsatisfactory and we do not think that this accused ought to have been convicted under S. 411, I. P. C., for having the biridani found in his possession. The conviction and sentence passed on this accused are also set aside and his bail-bond will be discharged.

V B./R.K. *Rules made absolute.*

A I R 1918 Calcutta 244

WOODROFFE AND SMITHER, JJ.

Joy Chandra Das Gupta—Plaintiff—Appellant.

v.

Sm. Khuki and *others*—Defendants—Respondents.

Appeal No 1731 of 1916, Decided on 21st May 1918, from appellate decree of Sub. Judge, Dacca, D/- 20th April 1916.

Landlord and Tenant—Trespass on tenant's land—Cause of action to landlord does not accrue till termination of tenancy.

The grantor of a subordinate tenure is not bound to sue for trespasses committed against his tenant during the continuance of the tenure, inasmuch as his right of action does not accrue before the tenancy comes to an end.

[P 244 C 1; P 245 C 1]

Gunada Charan Sen and *Prokash Chandra Pakrasi*—for Appellant.

Gopal Chandra Das—for Respondents.

Judgment.—In this case the defendant has set up two defences, first of all it is stated that the land was part of a miras tenure of which she was the holder and the second was adverse possession. Both the Courts have held that the first ground failed. The question that arises now is as regards the second ground. The Munsif has found that the land was in possession of Sitanath as a tenant up to the year 1313, corresponding to 1906. He also appears to have accepted the case of the plaintiff that Sitanath got this land by inheritance from one Haridas, who is said to have held it as a tenant under the plaintiff. The Munsif then found that the tenancy was abandoned by Sitanath in 1313 and was sold by him. This story of the sale and abandonment has not been accepted by the Subordinate Judge, who finds that Sitanath was not in possession of the disputed land within 12 years before the date of suit, and the account of the sale and abandonment is a got-up story. He does not, however, find that Sitanath was never a tenant nor in possession of the land at any time, and on this point reliance is placed by the appellant on the principle stated in the decision reported as *Gunga Kumar Mitter* v. *Asutosh Gossami* (1) and some other decisions, that a grantor of a subordinate tenure is not bound to sue for trespasses committed

1. (1896) 23 Cal 863.

against his tenant during the tenure and that his right of action accrues when the tenancy comes to an end. In order, therefore, to determine this part of the case it is necessary, in the first place, to ascertain whether Sitanath held the tenancy under the plaintiff and what the nature of that tenancy was, and secondly, if Sitanath had such a tenancy when did it terminate. The learned Subordinate Judge does not seem to have realized that the time ran against the plaintiff, not from the date upon which the defendant got possession, but on the termination of Sitanath's tenancy, if that existed. The tenancy might not in fact terminate until some time after Sitanath had lost possession.

We must, therefore, set aside the judgment and decree of the Subordinate Judge and remand the case to him for re-hearing after determination of the issues stated above. If it be found as a fact that Sitanath never had the tenancy under the plaintiff, then the claim of the plaintiff for khas possession must be dismissed. Similarly if it be found that Sitanath had a tenancy but that the tenancy terminated more than 12 years before the institution of the suit, then also the plaintiff's claim mentioned must be dismissed. But if it be found that there was a tenancy of Sitanath under the plaintiff and the same terminated within 12 years of suit, then the plaintiff's claim is not barred. With these observations we must remit the case to the lower appellate Court for re-hearing of the appeal. Costs of this appeal will abide the result of the hearing.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 245

FLETCHER AND RICHARDSON, JJ.

Joyanuddin Khan—Petitioner.

v.

Jamiruddin Sarkar—Opposite Party.

Civil Revn. No. 682 of 1916, Decided on 9th January 1917, against order of Sub.- Judge, Rangpur, in Misc. Judicial Case No. 75 of 1915.

(a) Execution—Decree binding—Consent decree—Executing Court can go behind decree to properly understand what it was.

An executing Court can go behind a consent decree and look at the terms of the compromise in accordance with which the decree was passed, in order properly to understand what the decree was. [P 246 C 1]

(b) Civil P. C. (1908), O. 21, R. 17 (1)—Application for execution rejected as not being in accordance with law does not save limitation—Limitation Act (1908), Art. 182.

An application for execution of a decree rejected by a Court under O. 21, R. 17, sub-R. (1), as not being an application in accordance with law, will not operate to save limitation under Art. 182 Lim. Act. [P 246 C 1]

(c) Limitation Act (1908), Art. 182—Decree payable by instalments—Whole amount to become due on default of one instalment—Decree-holder has no option.

When, under a decree payable by instalments the whole decretal amount becomes due on default in the payment of one instalment, the decree-holder has not the option either to compel immediate payment of the whole amount due under the decree or to recover the money in accordance with the instalments: 13 *C. L. R.* 243, *not Foll.* [P 246 C 1]

Hemendra Chandra Sen—for Petitioner.

Girija Prasanna Sanyal for *Atul Chandra Gupta*—for Opposite Party.

Fletcher, J.—This is a rule calling upon the opposite party to show cause why the order complained of should not be set aside. The present applicant is a decree-holder. He brought a suit on 10th May 1911 against five persons to recover certain moneys due on a promissory note. The suit was decreed on compromise. The compromise petition was dated 1st July 1911 and the decree passed on the terms of the compromise was dated 10th July of the same year. Under the terms of the compromise, it was provided that a certain sum should be paid by each of the various defendants and by instalments and that, default being made in the payment of one of the instalments, the whole amount would become due. The decree itself stated the instalments but it omitted, by an error presumably, to state the condition as to the whole amount becoming due on default being made by the judgment-debtors in the payment of the instalments. An application was made for execution on 10th July 1914 against all the five defendants. That application was rejected by the learned Judge on the ground that the prayer for execution was not in accordance with the terms of the decree. The present application was then made on 10th November 1915 against defendant 2 alone and the learned Judge dismissed his application too on the ground that the decree is barred by limitation. Against this order the present Rule has been obtained. The first point that has been argued is that the Court is

not entitled to go behind the decree, but is bound to take the decree and not consider what appears in the solenamah or the petition of compromise. The order sheet shows that the suit was decreed in accordance with the terms of the compromise and it was necessary for the Court, in order to properly understand what the decree was, to look at the terms of the compromise. That being so, the Judge was clearly entitled to consider the terms of the compromise.

The next point that was taken was that the application for execution dated 10th July 1914 was an application made in accordance with law in a proper Court for execution and that, therefore, the limitation was saved by that application. But what happened in that case was that the application was dealt with by the learned Judge under the provisions of O. 21, R. 17, sub Rr. (1) Civil P. C., namely, that the Court having ascertained that the requirements of R. 11 to 14 of the said order had not been complied with rejected the application. It is clear from the terms of sub-R. (2), O. 21, R. 17, that, when a Court rejects an application under O. 21, R. 17, sub-R. (1), the application in that case shall not be deemed to have been an application in accordance with law, because that sub-rule shows that, when the Court permits an application to be amended and then receives it, the application then and only then can be deemed to have been an application in accordance with law. I am of opinion that in this case the application dated 10th July 1914, having been rejected under O. 21, R 17, sub-R. (1), as not being an application in accordance with law, that application would not be one that would save limitation. Then the next point that was argued was that in any case, the decree being payable by instalments, the decree-holder had the option either to compel immediate payment of the whole amount due under the decree or to recover the money in accordance with the instalments. In support of that view the decision of this Court in the case of *Chunder Komul Das* v. *Bisassurree Dassia* (1) has been relied upon. That decision has not been followed in many cases and I prefer to follow the decisions which have taken a contrary view. In the result, the present Rule fails and must be discharged with costs, one gold mohur.

Richardson, J.—I agree.

V.B./R.K. *Rule discharged.*

1. (1883) 13 C L R 243.

A. I. R. 1918 Calcutta 246

CHATTERJEE AND RICHARDSON, JJ.

Rajab Ali Mian and *another*—Plaintiffs—Appellants.

v.

Pandu Mulick and *others*—Defendants—Respondents.

Appeal No. 2476 of 1914, Decided on 2nd July 1917, from appellate decree of Offg. Sub-Judge, Pabna, D/- 2-5-1914.

Landlord and Tenant — Abandonment—Usufructuary mortgage of part of non-transferable occupancy holding—Tenant leaving village but not for good—There is no abandonment.

There is no abandonment of an occupancy holding where the tenant after execution of a usufructuary mortgage of a portion of the holding leaves the village but not for good and his heirs come back and resume possession of a portion of the land. [P 247 C 1]

Sarat Chandra Roy Choudhury—for Appellants.

Basori Lal Sircar—for Respondents.

Facts.—The plaintiff was the appellant, and the appeal arises out of a suit for ejectment of the transferee of an occupancy holding by the plaintiff landlord. One Hajitulla was the tenant in occupation of the holding. He executed a usufructuary mortgage of the whole holding, delivered possession to the mortgagee, and left the village in which the land in suit was situate and went to live in another village. Subsequently, just before the institution of the suit, some of his heirs erected a hut on the land probably with a view to live there. The landlord then brought this suit for ejectment on the ground of transfer of the occupancy holding and its subsequent abandonment by the tenant. The defence was that only a portion of the holding was transferred and that there was no abandonment. The Court of first instance gave a decree for ejectment, but on appeal, the lower appellate Court reversed the decision of the Munsif, holding that although the tenant left the land after having delivered possession to the usufructuary mortgagee, still as his heirs came to live upon a portion of the land, there was no abandonment and so the landlord could not get a decree for ejectment. Hence this second appeal to the High Court.

Judgment.—It is found that the tenant who executed the usufructuary mortgage never left the village for good. As a matter of fact within a short time after the mortgage, his sons came back and they are in possession of a portion of the land. The Court of appeal below, upon a consideration of these circumstances, has come to the conclusion that there was no abandonment. That being so, the appeal must fail, and it is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 247

FLETCHER AND SMITHER, JJ.

Gopal Chandra Das and *others*—Petitioners.

v.

Kshetra Mohun Bhuia — Opposite Party.

Rule Nisi No. 208 of 1918, Decided on 3rd May 1918, from the order of Munsif 3rd Court, Tamluk, in Revival Case No. 193 of 1917.

(a) Arbitration—One party failing to appear—Arbitrator should hear other party before making award.

A reference to arbitration in a case provided that the arbitrator should determine the case after hearing the evidence and that if one of the parties failed to appear before him, he should have power to proceed to hear the reference ex parte.

Held: that on the plaintiff's failure to appear before the arbitrator on the day fixed for trial the arbitrator could not make an award without taking any evidence but should have proceeded to hear the evidence of the other side. [P 247 C 2]

(b) Civil P. C. (1908), O. 9, R. 9 and Sch. 2, Para. 24—Award without any evidence cannot be set aside under O. 9, R. 9, but should be remitted to arbitrator for re-consideration.

An award made without taking any evidence at all cannot be set aside by the Court on the plaintiff's application under O. 9, R. 9, but should be remitted under the provisions of Cl. 14 to the arbitrator for re-consideration if a proper case is made out by the plaintiff to excuse his absence before the arbitrator. [P 247 C 2]

(c) Civil P. C. (1908), S. 115—Award without any evidence should be returned—Arbitration.

The High Court in the exercise of its powers under S. 115, should order remitting the award made without taking any evidence at all for re-consideration by the same arbitrator on the ground that the award had left undetermined the matters referred to arbitration. [P 218 C 1]

Sarada Charan Maity — for Petitioners.

Judgment.—This is a rule on the opposite party to show cause why the order of the Munsif, dated 9th February 1918, should not be set aside. What happened was this: There was a dispute between the plaintiff and the defendants. That gave rise to a suit. Better counsels prevailed and the suit was referred by the Court to the arbitration of a certain gentleman by the consent of both parties. The terms of the reference provided that the arbitrator should determine the case after hearing the evidence and that, if one of the parties failed to appear before him, he should have power to proceed to hear the reference ex parte. The plaintiff on the date fixed for the trial did not turn up, although the arbitrator waited for two hours. Then instead of proceeding to hear the case ex parte, the arbitrator considered that he had power to deal with the matter as a Civil Court had, if the plaintiff was in default. That is not so. The arbitrator ought to have proceeded to hear the evidence of the other side. But instead of doing that, he made an award. The award was then sent to the Court and, on an application to file the award, the plaintiff objected on the ground that he had a reasonable ground for not appearing before the arbitrator and gave some excuse for being absent.

The learned Judge said that that was not the proper way but that the plaintiff ought to have applied under the provisions of O. 9, R 9. Civil P. C. Of course, the learned Judge was clearly wrong in that view. The plaintiff having acted on the suggestion of the learned Judge and having made an application under O. 9, R. 9, Civil P. C., the learned Judge then set aside the award of the arbitrator and restored the matter to his own file. The learned Judge was obviously wrong in doing that. It is quite clear that if the arbitrator in this case had left undetermined the matters referred to him for arbitration under the provisions of Cl. 14, Sch. 2, Civil P. C., the Court might remit the award or any of the matters referred to arbitration for re consideration to the arbitrator. That being so, the learned Judge, when a proper case was made by the plaintiff to excuse his absence and when it was shown that the arbitrator had made his award without hearing any evidence at all, ought to have remitted the award or the matters referred to arbitration for re-consideration by the arbitrator. The proper order to make in this case is that

the order of the learned Munsif should be set aside and instead thereof, under the provisions of S. 115, Civil P. C., we should make an order remitting the award in the matter referred to arbitration for re-consideration by the same arbitrator on the ground that the award has left undetermined the matters referred to arbitration. There will be no order as to costs of this rule.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 248

FLETCHER AND SHAMSUL HUDA, JJ.

Sarada Prosad Roy—Defendant—Appellant.

v.

Ananda Moy Dutta and *others*—Respondents.

Appeal No. 1138 of 1916, Decided on 23rd April 1918, from the Appellate Decree of Sub. J. 1st Class, Burdwan, D/- 20th April 1916.

Estoppel—Party pleading estoppel put on notice—No case of estoppel.

Where the person pleading the estoppel is put on notice and can by reasonable diligence discover what the true facts were, there cannot be a case of estoppel. [P 218 C 2]

Dwarka Nath Chuckerbutty, Kalikinkar Chuckerbarty, Narendra Nath Choudhry, Bipin Behari Ghosh II, and *Urukramdas Chuckrabarty*—for Appellant.

Mohendro Nath Roy, Sarat Chunder Roy Chowdhury and *Jadu Nath Mandal*—for Respondents.

Fletcher, J.—This is an appeal by the defendant 1 against the judgment of the learned Subordinate Judge of Burdwan dated the 20th April 1916, reversing the decree of the Munsif of the same place. The plaintiff brought the suit for setting aside a conveyance and a sale under Regulation 8 of 1819, with respect to a 1 anna 8 gunda odd share in a Putni. The share in the Putni is said to have been sold by the defendants 8 and 9 on behalf of the plaintiff on the 10th Assar 1319, when he was a minor, the defendant No. 8 being the executor of the plaintiffs uncle's will and the defendent 9 being his mother. The fact found is that the plaintiff was not a minor at the time of the sale and, therefore, it is obvious that his mother could not sell the property on his behalf. The case is obviously a clear case of caveat emptor and the learned Judge has found that there was no case of representation by plaintiff that he had not reached the age of maiority. A point is made that, as regards the part of the property that was derived under the uncle's will, it is not shown that the defendant 8 as executor had not sold it for the purposes of administration. There are many answers to that. First of all, the uncle died many years before, much longer than prima facie there could be any outstanding debt against the estate of the uncle which could be recovered, having regard to the provisions of the Limitation Act. Therefore, prima facie the executor's power to sell for payment of any debt had gone. The other powers given by the will to the executor, as appears from the judgment of the lower appellate Court, came to an end when the plaintiff attained majority. The will has not been shown to us; but that appears from the judgment. If the defendant 1 had made the ordinary enquiries on inspecting the will, he would have found out that the powers given by the will to the executor terminated when the plaintiff attained majority. Therefore, there cannot be any case of estoppel when the defendant 1 was put on notice and he could have by reasonable diligence discovered what the true facts of the case were. On the findings of fact made by the learned Judge of the lower appellate Court it is quite clear that there is no estoppel against the plaintiff nor did he lose his title to the property conveyed by the defendants 8 and 9.

The other point is about what is called the astam sale, which seems to suggest that the defendant 1 knew perfectly well that the title that he had acquired was not a good one, because his view was that the title would be improved by a default and sale under the Putni regulation. One does not ordinarily want to improve his title. The title generally improves with age like many other things. But this person thought that it would be improved by being extinguished and that thereby a new title would come into operation. It is not shown that that sale was fraudulent—probably it was not. But what is shown is that the defendant 1 was never in a position to commit a default and have the property brought to sale, unless he had this improper purchase from the defendants 8 and 9. That being so, it is quite clear that, on ordinary principles, he cannot retain the property that he simply acquired by reason of being in a position that he had

no right to occupy. The case is a perfectly simple one having regard to the facts found by the lower appellate Court. The appeal fails and is dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 249

GREAVES, J.

Metropolitan Engineering Works—**Plaintiffs.**

v.

Walter Eugene Debrunner — **Defendant.**

Original Civil Suit No. 547 of 1917, Decided on 1st June 1917.

(a) Deed—Construction—Meaning of words "up to" or "until" certain day, illustrated.

The words "up to" or "until" a certain day in a contract may be construed as exclusive or inclusive of the day to which they are applied according to the context and subject-matter of the contract. [P 249 C 2]

Where in making an offer for the sale of a motor car the vendor said in a letter "please understand that my offer only holds good up to Wednesday next as the time I have is limited,"

Held: that having regard to the ordinary bearing of the words "up to" and to the well-known principle applicable to deeds and other documents that a document should in case of doubt and where all other rules of constructions fail to be construed most strongly against the grantor, the offer remained open during the whole of Wednesday and did not expire at midnight of Tuesday. [P 250 C 1,2]

(b) Evidence Act (1 of 1872), S. 91—Extrinsic evidence to explain document is not admissible.

No extrinsic evidence as to the sense in which the words were used by the promisor or understood by the promisee is admissible under S. 91. [P 249 C 2]

Langford James and *B. K. Ghose*—for Plaintiffs.

R. C. Banerjee—for Defendant.

Judgment.—The short point which arises for decision in this suit is the meaning of the words "up to Wednesday" contained in a letter, dated 12th May 1917, and addressed by the defendant to the plaintiff Company and whereby the defendant offered to sell to the plaintiff Company his Motor car in these words:

"Nevertheless I am quite willing to hand over the Motor car to you against a cheque of Rupees 3,120,—Rs. 3,000 being the costs of the car and Rs. 120 interest. As I intend advertising the car unless you wish to have it, please understand that my offer only holds good up to Wednesday next, as the time I have is limited."

It is not disputed that the plaintiff Company some time on Wednesday 16th May tendered Rs. 3,120 in Government currency notes to the defendant and asked for delivery of the car in accordance with the offer contained in the letter of 12th May. The defendant, however, refused the tender contending that his offer expired at midnight on Tuesday, 15th May, and that the phrase "up to Wednesday" was exclusive and not inclusive of Wednesday. The defendant claimed to give evidence of his meaning and intention when he wrote the letter and of the sense in which the plaintiff Company understood the offer, but I refused to admit this evidence having regard to S. 91, Evidence Act. I have not been able to find, nor have counsel who appeared before me, any authority in which the meaning and effect of the word "up to" has been judicially considered; but counsel have referred me to various authorities in which the meaning of the word "until," which seems to me to be synonymous with "up to," has been considered and discussed. These authorities are collected in the late Mr. Stroud's Judicial Dictionary, Edn. 2, Vol. 3, 2142, under the heading "until," and it appears from *Rex* v. *Stevens* (1) that the word "until" may be construed either as exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. It appears from the cases cited in Mr. Stroud's book that in a memorandum enlarging the time within which an award may be made, "until" will generally include the whole of the day named, that where a defendant is given "till" a certain day to plead, judgment signed for want of a plea on that day was bad as the defendant might have delivered a plea during such day. In *Bellhouse* v *Mellor* (2) a bankrupt was granted protection until 29th July from all process, and it was held that the protection extended to the whole of 29th July. In *Isaacs* v. *Royal Insurance Co.* (3) goods were insured from 14th February 1868 until 14th August 1868, and it was held that under the terms of the policy the whole of 14th August was protected.

In the Annual Practice for 1917 at p. 1202 in the notes to R. 1 of Rules of the Supreme Court, O. 54, which deals with time under the heading "General Rule of Computation" these words occur:—"all periods of time under Rules of Court in the Supreme Court (including Bank-

1. (1804) 5 East 244=102 E R 1063.
2. (1859) 4 H & N 116=28 L J Ex 141.
3. (1870) 5 Ex 296=39 L J Ex 189.

ruptcy)" and in the County Court are so computed that the day "from" or "after" which the time is fixed is excluded from such computation; and the day on which the act is to be done or "until" which some act is prohibited or protection afforded, is included therein (Encyclopaedia of the Laws of England, Edn. 2, tit. "Time) and see p. 1203 of the Annual Practice under the heading "until." There is an Irish decision to the contrary effect in *Rogers* v. *Davis* (4), in which a plea of confession had been given with stay of execution until 1st May next, and on that day execution was issued. The three Judges who formed the Court held that the writ was properly issued, Burton, J., stating that the word until did not mean after. Now these authorities do not appear to me to be conclusive of the case, but I think they show a general tendency of inclusion rather than exclusion of the day up to or until which something is to be done; but of course the context and subject-matter have to be taken into account in determining whether the word "up to" is to be taken as exclusive or inclusive of the day to which it is applied. I cannot find anything in the context here which really assists in construing the words. It is true that the defendant states that his time is limited, but his anxiety on this score is not so much to limit the period during which the offer is to remain open, as to give him time to advertise the car in the event of his offer not being accepted, that is to say, his dominating motive is, I should say, not so much to limit the duration of the offer as to have time to dispose of the car elsewhere if his offer is not accepted.

The result is that I have to fall back on the words themselves, and I think that the ordinary meaning which the ordinary person would attach to them is that the offer is to be open during the whole of Wednesday and does not expire at midnight on Tuesday. Having regard then, 1st, to what, I think, is the ordinary meaning of the words, 2nd, to the manner in which similar expressions have ordinarily and generally been construed, and 3rdly, to the fact that I think the well-known principle applicable to deeds and I think to other documents that the document should in case of doubt, and where all other rules of construction fail, be construed most strongly against the grantor, Co. Litt. 183 a, is applicable here, I am of opinion that upon the true construction of the latter and the words "up to Wednesday" the offer remained open until midnight on Wednesday. The car has, I understand, been sold, and, accordingly the defendant, after deducting the sum of Rs. 3,120 from the sale-proceeds (less the sum of Rs. 583-7-0 due from him to the plaintiff Company for repairs to the car) and the commission on sale of the car, will pay over the balance to the plaintiff Company. And the defendant must pay the plaintiff Company's costs, to be taxed on scale No. 2.

V.B./R.K, *Order accordingly.*

4. (1845) 8 Ir L R 299.

A. I. R. 1918 Calcutta 250

FLETCHER AND NEWBOULD, JJ.

Halodhar Malo and *others*—Appellants.

v.

Kali Prosonno Basu Roy Choudhury and *others*—Respondents.

Appeals Nos. 3035 of 1914 and 65 to 70 of 1915, Decided on 31st July 1917, from appellate decrees of Sub-Judge, First Court, Dacca, D/- 10th July 1914.

Practice—New plea—Point not raised in lower Courts cannot be raised in second appeal.

Plaintiffs claimed certain land as a gradual accession to their land on the north bank of the river. The defendants alleged that it was an island sprung up in the river. It having been agreed upon between both parties that the case must be decided on whether the Court believed the plaintiffs' case of gradual accession or the defendants' case of the land being an island, the lower appellate Court found that the land in suit was an island and dismissed the plaintiffs' suit:

Held, (1) that it was not open to the plaintiffs to urge in second appeal a re-trial on an issue as to whether the channel between the island and the plaintiffs' land was fordable; and [P 125 C 1]

(2) that the lower appellate Court was not bound to go outside the points pressed before it and to decide a point not raised in the issues. [P 251 C 2]

S. R. Das and *Troylokya Nath Ghose*—for Appellants.

Surendra Nath Guha and *Hem Chandra Sen*—for Respondents.

Appeal No. 3035 *of* 1914.

Fletcher, J.—This is an appeal by the plaintiffs 10 and 11 against a decision of the learned Subordinate Judge of Dacca, 10th July 1914, affirming the decision of the Munsif at Munshigunge. The suit was brought with reference to a chur which had formed in what is known as the Bahar Khal. The plaintiffs are the

tenants of the owners of the land on the north bank of the river and they claimed the land as being a gradual accession to the land on the north bank of the river. The defendants said that it was an island that had sprung up in the river and, therefore, did not belong to the plaintiffs. The plaintiffs' case about the re formation in situ has now been found to be untrue.

The only question is whether in this case the, learned Judge, having found that the chur was, in fact, an island which formed in this river Bahar Khal ought to have proceeded to enquire whether the river was or was not fordable at any season of the year. This point was not raised in the issues settled between the parties nor was it mentioned in the statements of the pleaders as to what were the respective cases of the parties on which they invited the Court to decide. It is no use coming up in second appeal and raising this question as to whether the learned Judge of the lower appellate Court ought to have decided whether this dova, which was a piece of water lying between the island sprung up in the mid-stream and the main land, was or was not fordable, if the parties agreed that the case must be decided on whether the Court believed this case of gradual accession to the main land as set up by the plaintiffs or whether the Court believed the case of the defendants that it was an island sprung up in the mid-stream and the subsequent action of the river deposited silt in the channel between the island and the mainland and rendered the channel not fordable. It is quite clear on the statement made by the learned Judge in his judgment that it was agreed or, as the learned Judge stated, that it was conceded on the plaintiffs' side that, if it was found that the chur was formed in the mid stream leaving a dova to the north in 1314 as contended by the defendants, then the plaintiffs were out of Court. It is quite clear that the plaintiffs recognized that they had got to stand or fall on whether they were able to prove or not this case of gradual accession to the mainland which they set up in their plaint, and attempted to prove at the trial. The plaintiffs' advisers before the learned Judge conceded—and I have no doubt rightly conceded—that, if that statement was disbelieved and the defendants' statement as to the island having sprung up in the mid-stream was accepted, then the question as to whether the channel was or was not fordable at any season of the year was a matter which it was not necessary to enter into in this trial. It is no use saying that the plaintiffs' legal advisers should not have conceded that it would not be a material fact in the event of the learned Judge disbelieving their evidence and that this Court ought to direct a re-trial on this matter, although there is the express consent of the plaintiffs' advisers. I think that the judgment of the learned Subordinate Judge was correct on the facts on which his opinion was invited by the parties and that the learned Judge, in view of the statements of the parties, was not bound to go outside the points pressed before him and decide a point that was not raised in the issues and which the parties considered was not necessary for the learned Judge to decide. In my opinion, the present appeal fails and must be dismissed with costs.

Newbould, J.—I agree.

Appeals Nos. 65 to 70 of 1915.

These appeals will be governed by the judgment just delivered in Second Appeal No. 3035 of 1914. They are also dismissed with costs.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 251

FLETCHER AND SMITHER, JJ.

Ram Nath Ojah—Plaintiff—Appellant

v.

Natabar Maiti and *others*—Defendants—Respondents.

Appeal No. 2156 of 1916, Decided on 1st May 1918, from the appellate decree of Additional Dist. Judge, Midnapur, D/- 19th June 1916

Appeal—Judgment in—Suit for confirmation of possession and declaration of possession—Question of title and possession not properly considered by appellate Court—Judgment is not in accordance with law.

Where in a suit for confirmation of possession on declaration of title, the trial Court goes both into the questions of possession and title, but lower appellate Court dismissed the appeal without considering the question of possession, holding that the plaintiff's title was not proved, the appellate judgment cannot stand as it is founded on a very partial view of the case without really going into the question either of possession or of title. [P 252 C 1]

Jyotish Chander Hazra—for Appellant.

Sarada Charan Maiti—for Respondents.

J. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

Judgment —This is an appeal by the plaintiff against the judgment of the learned Additonal District Judge of Midnapur, dated the 19th June 1916, affirming the decision of the Munsif of Contai. The plaintiff sued for confirmation of possession on declaration of title. The dispute really is as to whether this land forms a portion of the plaintiff's nispe or the defendant's nispe. The first Court went into the matter both of possession and on the question of title, and if those matters had been considered by the learned Judge of the lower appellate Court, there would not have been much to say against his judgment. But what the learned Judge has done in this case is that he has neglected the question of possession altogether. He has not come to any conclusion, one way or the other, as to who is in possession of the land, and on the question of title he says that it is not proved, solely on the ground that the appellant's pleader asked for a local enquiry to establish the identity of the land in dispute within certain days. A judgment founded on those particulars without really going into the question either of possession or of title is one that cannot stand. The decree of the lower appellate Court must accordingly be set aside and the case sent back to that Court for the appeal being heard in a proper manner. Costs will abide the result of the rehearing by the learned Judge of the lower appellate Court.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 252 (1)

FLETCHER AND WALMSLEY, JJ.

Harimohon Roy — Plaintiff — Petitioner.

v.

Khalil Bepary and *others* — Defendants—Opposite Parties.

Civil Rule No. 337 of 1918, Decided on 9th August 1918, against order of Munsif, 2nd Court, Nabinagore.

Specific Relief Act (1877), S. 9—Plaintiff proving his possession and dispossession is entitled to be restored to possession irrespective of question of title.

In a suit under the provisions of S. 9 the plaintiff on proving his possession and dispossession as mentioned in the section is entitled to be restored to possession, irrespective of whether his possession was with or without title. [P 252 C 2]

Gopal Chandra Das—for Petitioner.

Judgment —This Rule was obtained by the plaintiff calling upon the opposite party to show cause why the judgment and decree, complained of should not be set aside. No one shows cause at the hearing before us. The plaintiff brought the suit to recover possession under S. 9, Specific Relief Act The Court below found that the plaintiff was in possession of the land. Therefore, under the terms of the Act, he was entitled to be restored to possession. But the Munsif, finding the plaintiff to be in possession without any title, dismissed the suit. The suit being one under the provisions of S. 9, Specific Relief Act, the plaintiff, on proving his possession and dispossession as mentioned in the section, was entitled to be restored to possession. The judgment and decree passed by the learned Munsif must be set aside and in lieu thereof a decree must be passed directing the plaintiff to be restored to possession of the suit land. The petitioner is entitled to his costs in this Rule. We assess the hearing fee at one gold mohur.

V.B./R.K. *Rule made absolute.*

A I. R. 1918 Calcutta 252 (2)

FLETCHER AND WALMSLEY, JJ.

Protap Chundra Dutt—Petitioner.

v.

Abhimanini Surini and *another* —Opposite Parties.

Civil Rule No. 367 of 1918, Decided on 19th August 1918, against order of Munsif, Bolpur, in Sm. C. C. Suit No. 894 of 1917.

(a) Civil P. C. (5 of 1908), O 20, R. 4—Judgment of Court of Small Causes— Omission to give reasons for decision — High Court will not interfere.

Where in accordance with the provisions of O. 20, R. 4, Civil P. C, the judgment of a Court of Small Causes contains the points for determination and the judge's decision thereon, but omits to give reasons for the decision, the High Court will not interfere with it. [P 253 C 1]

(b) Practice— Precedents cannot override statute.

No decision of any Court can get over, add to or alter the clear words of a statute. [P 253 C 1]

Manmothonath Roy—for Petitioner.

Fletcher, J.—This is a Rule calling upon the opposite party to show cause why the judgment and decree complained of should not be set aside. What happened was this: the plaintiff brought a suit against the defendants in the Small Cause Court for the price of paddy with interest. The learned Judge's judgment consists of the following:

"The points for decision are: (1) Whether defendants borrowed the paddy in question? (2) Whether plaintiff is entitled to the interest claimed? The first point is found in the negative. So the second point does not arise for determination. Dismissed with costs."

The plaintiff complained that he is entitled to a judgment setting forth the reasons which moved the learned Judge to come to the conclusion he arrived at. That turns purely on the construction of the Statute. O. 20, R. 4, sub-R. (1), says,

"judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon."

That there is a difference between "the decision thereon" and "the reasons for such decision" is obvious from the terms of sub R. (2). The plaintiff has therefore, got to establish that this judgment is not a judgment in accordance with O. 20, R. 4, Sub-R. (1), Civil P. C. Prima facie it is because the judgment sets out the points for determination and what was decided thereon. The case, however, the plaintiff says, is covered by the decision of the Allahabad High Court in *Malik Rahmat* v. *Shiva Prasad* (1). But no decision of any Court can get over the clear words of the section and in so far as that decision purported to decide that in all cases the Small Cause Court must give its reasons for the decision, that was clearly in excess of what was stated in the Statute. One cannot add to or alter the clear words of the Act by judicial decisions. The Bombay case referred to namely, the case of *Bai Jasoda* v. *Bamansha Mancherji* (2), is really an authority the other way because the judgment of the Small Cause Court did not state, as pointed out by Fulton, J., the points for determination and the decision thereon. In that view of course the judgment did not comply with the terms of S. 203, Civil P. C. then in force. It seems to me that in this case we are not entitled to interfere, having regard to the terms of O. 20, R. 4, sub-R. (1), the learned Small Cause Court Judge having properly set out the points for decision and his decision thereon. The present Rule, therefore fails and is discharged. No one appearing on the other side, we make no order as to costs

Walmsley, J.— I agree.

V.B./R.K. *Rule discharged.*

1. (1891) 13 All 533.
2 (1899) 23 Bom 334.

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RICHARDSON AND BEACHCROFT, JJ.

Satish Chandra Sarkar and *others* — Defendants—Appellants.

v.

Brojo Gopal Dutta and *others*— Plaintiffs and Defendants—Respondents.

Appeal No. 1858 of 1915, Decided on 18th January of 1918 from appellate decree Sub Judge, 2nd Court, Burdwan, D/- 30th June 1915.

(a) Benamidar—Decree against, binds beneficial owner—Execution sale of his property does not so bind him—He can be met by plea of estoppel by benamidar.

Although the beneficial owner may be bound by the result of a money suit against his benamidar whom he has set up to represent him, he is necessarily bound by the sale of his property in execution of a decree passed against the benamidar. Nevertheless if the beneficial owner subsequently seeks to recover the property on the ground that his interest has not been affected by the execution sale, he may be met by a defence on the part of the purchaser, based on the doctrine of estoppel. [P 254 C 2]

(b) Ejectment Suit—Plaintiff must rely on strength of his own title.

In a suit for ejectment the plaintiff must rely on the strength of his own title and not on the weakness of his adversary's title [P 254 C 2]

(c) Limitation Act (1908), Art. 142—Symbolical possession in execution does not avail against actual party to suit.

In a suit for recovery of possession of land on declaration of title, if the plaintiff alleges in his plaint a previous possession and a subsequent dispossession, the burden is on him to prove possession by himself or his predecessor-in-interest within 12 years of the date of the suit. Symbolical possession in execution of a decree is of no avail except against the actual party to the suit or to the proceedings in execution: 6 *C. L.J.* 472, *Foll.* [P 255 C 1]

Dwarka Nath Mitter and *Rishindranath Sarkar*—for Appellants.

Ram Chandra Majumdar and *Nagendra Nath Ghosh*—for Respondents.

Richardson, J.— The suit out of which this appeal arises was a suit for a half share of a holding comprising 12 bighas odd, which stood originally in the name of one Jagannath Mitra. The last male holder of the entirety was Ramcharan Mitra. On his death the holding devolved as to half on his son Bepin Behary and as to the other half on his son Karunamoy. The sequence of the subsequent events and transactions is as follows:

On 30th Agrahan 1291 (November 1884) Bepin Behary having died, his widow Giribala, who succeeded him, sold his or her half, share to the father of defendant 1 and his cosharers, defendants 4 and 5. As to this half there is now no dispute that

it is in the possession of those defendants. As to the other half share which plaintiffs seek to recover, on Karunamoy's death unmarried it went to his mother Bimola (Ramcharan's widow) and on her death was inherited by Asutosh Haldar, her grandson by a daughter named Niroda. Asutosh Haldar was then a minor and for some reason Niroda caused the share to be entered in zamindar's books in the name of Biraj Mohini, her widowed sister. It is common ground that Biraj Mohini was a mere benamidar. On 4th Falgun 1301 Nirodaon behalf of her son sold the share to Mihir, the brother of defendant 1 and the father of defendants 2 and 3. In 1890 Niroda or her son through her brought a suit against Mihir to recover the share. The suit was successful and in execution of the decree, symbolical possession was given to Asutosh Haldar, as against Mihir, on 14th October 1898. Meanwhile in 1897 some of the landlords in respect of their fractional share brought a suit for rent against Biraj Mohini, and obtained a decree against her. It is not disputed that this decree was a money-decree and not a decree in execution of which the holding itself could be sold. Nagendra Nath Pal therefore the purchaser at the Court sale which followed, purchased only the right, title and interest of the benamidar, Biraj Mohini. On 20th Baisakh 1308 (April 1901) Asutosh Haldar, then apparently of age, executed a release of his rights in favour of Nagendra Nath Pal. This document was registered but it is clear that the registration was void, and accordingly the document is not admissible in evidence.

On 20th Sraban 1308 (5th August 1901) Nagendra obtained symbolical possession (against Biraj Mohini) of the share he had purchased at the execution sale. On 23rd Joista 1309 (July 1902), the plaintiff purchased Nagendra's rights and on 9th August 1910 instituted the present suit under colour of the title so obtained. He was successful in the Courts below and the principal appellant before us is defendant 1. Defendants 2 and 3, the sons of Mihir, and defendants 4 and 5 appear in the record as respondents, but have taken no active part. The contest is between defendant 1 and the plaintiff. The case for defendant 1 is, firstly, that the plaintiff vendor purchased merely the right, title and interest of a benamidar and that the title which he conveyed to the plaintiff is therefore worthless. Secondly, while admitting that Mihir's purchase of Rs. 130 was made on his behalf as well as on behalf of Mihir himself, defendant 1 asserts that before the suit against Mihir was instituted, Mihir had sold his rights and left the landland that he, defendant 1, has since been in possession of the disputed share adversely to the title claimed by the plaintiff through Asutosh Haldar and Nagendra. He therefore pleads that the suit is barred by limitation. On the question of title, the learned pleader for the plaintiff relied on *Rash Behary Sarkar* v. *Mahendra Nath Ghose* (1). The position that the beneficial owner may be bound by the result of a suit against the benamidar whom he has set to represent him is not in question. It may be that Asutosh Haldar was bound by the result of the rent suit, but as the decree made therein was a money decree he was not necessarily bound by the sale of his property in execution. In such a case the rule applicable appears to be that stated in *Baburam Mandar* v. *Ram Sahai Sahoo* (2):

"No doubt, the sale has taken place in execution of a decree for money. Prima facie, all that has passed in execution is the right, title and interest of the judgment-debtor. But nevertheless if the beneficial owner subsequently seeks to recover the property on the ground that his interest has not been affected by the execution sale, he may be met, and under certain circumstances successfully met, by a defence on the part of the purchaser, based on the doctrine of estoppeal."

Baburam Mandar v. *Ram Sahai Sahoo* (2). In the present case there is nothing to show that what was sold at the execution sale was anything more than the benami title. Nor is Asutosh Haldar or his legal representative a party to the suit. The plaintiff cannot say that his title is admitted in the suit by the beneficial owner. The Courts below have not found, nor apparently were they asked to find, that the plaintiff's vendor was a bona fide purchaser for value without notice. There may therefore be a jus tertis outstanding and as in a suit for ejectment, the plaintiff must rely on the strength of his own title and not on the weakness of his adversary's title. There may be at the lowest a doubt whether the plaintiff's title is established. It is not however necessary actually to determine this question because, in my opinion, the suit is barred by limitation. As the

1. A I R 1914 Cal 352=21 I C 979.
2. (1902) 8 C L J 305.

plaintiff alleges in his plaint, a previous possession of the disputed share and a subsequent dispossession, the burden is on him to prove possession by himself or his predecessor-in-interest within 12 years of the date of the suit. For this purpose, the plaintiff relies on the symbolical possession obtained by Asutosh Haldar on 14th October 1898. But that possession was obtained as against Mihir. It is said that the decree against Mihir bound defendant 1. That may be, but symbolical possession is of no avail except against the actual party to the suit or the proceedings in execution: *Mir Wazir-uddin* v. *Lala Deoki Nandan* (3). In a suit for ejectment all the parties in actual possession whom it is desired to eject should be made defendants. Defendant 1 was not made a defendant and constructive possession as against Mihir is of no avail against him. In my opinion therefore, the appeal succeeds on the ground of limitation and the suit should be dismissed with costs throughout.

Beachcroft, J.—I agree that the suit is barred by limitation.

V.B./R K. *Appeal allowed.*

3. (1907) 6 C L J 472.

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CHITTY AND BEACHCROFT, JJ.

Krishna Chandra Dutta Roy and *another*—Defendants—Appellants.

v.

Hemaja Sankar Nandi Mozumdar and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 536 of 1914, Decided on 23rd July 1917, from Original Decree of Sub-Judge, Second Court, Mymensingh, D/- 4th June 1914.

*** Minor—Compromise effected by guardian in consideration of settlement of disputed claim is not binding on minor, unless claim is proved to be honest and in good faith—Claim under alleged Will can form no basis of consideration for compromise, where Will is not genuine.**

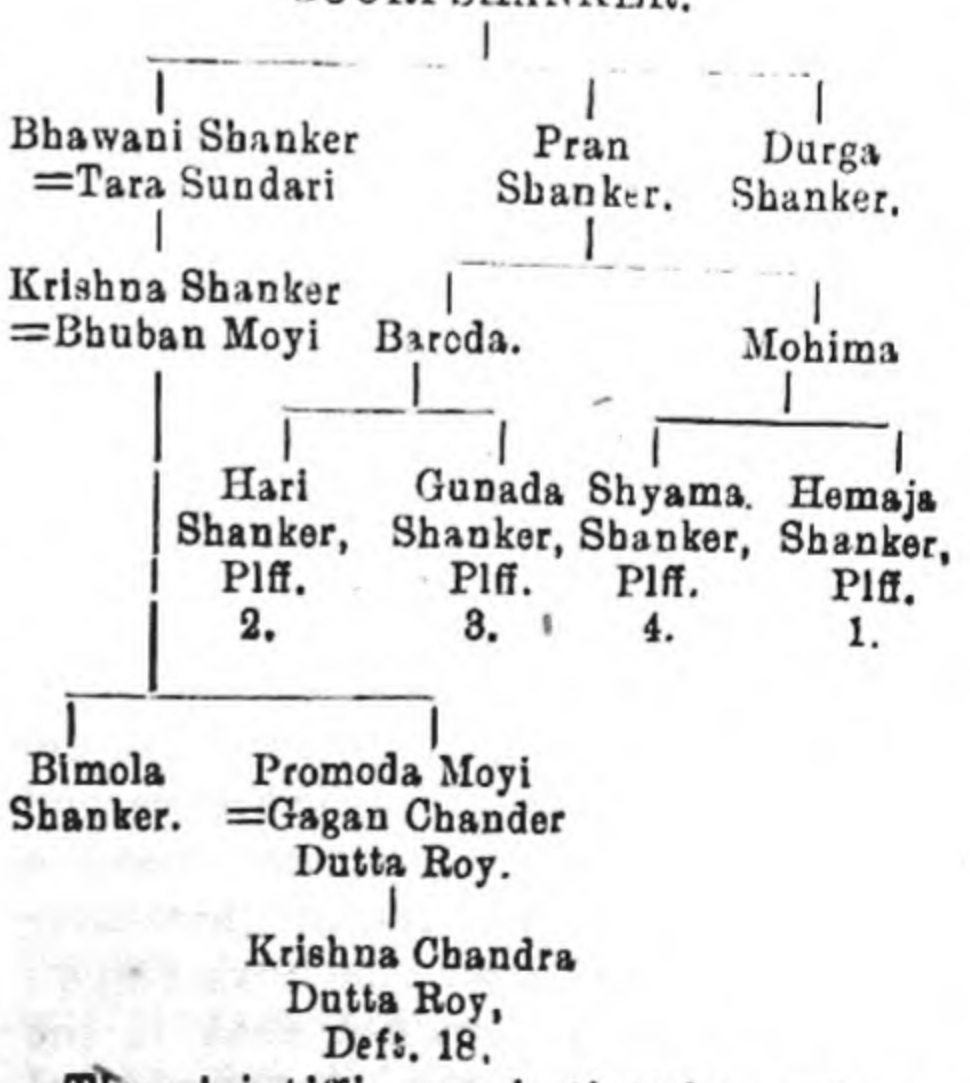
A mimanshapatra (deed of compromise) executed by a father on behalf of his minor son, by which the interest of the minor in an inherited estate is given up in consideration of the other party giving up a portion of their claim under an alleged will, is not binding upon the minor, unless it is proved by the other party that there was in fact such a will and that under that will they had a claim which was made honestly and in good faith, though it is not incumbent upon them to prove the will in solemn form after a long distance of time. [P 256 C 1]

The position of a minor son is different from the position of the father who executes a mimanshapatra on his behalf; for though the father might not be able to avoid a mimanshapatra which he had executed for himself, the minor through his guardian can avoid a mimanshapatra executed on his behalf if his interest is not properly protected by his father in executing it. [P 259 C 2; P 260 C 1]

Jogesh Chandra Roy and *Sasankajiban Roy*—for Appellants.

Dwarkanath Chuckerbutty, *Jatindra Mohan Choudhury* and *Khitish Chandra Neogy*—for Respondents.

Chitty, J.- This appeal is preferred by defendant 18 and arises out of a partition suit brought by Hemaja Sanker Nandi Mozumdar and others against a number of defendants for partition of a taluk known as Tilak Nandi Ram Mozumdar No. 2624 with a Sudder Jama of Rs. 27-12-0. Out of the same case arose Appeal No. 328 of 1914 which we decided last week. The dispute in the present appeal is between Krishna Chandra Dutta Roy—defendant 18—the minor son of Jagan Chandra Dutta Roy and his wife Promoda Moyi on the one side and the plaintiffs who are the descendants of Pran Shanker on the other. The relationship of the parties will appear from the following genealogical table. There is no dispute as to the share of the plaintiffs in this estate which they inherited from their ancestor Pran Shanker. They claim, however, in addition to that 5-annas 10-gundas share a portion of another 5-annas 10-gundas share which in ordinary course of inheritance would have devolved from Bimola Shanker upon his sister's son, the present appellant.



The plaintiff's case is that by a mimanshapatra, dated 28th March 1906, Gagan

Chandra Dutta Roy acting as the natural guardian of his minor son relinquished in favour of the plaintiffs a part of the minors's share in the estate in consideration of the plaintiffs not pressing the claim which they had to the whole of that share under an alleged will of Krishna Shanker Nandi Mozumdar. The only question before us is whether that relinquishment is binding on the minor appellant. The learned Subordinate Judge has found that there was such a will as the plaintiff's allege, that the plaintiffs claim under it was honest and bona fide and that it accordingly formed a good consideration for the relinquishment.

The following facts are not in dispute. Krishna Shanker Nandi Mozumdar died on 10th March 1902, leaving him surivving his widow Bhuban Moyi, an adopted son Bimola Shanker, and a daughter Promoda Moyi, the mother of the appellant. Bhuban Moyi died about a year after her husband, sometime in 1309. Bimola Shanker at the age of 11 or 12 died on 11th March 1906. At that time the present appellant was only two or three months old. He was the next heir of his maternal grandfather. It was not till after Bimola Shanker's death that anything was heard of this alleged will, but as soon as he had died the plaintiffs came forward with their claim. We have been taken through the evidence of both parties and have examined it minutely, and I think that the only possible conclusion on that evidence is that there was no such bona fide claim as the plaintiffs would have us believe. It was argued that the plaintiffs could not at this distance of time be expected to prove this will on solemn form. I do not think that any such obligation lies upon them. It was, however, necessary for them to show that there was a will and that upon that will they had a claim which was made honestly and in good faith.

As to the contents of the mimanshapatra there can, of course, be no dispute. It was admittedly executed by Gagan at the time and under the circumstances alleged. The recital of that deed is important and runs as follows: 'Now we the first party" (that is the plaintiffs) "contend that the said Krishna Shanker Nandi Mozumdar deceased executed a will on 18th Falgun 1308 and thereby provided that in the event of his adopted son dying unmarried the properties left by him should devolve in equal shares upon us, the Nandi Mozumdars, and that, therefore, the properties left by him have devolved upon us in equal shares and we claim those properties accordingly and I, Gagan Chandra Dutta Roy, father of the second party," (i. e., the appellant before us) "urge on his behalf that as the aforesaid will is not found it is likely that he" (meaning Krishna Shanker) "set it aside and destroyed it and that, therefore, the second party Krishna Chandra Dutt Roy is entitled to succeed to those properties as the heir of his maternal uncle, the said Bimola Shanker Nandi Mozumdar deceased." . . . "It is apprehended that if the dispute continues for a long time and if litigation be carried up to the highest Court, both the parties will suffer much loss and injury and the properties which form subject-matter of the dispute will go to rack and ruin. Moreover, no one amongst the co-villagers and relations of the late Krishna Shanker Nandi Mozumdar knows of the destruction or cancellation of his will aforesaid and the said will was executed in the presence of many respectable gentlemen whose names are given in Sch. (Ka) and they attested it as witnesses, and the will after being read out in their presence was signed by the testator and was then signed by them in the presence of the testator as attesting witnesses. There is no certainty as to what the result will be if there be any litigation carried on in that connection and both the parties are nearly related to each other. So we both the parties, acting through the arbitration of friends, relations, well-wishers and lawyers and with their advice, settle the matter and the dispute amicably in the way stated below and execute this deed in this town of Nasariabad while in enjoyment of sound sense and composed mind of our accord and free will." Gagan Chandra Dutta Roy now says that he was threatened by Kali Kumar Chowdhury and thus induced to give up his son's property by the mimanshapatra.

In 1909, the mother of the appellant was appointed the guardian of his person and property and she represented him in this partition suit and is representing him in this appeal. The question appears to be not between Gagan Chandra Dutta Roy and the plaintiffs but between the plaintiffs and the minor. There is a considerable difference between the two as

Gagan Chandra might not be able as a man of full age, and presumbaly of intelligence, to go behind his deliberate deed. It by no means follows, however, that the minor son would be bound by his father's action. Several cases were cited to us by the learned pleader for the plaintiff-respondents with regard to family settlements. Those cases do not, however, assist us much in coming to a conclusion in the present case. There is no doubt as to law. The question is one entirely of fact. We were referred by him to the case of *Miles* v. *New Zealand Alford Estate Co.* (1). That case is certainly useful as showing what the law is in such matters. Cotton, L. J., said :

"What I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good consideration for a contract; and if that is the law, what we really have to now consider is whether in the present case there is any evidence on which the Court ought to find that there was a serious claim in fact made, and whether a contract to abandon that claim was the consideration for this letter of guarantee."

He further quoted the dictum of Lord Blackburn, in *Cook* v. *Wright* (2), to this effect :

"We agree that unless there was a reasonable claim on the one side, which it was bona fide intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise."

Bowen, L. J., whose remarks alone the learned pleader quoted, also laid down the law to the same effect. He said :

"We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men. But an attempt was made to show that the forbearance was worth nothing. Of course forbearance of a non-existing claim would not be forbearance at all."

He then went on to point out that the mere fact that the success of the claim might be unlikly would not necessarily indicate that it was not a bona fide claim. Fry, L. J., also agreed in this statement of the law. In that case the learned Judges differed in their view as to whether the claim there was an honest and bona fide claim or not, Cotton, L. J., and Fry, L. J., thinking that it was not, while Bowen, L. J., took the opposite opinion. Applying that test to the facts before us, what do we find ? In this case plaintiff 1, Hemaja Shanker Nandi Mozumdar, and 5 witnesses have given evidence on the plaintiffs' side. Against them Gagan Chandra Dutta Roy has been called; and his brother Shib Chandra Dutta Roy, one Haranath Ghose, a servant of Krishna Shanker, and Promeda Moyi have also given evi lence. The learned Subordinate Judge has found that there was in fact a will as alleged by the plaintiffs, or at any rate, that the plaintiffs put forward an honest claim bona fide believing that Krishna Shanker Nandi Mazumdar had executed such a will. The learned Subordinate Judge has certainly in two instances found as facts proved what I have been unable to discover in the evidence as recorded. He says that Gagan admitted before the witness Babu Srinath Roy, a pleader of that Court, that a will was executed, but that it was destroyed by the testator. Now a perusal of the evidence of Babu Srinath Roy shows that Gagan did nothing of the kind, on the contrary the witness distrinctly stated that Gagan denied the will. In cross-examination he stated that he heard at a meeting prior to the execution of the mimanshapatra that the will was annulled.

When asked in re-examination, who told him this, he said that it was Gagan Roy. What he meant by the expression "the will was annulled" is not clear. The Judge has taken it as equivalent to destruction by the testator; but that does not, in my opinion, follow. The second error of fact into which the learned Subordinate Judge appears to have fallen is when he states that Shyama Charan Babu, another pleader, advised that it was possible to obtain probate of a copy in the absence of the original will, and that, in consequence, an application for probate was drafted. It does not appear from the evidence of Shyama Charan Babu or indeed from any of the other witnesses that he even gave such advice. He was asked, it is true, but what his advice was has not been elicited. All that he says is "everything was settled," whatever that may mean. He does not even recollect that he prepared any draft of the application for probate. The story of the plaintiffs, as they now put it before the Court, is that soon after the death of Bimola Shanker, Hemaja Shanker came to Mymensingh with a view to applying for probate of this will. We are told that there was a draft or a copy of that

1. (1886) 32 Ch D 266=55 L J Ch 801.
2. (1861) 1 B & S 559=30 L J Q B 321.

will which was shown to Shyama Charan Babu, that an attempt was made to take out probate of the will and that an application for that purpose was drawn up. Hemaja states that probably Shyama Charan Babu drew it up, though the pleader himself does not remember having done so. Then began the negotiations for an amicable settlement between the plaintiff and Gagan Chandra, at which at least three pleaders and several other persons assisted These negotiations are said to have gone on for eight or ten days, when ultimately Gagan, on behalf of his minor son agreed to execute the mimansha patra upon the plaintiff's giving up any claim which they might have under the alleged will.

The plaintiffs' story appears to me to be full of the most suspicious circumstances In the first place, Krishna Shanker had died just four years before his son Bimola Shanker. In those four years nothing had been heard of any will executed by him. Now Bimola appears to have been very sickly. It is difficult to believe that if a will to the effect alleged really existed, the plaintiffs would not have taken prompt measures to establish their title under it as reversioners in case of Bimola's dying childless. The evidence so far as it goes, of Krishna Shankr's state of health immediately before his death throws very grave doubt on his capacity, both physical and mental, to execute a will. He was suffering, as appears from the evidence of Promoda Moyi and Hara Nath Ghose, from diabetes. He was troubled also with some cerebral affection, with the result that he was sometimes unconscious and sometimes delirious. He appears to have been in this state more or less for at least a month before his death. He died on 28th Falgun 1308 (10th March 1902) and the will is said to have been executed on 18th. It is more than doubtful whether he was in a condition to execute a will. Directly the heir dies the plaintiffs come forward with an alleged will, by which Promoda Moyi and her son are to be disinherited in favour of the cousins of the deceased. No one has ever seen this will.

In the mimanshapatra it is stated that the will was attested by no less than 18 persons whose names are given in Sch. (Ka) to that document. It is not suggested that all these 18 persons have died or were not available for the purpose of giving evidence in this case. The only one who has been spoken of by any witness is Chandra Kishore Sarcar, who, no doubt, is dead. No one, however, of the remaining 17 witnesses was called before the Court to state that, as a fact, Krishna Shanker executed a will and that they attested it. The plaintiffs are said to have come to Mymensingh with a draft or copy of the will. The plaintiff Hemaja Shanker is a medical man and presumably a person of ordinary intelligence. He has not thought fit to state to the Court whether the document which he brought was a draft or a copy, still less has he vouchsafed to give the Court any explanation why the original will, if it existed, was not produced, whether it had been destroyed or lost. This mysterious draft or copy is not forthcoming. Some of the witnesses speak to having seen it but no one says whether it was a copy or a draft. There is a considerable difference, of course, between the two. A draft does not necessarily imply execution by the testator. A copy, if it were a correct copy, would reproduce the whole will, including the names of the testator and the witnesses. On a copy probate might be obtained if there was satisfactory evidence of the loss or destruction of the will itself, not so of the draft. The witnesses state vaguely that an application for probate was drafted.

There was no statement, who was the executor named in this will, or, if no executor was named, whether the application was really for letters of administration with the will annexed. This must have been within the knowledge of the plaintiff Hemaja Shanker. No draft or copy of this alleged application for probate has been produced. It is not stated whether it is in existence or not. It is impossible that these persons—the plaintiffs, the three pleadders, the Am Mukhtear Lakshan Chandra Laha and Kali Kumar Chowdhury, can all have forgotten all the matters of importance, which they should have spoken to in this connection. The story as it is now put forward by the plaintiff is entirely inconsistent with the evidence which Hari Shanker Nandi Mozumdar, plaintiff 2, gave on 30th May 1910 in Suit No. 2341 of 1909. There he stated that the will was with his jethi, i. e. Bhuban Moyi, that after Bimola's

death they wanted to take out probate of the will and searched for it but it could not be found, and that Hemaja then attempted to take out probate on verbal proof of the will. He admitted then that he had never seen the will and that they had got a draft of the will either from Ambica Charan Roy of Banagram or Iswar Roy of their own village when they made a search for it. "The draft," he said, "may be with us." Then he said, "probably it is not with us now." That presumably would be the draft which was taken to Mymensingh for the purpose of the application for probate. The witness Hara Nath Ghose, who was called on behalf of defendant 18, but who appears to have been gained over to the plaintiffs' side, gave a version as to the execution of the will which is also wholly inconsistent with the plaintiffs' case. In cross-examination by the plaintiffs he stated :

"I have heard Krishna Shanker Mozumdar executed a will. I heard of it before the death of Krishna Shanker Mozumdar, probably 5 or 6 days before his death. I heard it from Chandra Sarkar. He got a written piece of paper and asked me to raise Krishna Shanker Mazumdar to a sitting posture We both raised him and made him sit. He signed it and then Chandra Sarkar took away the paper. He said that it was a will."

Later he said, "I cannot say who attested it." Apart from the facts that this witness had already stated in examination-in-chief that Krishna Shanker Mozumdar had become almost unconscious for 5 or 6 days before his death, this evidence is entirely inconsistent with the fact of the will having been attested by the 18 witnesses named in the mimanshapatra. It is impossible if such a thing had happened that this witness should not know about it, as he was in Krishna Shanker's service and in close attendance upon him till he died. He states that he was continuously in the bari of Krishna Sankar Roy from 10 to 15 days before his death. The evidence of Shib Chandra Dutt.Roy, who is brother of Gagan and a Muktear, does not carry the matter any further. He admits having advised Gagan to settle the matter, but he admits that he never saw the will or knew anything about it. On this evidence it appears to me to be impossible to come to the conclusion, either that there was a will at all, or even that the plaintiffs ever thought that there was. There was no honest and bona fide claim put forward by them but merely a sham claim with a view to inducing Gagan Chandra to give up some of the property in their favour. If this be the case, it is obvious that the minor cannot possibly be bound by the act of his father. There was no consideration for the agreement even had the parties been of full age, still less in the case of a minor could his property be thus bargained away.

It was urged upon us that Gagan after the execution of this document acted upon it ; and we were shown a case in which registration of names was effected and another case in which he had brought a suit in his son's name for a portion of the property. We are not concerned in this matter with what Gagan did. It may well be that having executed the document he felt that he had no alternative but to act upon it. His subsequent acts, however, cannot bind his minor son if his initial act in executing the document is invalid against him. How Gagan came to execute this document there is not sufficient evidence before us to determine. Whether he was, as he now says, threatened or cajoled into signing it, I cannot say. It appears, however, probable that considerable pressure was brought to bear upon him. He is a man in a lowly position of life, merely a copyist in a civil Court in more or less temporary employ. It may well be, when the plaintiffs assisted by three pleaders, all of whom it may be noted are relations of the plaintiffs, recommended him to avoid possible litigation by entering into this agreement, that he consented.

It does not appear to me to be the act of a man of ordinary intelligence. One would at least have expected that he would ask to see the will, make enquiries of the witnesses, and most probably take advice of some independent pleader. It is clear that he did nothing of the kind. That the settlement was not for the minor's benefit cannot be disputed. It was directly contrary to his interests. About half his share in the property was given up in exchange for what, in my opinion, was a sham claim on the plaintiffs' part. In these circumstances, I hold that the mimanshapatra is not binding on the infant and that his share, which he inherited from

Bimola Shanker, cannot be said to have been conveyed away by that document.

It was said that it was Gagan Chandra who was now putting forward this plea on his son's behalf. There does not appear to be any foundation for that though, no doubt, he has given evidence more or less in favour of his son's contention. His wife Promada Moyi is her son's certificated guardian. She may possibly have been assisted by her husband. What we have to consider however, is not who is now representing the minor, but what are the minors' interests in this matter, have they been properly protected, and if not, what should this Court now do in his behalf? It is just as though the minor had attained his majority and was himself seeking to impugn his father's action. It is clear that he could not be held bound by it. I think that the decree of the Subordinate Judge, so far as it relates to the dispute in this appeal, must be set aside and that it must be declared that the plaintiffs are entitled only to a 5 annas, 10 gundas share while defendant 18 is entitled also to a 5 annas 10 gundas share in the property in question. This will necessitate a revision of the allotments. Plaintiffs must pay the costs of defendant 18, both in the Court below and in this Court.

Beachcroft, J.—I agree that this appeal must be decreed in the manner indicated by my learned brother. Before stating my reasons for coming to this conclusion, I wish to refer to the two points on which the learned Subordinate Judge appears to have misstated the evidence, both points of some importance one particularly so. He says in his judgment that Gagan admitted before Srinath Roy, the pleader, that a will had been executed but destroyed by Krishna Sanker. In Srinath Roy's evidence there is no allegation of an admission by Gagan. I presume the learned Judge is referring to two statements, which are as follows: "I heard in the sittings that the will was annulled;" and in re-examination, "I heard from Gagan Roy that the will was annulled." Possibly the learned Judge is right in interpreting the word "annulled" as meaning "destroyed by the testator." But even so, I cannot treat these two sentences as disclosing an admission by Gagan that a will had been executed. They are equally consistent with a suggestion by him that the will had been destroyed assuming, while not admitting, the allegation of the plaintiffs to be true, that one had in fact been executed. Nor can I find any trace of any admission by Gagan elsewhere in the evidence that any will had ever existed. Evidence will naturally be somewhat vague when the witnesses speak to what happened eight years previously; but the rest of the evidence, such as it is, suggests the contrary. Kali Kumar says, "Plaintiffs said that there was a will of Krishna Shankar and Gagan Roy denied it." Revati Sankar Roy says, Gagan could not positively say if there was or was not any will." Lakshen Chandra Laha says, "Gagan Babu said the will was missing." I think it would be straining language to find in any of these statements an admission by Gagan that Krishna Sanker had in fact executed a will.

The other misstatement is that the pleader Shyama Charan advised that it was possible to obtain probate in the absence of the original will. Shyama Charan does not say so, nor does the plaintiff Hemaja. Shyama Charan nodoubt says he saw a paper purporting to be a draft or copy of a will and made a draft of an application for probate, but he was not asked if he advised that probate could be obtained without the original. Hemaja does not even say that he consulted Shyama Charan. The pleaders whom he consulted were Mohendra Babu and Mohim Roy Babu. I think it may be inferred that Shyama Charan was consulted even if not by Hemaja, but from the mere fact that he prepared the draft of the application for probate. if indeed he did prepare it, for he does not remember doing so, it cannot be presumed that he advised that probate might be obtained. Nor are we told that any other pleader gave such advice.

Not a single witness has been called on behalf of the plaintiffs to speak to the fact that Krishna Sanker did execute a will, though a number of persons are named in the compromise as having witnessed such execution. And it has been reiterated in argument that the plaintiffs were not bound to prove execution of a will. No doubt that is true and it is equally true that primarily all that it was necessary for them to prove was that they had a bona fide claim, even

though it may have been a weak one, which they intended to litigate, for where that is the case, withdrawal from litigation is ordinarily a sufficient consideration and the party supporting a compromise is not called upon to prove the quantum of the consideration against the party impugning it. That they alleged a claim there is no doubt and that they would have attempted to litigate it is not improbable, considering the value of the property. But to prove that the claim was a bona fide one there could hardly have been better evidence than that of persons who had seen Krishna Sanker execute a will, especially if coupled with evidence that the plaintiffs obtained legal advice that they had a good fighting claim. Not that it was necessary for them to show even that they had a strong claim or one likely to succeed, for as Bowen, L. J., said in *Miles* v. *New Zealand Alford Estate Company* (1):

> "It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong."

Lakshan no doubt says he came to know of the will the day after it was executed and Hemaja speaks of hearing of it 3 months after Krishna Sanker's death. But none of the witnesses ever saw the will, and no attempt appears to have been made to take probate of it till Bimola died some years later, or even to see that it was kept in safe custody. There is no doubt a suggestion in Hemaja's evidence that Gagan had taken the will, with the implication that he made away with it, but the suggestion was never put to Gagan, who with the other witnesses for the defendant was examined after P. W. 2 and before Hemaja.

It is strongly contended on behalf of the plaintiffs that as regards the execution of a will they need do nothing more than refer to Gagan's own statement in the mimanshapatra that a will had been executed, and it was repeatedly urged that even now Gagan does not deny that one was executed. As regards the latter point Gagan's evidence is perfectly clear that he had never heard of the will before Bimola's death and has no personal knowledge of there ever having been a will. To the first point there are two answers; the argument identifies Gagan with the minor and thereby begs the question at issue, and in fact Gagan in the mimanshapatra does not admit execution of a will. What is stated in the document is that the first party alleged execution of a will while Gagan urged that the disappearance of the alleged will pointed to its destruction, but there is no admission by Gagan that a will had been executed. Nor do I think that such an admission can be spelled out of the following sentence, that certain persons named in the schedule were witnesses to the will. Now while, on the evidence before us, there is every reason for doubting whether Krishna Sanker did ever in fact execute a will, apart from the question of his having subsequently destroyed it, what we have mainly to look to is the facts before the parties at the time of the compromise, and to ascertain whether the compromise was for the benefit of the minor and the test of the minor's benefit is not whether he got a good bargain out of the compromise but whether the guardian, who acted for him, acted as a prudent man would have acted in arranging his own affairs. The minor will not be bound by the guardian's act, if there has been a concealment of material facts or if the facts necessary to enable the guardian to correctly appreciate the minor's interests have not been disclosed. Gagan says he was induced to enter into the compromise by the threats, the threats being to the effect that plaintiffs would litigate the matter up to this Court and that the property would be ruined by the litigation. He says, seeing that the property was of small value, he realized that litigation would ruin it and so consented. It is argued by the plaintiffs, and it was so found by the learned Subordinate Judge, that Gagan knew that the value of the property was considerable, certainly much more than he chooses to admit that he understood it to be. I think that finding to be correct, though the fact that Gagan's own house was near Gachihata is not, considering that Gagan was employed in the civil Court, in my opinion, a good reason for coming to that conclusion. He had however assisted in the management of the property after Krishna Sankar's death and must have had a fair idea as to the value of it. But that very knowledge should have told him that there was not the same fear of ruin of the property from the threatened litigation as there

would have been in the case of a smaller estate. Facts which might justify compromise where a small estate is at stake, might not justify compromise in the case of a large property.

Now, what was the position? The minor would succeed to the whole estate in the absence of a will. Litigation was threatened on the ground that Krishna Sankar had executed a will, but admittedly no will could be found and Gagan knew it. Gagan was in strong position. One would have expected some evidence as to the course which the deliberations took, to show how Gagan was persuaded that compromise was in the minor's interest. After such a lapse of time the evidence might not be very definite as to details but the broad features might have been indicated. There is no such evidence. There is no suggestion that any of the persons who are said to have been witnesses to the will told Gagan of what they knew. It is not alleged that Gagan was shown the draft or copy on the strength of which the plaintiffs were threatening to apply for probate. It was not even suggested to Gagan that he had ever seen that paper. It was not suggested that the plaintiffs were ready with an explanation for the disappearance of the alleged will. In fact the deed of compromise negatives the idea that they had any explanation. Possibly Gagan was overwhelmed by the pleaders who were advising compromise as friends of the parties. An indication that their advice was not altogether disinterested is to be found in the evidence of Ravati Sankar Roy. He says:

"in the sitting of execution we did not raise any question about will as the matter was going to be compromised between the parties. We rather asked him not to do anything which would give us the trouble of deposing in a Court. We did not raise any question about any term of the solehnama lest the compromise would fail."

Ravati does not remember giving any help in bringing about the compromise. His evidence rather suggests that he took no part in it beyond attesting the document. He was however according to his evidence given to understand that the will was in existence, and his evidence that at the time of execution they asked Gagan to do nothing which would bring them into Court as witnesses suggest that even at the eleventh hour Gagan was oppressed with doubts. It does not appear that Gagan consulted any pleader. It is argued that he had the advice of his brother Sib Chandra Roy, a Mukhtear. That is true and Gagan says that Sib Chandra advised him to compromise. Sib Chandra admits that he did so, but also admits that he made no inquiry whether any will had been executed. He says his first impression was that the will was in existence. That impression was apparently corrected later, though we do not know when it was first corrected, for he says, "it was said that the will had been missing." At the time of execution of the compromise, he says Lakshan Hemaja and Hari Sanker said the will was missing. The information given to Ravati, to which I have already referred, as to the will being in existence shows at least a suppression of the truth and to that extent corroborates Sib Chandra's evidence that he at first believed the will to be in existence and that belief might be sufficient to cause him to advise Gagan to compromise. One would have expected that advice to be withdrawn when Gagan told him, as one cannot but imagine he must have, that no will was to be found. However it is at least doubtful whether Sib Chandra was in possession of the full facts when he advised compromise, there is certainly no evidence that when he did so he knew the plaintiffs were basing their claim to probate on what has been described as a copy or a draft of a will but the real character of which is unknown.

That Gagan subsequently acted on the deed of compromise as evidenced by applications for registration of the minor's name and the kabuliyat Ex. 8, is not surprising whatever view may be taken of Gagan's conduct in the compromise. The conclusions, to which I come on the evidence are that it is extremely doubtful whether the plaintiffs had a bona fide claim, for even the filing of an application for probate would not necessarily indicate that the claim was bona fide, and that the compromise was certainly not for the benefit of the minor. Gagan did not act as a prudent man would have acted in his own interests. Whether he was careless or over-timid, it is clear that he acted without a proper appreciation of the facts and that the minor's interests suffered in his hands.

V.B./R.K. *Appeal decreed.*

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SANDERSON, C. J. AND TEUNON, J.

Birendra Kishore — Plaintiff—Appellant.

v.

Mahomad Doulat Khan and *others*—Defendants—Respondents.

Letters Patent Appeal No. 92 of 1916, Decided on 31st August 1917, against decree of Newbould, J., D/- 3rd April 1916, in Appeal No. 1623 of 1914.

(a) Bengal Tenancy Act (1885), S. 50—Enhancement not enforced for 20 years—It merely gives rise to presumption.

Under the Bengal Tenancy Act if a landlord abstains from enforcing enhancement of rent for 20 years or more this in itself confers no right upon the tenant, but merely gives rise to a presumption under S. 50 (2) of the Act. [P 265 C 1]

(b) Bengal Tenancy Act (1885), S. 7—Relationship of landlord and tenant based on contract—Tenant's assertion cannot affect terms of contract—Suit for enhancement—Law of limitation presents no bar.

Where the relationship of landlord and tenant is founded upon contract, a mere assertion by the tenant, in the absence of a clear statutory provision to the contrary, cannot confer upon him rights other or higher than those embodied in the contract. [P 265 C 1]

In course of proceedings under Ch. 10, Ben. Ten. Act, the plaintiff applied for enhancement of rent and the defendants asserted that the tenure had been held at a rent which had not been changed since the Permanent Settlement, and the rent could not, therefore, be enhanced. Thereupon the plaintiff withdrew his application with liberty to sue afresh. More than 12 years thereafter the plaintiff brought a suit for enhancement of rent of the same tenure under S. 7, Ben. Ten. Act, relying on a contract embodied in some old kabuliyats:

Held: that the law of limitation presented no bar to a suit of this nature. [P 265 C 1]

(c) Practice—New plea.

An appellate Court is not entitled to accept and act upon a case made or the first time before it and not made in the trial Court. [P 264 C 2]

(d) Limitation Act (1908), Art. 144—Applicability.

Article 144 has no application to a landlord's assertion and the tenant's denial of the right to enhance the rent of the holding. [P 265 C 1]

Dwarka Nath Chakravarty and *Gobinda Chandra Dey Roy*—for Appellant.

Mohendra Nath Roy and *Upendra Lal Roy*—for Respondents.

Sanderson, C. J.—I have had the opportunity of reading the judgment about to be delivered by my learned brother Teunon, J. I agree with that judgment. I merely wish to add a few words with regard to the second contention raised by the defendants, viz, that inasmuch as in the proceedings instituted in 1896 under Ch. 10, Ben. Ten. Act, by the plaintiff, the defendants had asserted that the tenure had been held at a rent which had not been changed from the time of the Permanent Settlement, and that, therefore, the rent could not be enhanced, and that thereupon the plaintiff withdrew his application and that inasmuch as this suit was not brought until 16th December 1911, more than 12 years thereafter, the suit was barred by the Act of Limitation. For the consideration of this question it must be assumed that it was one of the terms of the contract, regulating the rights of the parties, that the rent was capable of enhancement. If this be so, in my judgment, it was not possible for the defendants by the mere assertion that the rent was not capable of enhancement, which assertion was not agreed to by the plaintiff, to obtain a right which was contrary to the terms of the contract: and further if the period of limitation were to run from the date of such an assertion by the defendants, the result would be that the landlord would be compelled to sue for enhancement of rent within 12 years, even though an occasion for enhancement had not arisen. For these reasons I think that the defendants' contention that the suit is barred by the Act of Limitation is ill founded.

Teunon, J.—This is an appeal by the plaintiff against a decision of Newbould, J., affirming on second appeal a decision of the District Judge of Tipperah. It arises out of a suit brought by the plaintiff-appellant for enhancement of the rent of a certain tenure under the provisions of S. 7, Ben. Ten. Act. The defence of the tenure holder defendants-respondents was that the tenure had been held at a rent that had not been changed from the time of the Permanent Settlement and that therefore, the rent could not now be enhanced. They further say that when in proceedings under Ch. 10, Ben. Ten. Act, the plaintiff landlord by an application under S. 104 (now S. 105) attempted to enhance their rent, they resisted his claim on the ground just set out and that thereupon the plaintiff withdrew his application, though with liberty to sue afresh. This was in 1896 and the plaintiff did not bring the present suit until 16th December 1911, that is more than 12 years thereafter. They contend that since their assertion to the

plaintiff's knowledge of their claim or title to hold as tenants at a rent fixed in perpetuity, their possession has been pro tanto adverse to the plaintiff and his claim to enhanced rent is, therefore, barred by the 12 years' rule of limitation.

The trial Court and the Court of first appeal have both found that the defendants have succeeded in showing that for a period of more than 50 years immediately before suit they hove held at an enhanced rent, that is, at the present rate, Rs. 63-6-7. Indeed this position, it appears, was not disputed, and it is necessarily conceded that the defendants are, therefore, entitled to the presumption created by S. 50, Ben. Ten. Act, sub S. (2). The appellant sought and seeks to rebut this presumption by puting in evidence two "doul" kabuliyats, an ekrarnama, a judgment and a decree. Both Courts have found that these documents are genuine, but the learned District Judge has further found that the plaintiff appellant has failed to show that they relate to the taluk in suit. As to the taluk now in question there is in fact no controversy between the parties. It is situated in or comprises Mouzah Debugram within pargana Nurnagar in the plaintiff's zamindari, Chakla Roshnabad. It is known as "Jitram taluk" being so called after Jitram, the grandfather of defendants 5 to 7. Jitram died leaving a widow Indrani and a minor son Harish Chandra. Exs. 7 and 9 are kabuliyats executed by Indrani in respect of Jitram taluk: one on 19th Pous 1248 I. E., and one on 23rd Sraban 1256. Ex. 8 is an ekrarnama executed by Indrani on the date of the earlier kabuliyat. By these documents the rent of the taluk is fixed at Rs. 28 for the years 1248 to 1251, and at Rs. 17 for the years 1256 to 1265 (=say 1855-56).

The judgment, Ex. 11, and the decree, Ex. 10, next show that in a suit brought by the plaintiff's predecessor against Indrani's son Harish in the year 1857 the rent of Jitram taluk was enhanced to Rs. 59-10-11.

In the trial Court the only suggestion put forward by the defendants against these documents was that they were not genuine, and that the kabuliyat and ekrarnama being executed by an illiterate pardashin woman should not be accepted in evidence. On these points the findings of both Courts were against the defendants.

That being so, we are of opinion that in accepting a contention put forward for the first time in the appellate Court the District Judge fell into error. The defendants may have other tenures under the plaintiff, but it is not suggested that they hold or ever held another "Jitram Taluk" and there is no suggestion that in this Mauza Debugram there was another Jitram who like the defendants' ancestor had a taluk named Jitram, and died leaving a widow named Indrani and one minor son, be his name Harish Chandra or Hari Narain. In the decree and judgment the trifling differences in the figures of rent, between the second kabuliyat on the one hand and the present rent on the other, appear to be explained by the reference to a "15 annas" touzi. With these materials before him we are of opinion that in accepting and acting upon a case made in his Court for the defendants and not made in the trial Court the District Judge has fallen into error. When it is once found that the documents we have mentioned refer to and evidence transactions relating to the taluk now in dispute, it must be held that the rent of this taluk has been varied from time to time and is in fact in its very nature variable.

We then come to the question of limitation. The District Judge has applied Art. 144, Sch. 2, Limitation Act, and in so doing has relied on a number of cases decided in this Court. But these decisions were all in suits for ejectment and can be distinguished, as can the further cesis cited in this Court, for instance, the cases reported as *Birendra Kisore Manikya* v. *Anandapriya Baishanabi* (1), *Birendra Kisore Manikya* v. *Ram Chandra Day* (2), *Birindra Kisore Manikya* v. *Koilas Chandra Sarkar* (3), and *Aman Gazi* v. *Birendra Kishore Manikya Bahadur* (4). Indeed the only cases put forward on behalf of the respondent as directly supporting his contention are two cases decided by the High Court of Bombay and reported as *Gopalrao* v. *Mahadevrao* (5) and *Thakore*

1. (1915) 30 I C 946.
2. (1915) 30 I C 948.
3. (1915) 30 I C 937.
4. (1912) 15 I C 64.
5. (1897) 21 Bom 394.

Fatesingji v. *Bamanji Ardeshir Dalal* (6). But the enactment on which these cases were decided has not been placed before us and it would seem that there the refusal of the tenant to comply with the landlord's demand for enhanced rent entitled the landlord to eject. Here the tenant's assertion that his rent was unalterable does not work a forfeiture or entitle the landlord to sue in ejectment. If then limitation were to run from the date of the tenant's assertion, the result would apparently be to compel the landlord to sue though no grounds for enhancement in fact existed. Further in the present case it has been shown that the relations between the parties depended upon contract. The judgment and decree to which we have referred are founded on contract and, in the absence of a clear statutory provision to the contrary, a mere assertion by the tenant cannot confer upon him rights other or higher than those embodied in the same.

Whether, it being conceded that the relationship of landlord and tenants exist, Art. 144, Sch. 2, Limitation Act, can ever apply to a landlord's assertion and the tenant's denial of the right to enhance is a question which I do not think it necessary to decide. It may however be pointed out that under the Bengal Tenancy Act if for 20 years or more the landlord abstains from enforcing enhancement this in itself confers no right upon the tenant, but merely gives rise to a presumption. It is, however, sufficient to say that, in my opinion, the law of limitation presents no bar to the present suit. On these findings we are agreed that the decree of the District Judge must be set aside and the case remanded to him in order that he may assess and determine the rent to which the plaintiff is now entitled. Plaintiff will have his costs of this appeal, and of the hearing before Newbould J.

V.B./R.K. *Appeal allowed.*

6, (1903) 27 Bom 515.

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CHATTERJEA AND SMITHER, JJ.

Satya Sankar Ghosal—Appellant.

v.

Mon Mohan Guha Roy—Respondent.

Appeal No. 34 of 1915, Decided on 1st June 1917.

(a) Patni Regulation (1819), Ss. 3 and 1—Patni tenure can be sold for arrears of rent under Bengal Tenancy Act—Previous decrees for rent are charge enforceable against surplus sale proceeds of patni sold in execution of later decree—Bengal Tenancy Act (1885), Ss. 65, 165 and 195. (Per *Chatterjea, J., Smither, J.* dissenting).

Per *Chatterjea, J.* (*Smither, J.* dissenting).—The Patni Regulation does not take away the rights of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent: it only gives him an additional right to recover rent by a summary process of sale which is restricted to the recovery of rent for only one year. [P 266 C 2]

Not only a patni tenure can be sold in execution of a rent decree under the Bengal Tenancy Act, but decrees for rent for earlier periods can be enforced against the surplus sale-proceeds of a patni sold in execution of a decree for rent under the provisions of the Bengal Tenancy Act. [P 271 C 1]

Rent is a first charge upon the patni tenure under the Patni Regulation as well as under the Bengal Tenancy Act and there is no conflict between the two so far as the question whether rent constitutes a first charge on the patni is concerned. The provisions of Cl. 3, S. 3 and Cl. 3, S. 17 of the Patni Regulation, do not lay down that there will be no first charge on a patni for rent except for the rent of the current year or of that immediately expired if the sale be held at the commencement of the following year. On the contrary the proviso to Cl. 2, S. 3 and Ss. 11 and 15 of the Regulation, show that the rent is a first charge on the patni. [P 267 C 1, 2]

The provisions of S. 17, Cl. 3 of the Regulation, viz., that the former balances, etc., will be mere personal debts of the patnidar, applies only when the patni is sold under the Patni Regulation. [P 267 C 2; P 268 C 1]

The words "sale by public auction" in S. 3, Cl. 3, of the Regulation, refer to the summary sale under the Patni Regulation. The provisions of that section or S. 17 have nothing to do with a sale held under the general law. [P 268 C 1]

The Bengal Tenancy Act supplements the provisions of the Patni Regulation in matters not dealt with by it. [P 268 C 1]

(Per *Smither, J.* contra.) The practice of taking proceeding under the Bengal Tenancy Act for the sale of patnis for arrears of rent, which has gone on so long unquestioned, is unwarranted by law. [P 271 C 2]

The procedure prescribed by the Patni Regulation for the sale of a patni for its arrears of rent is not intended to be optional and is not alternative to a more elaborate procedure for sale under the Bengal Tenancy Act. [P 271 C 2]

The words "public auction" in S. 3 of the Patni Regulation should be taken to apply to any public auction and not limited to an auction under the Regulation. Therefore, even if there can be a sale of a patni in execution of a rent decree under the provisions of the Bengal Tenancy Act, the zamindar can have no charge on the surplus sale-proceeds in respect of his previous decrees for rent. [P 273 C 1]

A landlord's charge for rent under S, 65, Ben. Ten. Act, can be enforced only by following the procedure laid down by the Act by getting a decree for the rent in respect of which the charge is to be enforced and by selling up under that decree. [P 273 C 2]

(b) Transfer of Property Act (1882), S. 73 — Applicability.

The principle embodied in S. 73, is a principle of justice, equity and good conscience and should govern cases to which that section is not applicable. [P 270 C 1]

(c) Bengal Tenancy Act (1885), Ss. 161 and 167— Charge on tenure in respect of rent decree is not encumbrance and cannot be annulled under S 167.

Per *Chatterjea, J.*—The charge upon a tenure which the landlord has in respect of his rent-decree is not an encumbrance within the meaning of S. 161, and cannot be annulled under S. 167 of the Act. It is a charge which can be enforced against the tenure and when the tenure is sold for arrears of rent and the charge cannot be enforced against the tenure itself, it must follow the sale proceeds: *Kumar Satya Sankar Ghosal* v. *Altapannessa Bibi*, *Appeal from Original Decree No. 302 of 1911, decided on 12th May 1913, not Foll.* [P 270 C 2]

Rash Behari Ghose and *Ram Charan Mittra*—for Appellants.

Dwarka Nath Chackerbutty, *Sarat Chandra Basak*, *Bipin Chandra Bose* and *Sib Chandra Palit*—for Respondents.

Chatterjea, J.— The main question involved in this appeal is whether in the case of a patni taluk being sold in execution of a decree for rent under the provisions of the Bengal Tenancy Act, the zamindar has a first charge on the surplus sale proceeds in respect of decrees for rent for earlier periods. It appears that the defendants-appellants who are the zamindars obtained a decree for rent against the patnidars for the years 1303 to 1306 on 26th June 1900 for Rs. 4,792. Then on 11th July 1904 they obtained another decree for Rs. 2,368 for the years 1337 to 1309 and a third decree for Rs. 8,763 for the years 1309 to 1312 on 29th April 1909. The patni taluk was sold in execution of the third decree, dated the 29th April 1909, free of all encumbrances and purchased by one Durga Charan on 11th March 1910 for Rs. 40,150 and the sale was confirmed on 13th May 1910. The defendants appropriated out of the sale proceeds Rs 10,626 due to them under the third decree and also Rs. 1,229, being the rent due from the date of the last suit up to the date of the confirmation of sale. The defendants then attached the surplus sale proceeds to the extent of Rs. 5,519-3 0 and Rs. 3,583-4-3 in execution of the two previous rent decrees. The plaintiffs were purchasers of one of the three mauzahs comprised in the patni taluk, and they brought the suit out of which this appeal arises for a declaration that they are entitled to a proportionate share of the surplus sale-proceeds held in deposit in Court. The zamindar defendants pleaded that they have a first charge on the surplus sale proceeds in respect of two previous rent decrees. The Court below decreed the suit and the zamindar defendants have appealed.

Before dealing with the main question involved in the appeal I will deal with the contention raised on behalf of the respondents, viz., that a patni tenure cannot be sold at all under the provisions of the Bengal Tenancy Act; in other words, that it cannot be sold (for enforcing the rent charge) except under the summary process as laid down by the Patni Regulation. It is contended that the regulation fixes the process by which patni tenures are to be brought to sale and the form and manner of conducting such sale, and that therefore that is the only manner in which a patni tenure can be sold for arrears of rent. But the Regulation shows that it was enacted for defining the relative rights of zamindars and patnidars and for prescribing a summary process for recovery of rent. It is true the word "summary" is not used in the Regulation, but the process cannot but be a summary one when proceedings are taken on ex parte statements of the zamindar, and without taking evidence. The Regulation does not not take away the rights of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives him an additional right to recover rent by a summary process of sale. The Patni Regulation has been in force for nearly a century. Patni tenures are sold every day under the provisions of the Bengal Tenancy Act and no objection has ever been raised that a patni tenure cannot be sold under the provisions of that Act. If any authority were needed, I might refer to the case of *Brindabun Chunder Sircar Chowdhry* v. *Brindabun Chunder Dey Chowdhry* (1), where a patni tenure was sold in execution of a decree for rent under the general law (under S. 105 of Act 10 of 1959) and the Judicial Committee had to consider whether the sale was free of encumbrance, viz. a darpatni tenure.

Turning to the main question in the case, and leaving aside for the moment the nature of the charge and the manner

1. (1873-74) 1 I A 178=13 B L R 403 (P C).

in which it must be enforced, there can be no doubt that under S. 65, Ben. Ten. Act, rent is a first charge on a tenure. It is contended however that so far as patni tenures are concerned there is no first charge for rent except for rent of the current year or of that immediately expired, if the sale be at the commencement of the following year, and that the provisions of the Bengal Tenancy Act in so far as they militate against the provisions of the Patni Regulation are inoperative, as expressly laid down in S. 195, Cl. (e) of the former Act. Reliance is placed on the provisions of Cl. 3, S. 3 and Cl. 3, S. 17 of the Regulation, in support of the contention that the rent is not a first charge on a patni tenure except for the period of one year. S. 3. Cl. 3, says that the tenure shall be

"sold by public auction and the holder of the tenure will be entitled to any excess in the proceeds of such sale beyond the amount of the arrear of rent due subject however to the provisions contained in S. 17 of this Regulation;"

and Cl. 3, S. 17 provides that the "former balance," that is, the balance due for a period earlier than the year immediately expired of the current year, as the case may be, is not to be included in the demands of the zamindar to be satisfied from the sale proceeds. It is argued that under S. 3, Cl. 3, and S. 17, Cl. 3, of the Patni Regulation, the zamindar's first charge for his rent is restricted only to the arrears of one year, and that a substantive right is conferred upon the patnidar to the surplus sale-proceeds after satisfying the zamindar's demand only for the period limited as above, and S. 65, Ben. Ten, Act, which gives a first charge to the zamindar beyond the period so limited, necessarily affects the provisions of the Patni Regulation, and is therefore inoperative having regard to the provisions of S. 195, Cl, (e), Ben. Ten. Act. But in the first place I think rent is a first charge under the Patna Regulation as well as under the Bengal Ten. Act, and there is no conflict between the two so far as the question whether rent constitutes a first charge on the patni is concerned. The proviso to Cl. 2, S. 3, of the Regulation, lays down that no engagements (by the patnidar with his subordinate talukdar) shall operate to the prejudice of the right of the zamindar to hold the superior tenure (i. e., the patni, answerable for any arrear of his rent in the state in which he granted it, and free of all incumbrances resulting from the act of his tenant. S 11, Cl. 1 (para. 2), says that no transfer by sale, gift or otherwise, no mortgage or other limited assignment by the patnidar, shall be permitted to bar the indefeasible right of the zamindar to hold the tenure of his creation answerable in the state in which he created it for "the rent, which is in fact his reserved property in the tenure," except the transfer or assignment should have been made with a condition to that effect under express authority obtained from the zamindar, and Cl. 2 says that all under-leases originating with the patnidar, if creative of a middle interest between the resident cultivators and the late proprietor, must be considered cancelled (unless the authority to grant them should have been specially transferred) and the possessor of such interest must consequently lose the right to hold possession of the land and to collect the rents of the raiyats, this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, "the whole of which was liable for the rent."

Section 15, Cl. 2, provides for the issue of a proclamation declaring that the new incumbent, having by purchase at a sale for arrears of rent due to the zamindar, acquired the entire rights and privileges attaching to the tenure of the late talukdar "in the state in which it was originally derived by him from the zamindar," he alone will be entitled to make the zamindari collections in the mofussil. It is true Ss. 11 and 15 lay down the rights accruing to a purchaser at a sale under the Patni Regulation, but they at the same time show that the rent is a first charge on the tenure. In any case the proviso to Cl. 2, S. 3 unmistakeably shows that rent is a first charge. That clause declares a substantive right and is independent of the particular procedure which may be adopted for realizing the rent. S. 65, Ben. Ten. Act, therefore which gives a first charge to the landlord for his rent does not confer any right upon the zamindar which the latter does not possess under the Patni Regulation, and that being so, the Bengal Tenancy Act does not affect the Patni Regulation, so far as the question of charge is concerned. In the next place, I think that the provision of S. 17, Cl. 3, viz., that the former balances beyond those of the current year (or of

that immediately expired if the sale be at the commencement of the following year) will be mere personal debts of the patnidar, applies only when the patni is sold under the Patni Regulation. It is contended that S. 3, Cl. 3, of the Regulation, speaks of "sale by public auction" without any qualification and confers a right upon the patnidar to the surplus sale proceeds after satisfying the demand of the zamindar for one year only, which cannot be taken away by a sale under the Bengal Tenancy Act.

But the words "sale by public auction" in S. 3, Cl. 3 of the Regulation evidently refer to the summary sale under the Patni Regulation, which alone is dealt with by it. The provisions of that section or of S. 17 have nothing to do with a sale where it is held under the general law. It is only where the zamindar proceeds to recover arrears of rent not exceeding one year that he can avail himself of the summary sale under the Regulation and the provisions of S. 17, Cl. 3, apply to such a case only. The summary process under the regulation, as stated above, is held on the ex parte statements of the zamindar without taking any evidence and is therefore restricted to the recovery of rent of only one year. Where however the zamindar proceeds to realize rent under the general law (i. e. the Bengal Tenancy Act) his rights are not restricted by the provisions of S. 17 of the Regulation. The regulation provides for a summary sale only and in so far as such a sale is concerned the provisions of the Bengal Tenancy Act cannot affect such sales or the provisions relating to the distribution of the sale proceeds as laid down in the Regulation.

With regard to sales under the general law there is no inconsistency between the provisions of the Bengal Tenancy Act and the Patni Regulation because the latter has nothing to do with such sales and the Bengal Tenancy Act supplements the provisions of the Regulation in matters not dealt with by it.

The question whether a decree for rent is a first charge on the surplus sale-proceeds of a patni tenure was considered in the case of *Basant Kumar Bose* v. *Khulna Loan Company* (2). There the zamindar obtained a decree for rent for a certain period, and then put up the patni tenure for sale under the Patni Regulation for the rent of a subsequent period. The question was whether the decree for rent previously obtained was a first charge on the surples sale proceeds. It was argued in that case, with reference to the provisions of S. 17 of the Regulation, that the antecedent balances should not be deemed a charge upon the sale-proceeds which represent the property after the sale has taken place, and that the effect of the Regulation sale is to destroy the charge which the zamindar previously had upon the property in respect of all arrears of rent. The learned Judges referred to the difference of judicial opinion in the cases of *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (3) and *Jogonath* v. *Mohiuddin Mirza* (4) on the question whether there is any conflict between S. 65, Ben. Ten. Act, and S. 17 of the Patni Regulation, and without deciding the question held that para. 2, Cl. 3, S. 17, contemplated a case in which a regular suit had to be brought for the recovery of the antecedent balance as the personal debt of the patnidar and therefore could not possibly apply to that case where a decree for rent had already been obtained before the sale under the Patni Regulation took place. and that the patni sale did not destroy the character of the decree previously obtained as a rent-decree.

It is contended before us on behalf of the respondents that in that case the provisions of Cl. 4, S. 17, viz., that any excess of the sale-proceeds after satisfying the demand of the zamindar in the manner described in Cl. 3 (viz., the arrears of the current year or of the previous year as the case may be) shall be forthwith sent to the Treasury to be there held in deposit to answer the claim of the talukdars of the second degree or of others who by assignment of the defaulter may be at the time in possession of a valuable interest in the patni were overlooked and that Cl. 4 is conclusive to show that the surplus sale-proceeds are not available to the zamindar for decrees for antecedent balance. It is unnecessary to consider in this case whether the zamindar has a first charge in respect of decree for antecedent balances upon the surplus sale-proceeds when the zamindar sells the patni tenure under the provisions of the

2. A I R 1915 Cal 24=26 I C 197.

3. (1902) 6 C W N 794.

4. (1910) 37 Cal 747=6 1 C 371

Regulation. In the case of *Jogonath* v. *Mohiuddin Mirza* (4) it was held having regard to the provisions of S 17, Cl. 3, Patni Regulation, that S. 65, Ben. Ten. Act, does not give the zamindar a first charge on the surplus sale-proceeds for antecedent balances and the learned Judges did not agree with the view taken in the case of *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (3) that there was no conflict between S. 65, Ben. Ten. Act, and S. 17, Cl. 3, Regn. 8 of 1819. The sale in the case of *Jogonath* v. *Mohiuddin Mirza* (4) however was held under the Patni Regulation, and the learned Judges in that case themselves distinguished the case of *Peary Mohan Mukhpadhya* v. *Sreeram Chandra Bose* (3) on the ground that in the latter case the patni was sold under the Bengal Tenancy Act, and not under the Patni Regulation.

It may be conceded that the zamindar has no right to recover the antecedent balances or to enforce his charge under a rent decree against the surplus sale proceeds when he choose to adopt the summary process under the Panti Regulation. But if the zamindar has a first charge, as I think he has, both under S. 65, Ben. Ten. Act, and under the Patni Regulation does he forfeit his right to enforce that charge against the surplus sale proceeds to which the patni is converted even though he sells the tenure under the provisions of the Bengal Tenancy Act? The Bengal Tenancy Act does not contain any provision similar to that contained in Cl. 3, S. 17 of the Regulation. If the zamindar has a first charge for rent both under the Bengal Tenancy Act and the Regulation, although such charge in respect of antecedent balances may not, having regard to the provisions of S. 17 of the Regulation, be enforced against the surplus sale proceeds when the patni is sold in a summary way under the Regulation, there is no reason why the zamindar should lose such charge under a decree for rent when the patni is sold under the Bengal Tenancy Act.

The next question is what is the nature of the charge which the landlord has under the Bengal Tenancy Act upon the tenure. The appellants contend that it is a charge which can be enforced by sale of the tenure, but as the tenure has already been sold under the Patni Regulation, it cannot be again sold for arrears of rent of an earlier period: see *Mt. Lutifun* v. *Shaikh Mean Jan* (5) and *Prangour Mazoomdar* v. *Himanta Kumari Deby* (6), and the charge is, therefore transferred to the surpuls sale-proceeds. On the other hand it is contended on behalf of the respondents that the first charge which the landlord has under S. 65, Ben. Ten. Act, can be enforced only under the provisions of Ch. 14 of the Act, and not in any other way, and that where that remedy is not open to the landlord by reason of the tenure having been already sold away under the Patni Regulation, the charge cannot be enforced against the surplus sale proceeds; and reliance is placed on the cases of *Soshi Bhusun Guha* v. *Gogan Chunder Shaha* (7) and *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (8). These cases however are distinguishable. In the first case it was held that an assignee of a decree for rent to whom the reversion had not been transferred cannot avail himself of the charge under S. 65, Ben. Ten. Act. It is true in the last but one paragraph of the judgment the learned Judge observed that:

"the charge under S. 65 of the Act should be enforced by the sale of tenure or holding free of encumbrances under Ch. 14 of the Act, and if in any case the decree for rent either has not been or cannot be enforced by the sale of the tenure we do not think that the charge created by S. 65 can be enforced in any other way."

These observations however must be taken to have been made with reference to the question which they had to consider in the case, viz., whether an assignee of a decree for rent can enforce the charge. As soon as a decree for rent is assigned to a stranger the charge ceases to exist, and the assignee can enforce the decree only as a money decree, and that is all that the Court decided in that case. In *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (8) it was held by the Judicial Committee that a decree for arrears of rent obtained by a zamindar against the patnidar after the former had parted with all his interest in the zamindari, is not a decree for rent within the meaning of S. 65 of the Act, and that the right to bring the tenure to sale attaches to the status of the decree-holder *qua* landlord, and exists so long as the relationship of landlord and tenant exists. All that was decided

5. (1866) 6 W R 112.
6. (1886) 12 Cal 597.
7. (1895) 22 Cal 864.
8. A. I. R. 1914 P C 111=41 Cal 926=23 I C 632=41 I A 91 (P C).

in that case was that the charge created by S. 65 is in favour of the landlord only and that a stranger to the landlord's interest cannot claim the charge on the ground that the decree was for arrears of rent.

The respondents however rely upon some observations in the above cases to show that the charge for rent which the landlord has under S. 65, Ben. Ten. Act, can be worked out only by sale of the tenure under Ch. 16 of the Act. That no doubt is the manner in which the charge is to be enforced so long as the tenure has not been sold away, but the zamindar cannot in the present case execute the decree in the manner laid down in Ch. 16 of the Act, because the tenure having been once sold for its own arrears passed to the purchaser free of the charge of the landlord under the rent decrees, and cannot be sold again. The question, whether the zamindar is entitled to enforce his charge against the surplus sale-proceeds after the tenure is sold, did not not arise nor was considered in either of the two cases. As already stated, the observations made in those cases must be taken to have been made with reference to the facts of those cases and the questions which arose for consideration. If the respondents' contention that the charge cannot be enforced against the money to which the tenure is converted by the sale is correct, the zamindar would lose his charge and cannot enforce it against the amount awarded as compensation under the Land Acquisition Act in a case where the patni is acquired under that Act.

The charge which the landlord has for his rent upon a tenure is no doubt of a somewhat peculiar character, but if the rent constituted a charge on the patni when it was sold, the zamindar did not lose the charge by selling the tenure. He cannot sell the tenure again, and under the circumstances I do not see why he cannot enforce the charge against the surplus proceeds of the sale to which the tenure is converted. Even if S. 73, T. P. Act, is not applicable to the present case, the principle embodied in that section is a principle of justice, equity and good conscience, and I think that where the property upon which there is a charge is not available, the charge should be allowed to follow the sale-proceeds of the property. S. 73, T. P. Act, would not apply to a case where a patni is acquired under the Land Acquisition Act, but the landlord would have a first charge upon the compensation awarded under the Act upon the principles. The charge which the landlord has in respect of his rent is not one created by law under S. 100. It is a statutory charge and is different from an ordinary charge created by law. In an ordinary mortgage, the mortgagee cannot foreclose without making all persons interested parties and giving them opportunity to redeem, but a landlord can enforce his charge against the registered tenants without making all the persons interested in the tenure parties. An ordinary change cannot be enforced against a bona fide purchaser without notice but that principle does not apply to a charge under nnder a rent decree.

It is contended that if the decree constituted incumbrances on the tenure, the incumbrances did not cease to exist as the purchaser of the patni did not annul the incumbrances as required by S. 167, Ben. Ten. Act. But the charge under the rent-decree was not an incumbrance within the meaning of S. 161, Ben. Ten. Act, and cannot be annulled. It is a charge which can be enforced against the tenure, and when the tenure is sold for arrears of rent and cannot be enforced against the tenure itself, the charge must follow the sale-proceeds. I am accordingly of opinion that the plaintiffs have a first charge in respect of the two earlier decrees over the surplus sale-proceeds. The question raised in the present case was raised in the unreported case of *Kumar Satya Sanker Ghosal* v. *Altapannessa Bibi* (9). That was a case relating to the right to the surplus sale-proceeds of the very patni taluk between certain mortgagees of the patni and the zamindars. It was held by Stephen and Mullick, JJ., that the two earlier rent-decrees did not constitute a first charge. The learned Judges held that the rent in respect of which the landlord has a first charge is the rent-decree of which execution is taken out and does not include rent decreed in suits with which the execution is not concerned. They further held that

"although by S. 100, T. P. Act, read with O. 34 Civil P. C. it may be that the appellant had a

(9) Appeal from Original Decree No, 302 of 1911 decided on 12th May 1913.

charge on the property, it does not follow that the appellants are in the position of mortgagees within the meaning of S. 73 of the Act. The appellants do not possess all the rights of a mortgagee but only those defined in Ss. 81 and 82 and such other rights as are subservient to the right to bring the mortgaged property to sale. This view is in accord with *Fotick Chunder Dey Sircar* v. *E. G. Foley* (10) and *Soshi Bhusun Guha* v. *Gogan Chunder Shaha* (7)."

I regret I am unable to agree with the view taken by Stephen and Mullick, JJ. I have discussed the first point. As regards the question of charge, I think the learned Judges took a narrow view of the nature of the charge which a landlord has with respect to rent on a tenure. On principle I think that a chargee ought to have the same privileges as a mortgagee, and even if S. 73, T. P. Act, does not apply, the principle of the section should be held to apply. The view taken by the learned Judges is opposed to that taken by Mookerjee and Carnduff, JJ., in *Basant Kumar Bose* v. *Khulna Loan Company* (2), and with which I agree so far as the question which has been raised before us is concerned. The decision of Stephen and Mullick, JJ., was followed in another unreported case by D. Chatterjee and Walmsley, JJ., but we are informed by Babu Ram Charan Mitter that the case was not argued before them and that he conceded that the decision of Stephen and Mullick, JJ., would govern the latter case.

Having regard to the conflict of views on the main points in the case, I think it would have been satisfactory to have the points referred to a decision by the Full Bench, but my learned brother is of opinion that a patni tenure cannot be sold under the Bengal Tenancy Act and that being his opinion, the other questions cannot be referred to a Full Bench. I am of opinion that not only a patni tenure can be sold under the Bengal Tenancy Act, but that decrees for rents for earlier periods can be enforced against the surplus sale-proceeds of a patni tenure when sold in execution of a decree for rent under the provisions of the Bengal Tenancy Act. Some questions were raised on behalf of the respondents as to the effect of the withdrawal of a portion of the surplus sale proceeds by certain mortgagees and other persons in the presence of the zamindar defendants and as to whether there should not be apportionment, but the questions were not raised in the Court below and as that Court decreed the suit, it was unnecessary to go into the questions. Under the circumstances, I would reverse the decree of the Court below, and remand the case for a decision of the questions raised on behalf of the respondents, as stated above, and disposal of the case accordingly.

Smither, J.—The practice of taking proceedings under the Bengal Tenancy Act for the sale of patnis for arrears of rent has gone so long unquestioned that I was prepared to take it for granted that it was well founded in law. But now that the question has been gone into, I have come to the conclusion that the practice is bad. Though in cases in which other points have been decided, this practise was taken to be good by the parties and by the Court, this question itself seems never to have been gone into. It was argued that the procedure for sale under the Patni Regulation is summary and, therefore only an alternative to some more elaborate procedure. It is a summary procedure, especially by the standard of the present day, but it is to be remembered that at that time, nearly hundred years ago, all rent suits were in the Revenue Courts. They did not come under the more elaborate procedure of the civil Courts till later, and at the same time some protection was given by S. 14 Taking it nevertheless, that the procedure is a summary one, as I think it is though it probably did not at that time seem so summary, compared to ordinary procedure, as it now seems it does not follow that it was merely an alternative to a more elaborate procedure. There is a summary procedure in many matters at the present day, but an optional alternative procedure, of a more elaborate kind, is not always available. I can find nothing to indicate that the procedure laid down was intended to be optional. I find the contrary. The Regulation itself, in its first section declares the purpose for which it was enacted. It narrates how the Permanent Settlement, then little more than 20 years' old, had given rise to the creation of patnis. It states that the deeds creating them provide that the tenure may be brought to sale for arrears of rent, but that "the manner of the sale is not specified," and that

"the mischiefs which have arisen, and the want of a consistent rule of action for the guidance

10. (1888) 15 Cal. 492.

of the Courts in regard to them have been productive of such confusion as to demand the interference of the legislature and it has accordingly been deemed necessary to regulate and define the nature of the property given and acquired, on the creation of a patni as above described, also to declare the legality of the practice of underletting in the manner in which it has been exercised by patnidars and others, establishing at the same time such provisions as have appeared calculated to protect the underlessee from any collusion of his immediate superior with the zamindar or others for his ruin, as well as to secure the just rights of the zamindar on the sale of any tenure under the stipulations of the original engagement entered into with him. It has further been deemed indispensable to fix the process by which the said tenures are to be brought to sale, and the form and manner of conducting such sales."

The contention is that the process by which such tenures are to be brought to sale was nevertheless not fixed at all, but only an addition was made to existing processes. The words of the Regulation are: "It has been deemed indispensable to fix the process." There must be very strong reason for it, if it is to be held that in spite of this purpose, the Regulation did not fix the process, but left it optional to ignore the process provided by the Regulation and to pursue the old processes, which had led to the "mischiefs" and "confusion" which the Regulation was intended to remedy. In the case of *Brindaban Chunder Sircar Choudhry* v. *Brindabun Chunder Dey Chowdhry* (1) the question whether a patni could be sold under the Bengal Tenancy Act was not gone into. The dispute was on other points. No case deals with the point. Returning to the Regulation itself, when it is stated, in S. 3 (3), that the zamindar has the right to hold the patni answerable for any arrear of his rent, the right is left subject to whatever time limitation may be applied to it. Though in cases where the Bengal Tenancy Act applies there is a charge for the rent, this right also is subject, I think, to such limitation. A landlord who has allowed four years to pass without suing loses the charge given by the Tenancy Act. A landlord who allows more than one year to pass loses his charge under the Regulation. The essential difference is in the time limit only. If he comes in time, the landlord has a charge for any arrear of rent of a patni, even if it be held that it cannot be sold under the Bengal Tenancy Act.

The same remarks apply to the provisions of S. 11 (1) that the zamindar's right to hold the tenure answerable cannot be defeated by any transfer, etc. His right is subject to a time limit on proceedings to enforce it. Under S. 17 (3) after deduction of one per cent of the sale proceeds to be paid to Government,

"the balance on account of which the sale may have been made shall next be made good in full to the zamindar, provided however that no former balances beyond those of the current year (or etc,) shall be included in the demand to be thus satisfied. Such antecedent balances, if the zamindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become in fact mere personal debts of the individual talukdar and must be recovered in the same way as other debts by a regular suit,"

and provision is then made for payments out of the balance to darpatnidars and others. This is very important. If the zamindar omits to avail himself of the process within his reach for having them satisfied at the time, arrears of a period before the current year, or the year immediately expired, become mere personal debts. The "process within his reach" means the process which the Regulation provides. If the zamindar omits to avail himself of it, till it is too late, his charge is time barred. One of the declared objects of the Regulation is to protect the underlessee. This provision protects him; this and the provision [S. 17 (4)] that the balance shall go to the darpatnidars, etc. The zamindar shall not get it; the darpatnidar shall get it. The decision in *Basant Kumar Bose* .v *Khulna Loan Company* (2) seems to me to be incorrect in this respect. Under S. 17 (4) the balance shall go as therein directed. It therefore shall not go to the zamindar. The Regulation is intended

"to protect the under-lessee from any collusion of his immediate superior with the zamindar or others."

A patnidar, who has diminished the value of his interest by creating a darpatni, is not to be left able to deprive the darpatnidar, both of his darpatni and of compensation for it, by an arrangement with the zamindar. If the zamindar's rent can accumulate as a charge through many years the patnidar not paying it, having come to an understanding with the zamindar, then on a sale for that large accumulation of arrears, the zamindar will get all his rent, and can give a patni to the old patnidar, on terms better for the zamindar than the terms of the old patni, and benefiting the pat-

nidar by the removal of the darpatnidar. They could thus, in the words of the Regulation, "ruin" the darpatnidar. In the present case the zamindar seeks to take the rent of ten years, or more, out of the sale proceeds.

The longer a zamindar is allowed to delay the enforcement of his charge for rent, the greater hardship results to the holders of interest subordinate to the patnidar. The question is, how long is he allowed to delay the enforcement in the case of a patni. In my opinion the Regulation has fixed the time. But even if a patni could be sold by "public auction" by any process other than the process provided by the Regulation, I do not find any good reason to hold that S. 3 (3) will not apply to that "public auction." The declared objects of the Regulation seem to require that the words "public auction" in S. 3 (3) should be taken to apply to any "public auction" and not limited to mean an auction under the Regulation, if there can be any public auction of a patni other than a public auction under the Regulation. In my opinion, therefore, the appellants have no charge for the amounts in respect of which they have appealed. The appellants have already got too much. The appeal should be dismissed with costs. I am also of opinion that if there can be a sale of a patni under the provision of the Bengal Tenancy Act, the lower Court is right in holding that the appellants have no charge for the amounts covered by the two previous decrees on the surplus sale proceeds under the last decree. A charge for rent is a charge which is to be enforced by the special procedure laid down for enforcing it. It is a charge which results in great hardships in many cases. If the zamindar allows himself to become time barred, or if he otherwise forfeits his right to enforce the charge by the prescribed procedure, he must suffer for it. In the present case, the zamindar has himself made it impossible to sell under the older decrees, by selling under the later decree. He obtained his first decree so long ago as 1900, and his second decree more than four years later. He had sufficient time to sell up under his first decree and so on. His own delays are the cause of his difficulties. He seeks to escape the penalty at the cost of transferees of part of the property.

If previous rent can be realized as a charge out of surplus sale proceeds from a sale under a rent-decree, after satisfaction of the decree, there is nothing in the Act to limit the charge to such previous rent as has been previously decreed. Rent not yet paid, but not decreed, would be a charge. The contention leads to these difficulties. Also a suit for such previous rent might be time barred. It is not apparent why the fact that a suit for such rent was time barred should stand in the way, if the fact that execution of a previous decree for rent is time barred will not stand in the away, if a zamindar tries to take the rent covered by that previous decree out of the surplus sale-preceeds. Thus if the charge given by S. 65, Ben. Ten. Act, is not a charge which can be enforced only by the procedure provided by the Act, the question comes up, whether there is such a charge for rent for which a suit is time barred; and if there has been a suit and a decree, whether the charge will be lost when the decree is time-barred for execution. In my opinion, the right view is that the charge can be enforced only by following the procedure laid down by the Act, by getting a decree for the rent in respect of which the charge is to be enforced and by selling up under that decree. No such difficulty as has been noticed can arise if this be held. And it is no hardship on a zamindar to have to sue, and then to execute his decree in the time allowed by law or forfeit his charge. But hardship does arise if a zamindar can enforce this charge for indefinite numbers of years, to the loss of mortgagees and others. In the present case the total rent is for eleven years. On the contentions set up, there might be cases in which the period was much longer still. In my opinion the appeal should, on this ground also, be dismissed with costs.

By the Court.—As there is a difference of opinion between us in this case, the order of the Court under S 98, Civil P. C., is that the decree of the lower Court be confirmed and this appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 274

SANDERSON, C. J. AND CHAUDHURI, J.

An Advocate, In re.

Original Civil Suit Decided on 14th June 1917.

(a) **Legal Practitioner—Receiving instructions only from attorney is beneficial.**

The usage which obtains on the Original Side of the Calcutta High Court that counsel should take their instructions only from Attorneys, though founded upon no rule of law, is a most beneficial one from the point of view of the public and of the Bar, and should be maintained. [P 274 C 2; P 275 C 1]

(b) **Legal Practitioner—Practice of selecting junior by counsel is to be discouraged.**

The practice of a counsel who is already engaged in a case selecting the other counsel who should be briefed with him is contrary to the traditions and to the best interests of the profession and ought to be discouraged. [P 275 C 2]

(c) **Legal Practitioner—Fees given for attending trial—Counsel unable to attend—He should return whole fee and not retain as consultation fee.**

Where an advocate accepted a brief marked 7 G. Ms.—4 and 3—containing instructions for him to appear at a trial in Calcutta on behalf of the client, but in consequence of an urgent professional call elsewhere he returned the brief to the attorney with his notes and claimed to have earned the consultation fee of 6 G. Ms. marked on the brief:

Held: that the advocate should have returned the whole fee of 7 G. Ms as it was given to him for the purpose of attending the trial and the consultation was held with a view to his so doing and that he should have returned the fee without being asked so to do. [P 275 C 1]

Eardley Norton, *H. D. Bose*, *S. K. Mullick* and *A. Rasul*—for Advocate.

Sanderson, C. J.—In this case we have considered the complaints which have been made against the advocate. After reading the affidavits we thought it necessary that we should further enquire into the matter, more especially with regard to two questions, namely, the circumstances under which the work was originally undertaken by the advocate, and the alleged non-return of his fees when he was unable to conduct the case in Court. Accordingly, we held the further enquiry yesterday. We regard to the first question, we are of opinion that there is no need for any further action by the Court. I take the account which is given by the advocate himself in his affidavit para. 2; after setting out that the petitioner was introduced to him at his house by one Mrs. Neil, and pointing out that the petitioner told him that he had a claim against the Uncovenanted Service Family Pension Fund; he goes on to say that

'he further told me that considerable correspondence extending over ten or twelve years had taken place with the authorities of the said fund and he requested me to peruse the whole volume of correspondence and other papers and documents in connexion with the matter and to advise him how to proceed. That thereupon he made over to me a very heavy file of papers and I demanded from the petitioner a fee of Rs. 500 for perusal and opinion in anticipation of any course I might advise him to pursue, whereupon the petitioner paid me Rs. 100 on account on that occosion, and a further sum of Rs 100 on or about the day following.'

Further money was paid afterwards, but not amounting to Rs. 500, and it does not affect the point that I am now considering. I think it unfortunate that the advocate did not follow the well-known custom and ask that he should be properly instructed by an attorney. The advice of the advocate was sought with a view to civil proceedings being taken. The custom to which I have referred is well known, and is stated in Lord Halsbury's book (The Laws of England, Vol. 2, p. 389) as follows:

"The usage and etiquette of the profession of a barrister require that in all but some exceptional cases counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor."

That, as we were informed yesterday, will not apply literally to the appellate side, where counsel are instructed sometimes either by a vakil or a mukhtear or in some cases by an attorney:

"There is no rule of law to prevent a litigant from instructing counsel directly, or to prevent counsel so instructed from appearing on behalf of a litigant; but a judicial opinion has been expressed that it is expedient in the interests of suitors and for the satisfactory administration of justice to adhere to the usage which requires that counsel should not accept a brief in a civil suit from anyone but a solicitor. The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business and to all criminal business except what is known as a dock defence. It does not extend to the preparation of a will, to work before Parliamentary Committees, where counsel may appear when instructed by Parliamentary Agents who need not be solicitors, or to inquiries under the Local Government Acts, the Public Health Acts, or the Light Railways Act; at such inquiries counsel may be instructed by clerks to local authorities who are not solicitors. A barrister may advise in non-contentious business without the intervention of a solicitor, though the practice has been stated to be undesirable."

The rule stated in Mr. Belchamber's Book, Practice of the Civil Courts, p. 8, to which the learned Advocate-General referred us yesterday, is as follows:

"The usage that counsel should take their instructions only from attorneys is beneficial and,

though founded upon no rule of law, ought to be maintained."

The learned Advocate General, when asked whether the course which the advocate adopted, as set out in para. 2 of the advocate's affidavit to which I have referred, could be said to be in accordance with the custom here, said that according to his experience it was not so, and it should not have been done. The above-mentioned usage is a most beneficial one from the point of view of the public and the Bar; and if it had been followed in this case, much of the trouble which has arisen would have been avoided. At the same time I do not think that in this case the complainant was prejudiced, for though the fee demanded was a large one, namely, Rs. 500, for perusal of the papers and opinion, the full amount was not paid and it is alleged that there was a large volume of correspondence and other documents which had to be looked into; and, apparently, the advocate took considerable trouble over the matter. As regards the second question, it appears that the advocate accepted the brief marked 7 G Ms.—4 and 3—containing instructions for him to appear at the trial on behalf of the complainant. Some time in March 1916, the advocate alleges, he had to go to Hazaribagh on an urgent professional call, and before he left Calcutta he returned his brief to the attorney with his notes. He did not, however, return his fees. He had had the consultation and he claimed to have earned the consultation fee of 6 G. Ms. marked on the brief. In my opinion he should have returned the whole fee of 7 G. Ms. It was given to him for the purpose of attending the trial, and this consultation was held with a view to his so doing; and if he could not attend the trial, another counsel would have to be briefed and a further consultation with the second counsel would be necessary for which the client would have to pay. Under the advice of his counsel the advocate has now offered to return the fee of 7 G. Ms., and I think he should do so.

Copies of certain letters were produced by the attorney. These letters are alleged to have been written by him to the advocate at Hazaribagh. The advocate denies having received them and he denies the statements contained therein. I accept his statement. If he had received these letters and if the facts alleged therein were proved, I should have taken a much more serious view of the matter. I think he should have returned his fees when he found he could not attend to the case without being asked so to do, especially, as he must have known that the complainant was not a man in affluent circumstances and that the non-return of the fees might place him in a difficulty. Fortunately, however, another consel took up the case for Mr. Chill and conducted it for him so that in the end his interests did not suffer. The conduct of the advocate with regard to this part of the case cannot be regarded with anything but disfavour: but having regard to the circumstances of the case, which I have mentioned, I do not think it necessary for the Court to take any further steps. Consequently, in my opinion, this Rule ought to be discharged. I wish to add a word about a matter which has nothing to do with this case, but it is a matter of general importance to the profession. It cropped up during the course of the hearing with reference to a passage in the affidavit of the advocate in para. 11, in which he says:

"I made over my brief with all the notes I had prepared for my own use to the attorney when I left Calcutta, and I state that I had no hand in the selection of my junior."

I happened to pass a remark about that; and, thereupon, one of the learned counsel alleged that it was by no means an unknown or uncommon practice for one counsel to select another counsel to act with him in the case. I should be very sorry to believe that this is so. I do not refer, of course, to a learned counsel holding a brief for another when he is temporarily unable to attend to a case. That is a very different matter. What was suggested was that a counsel already engaged in a case selected the other counsel who should be briefed with him. If such a thing has been done, I think that it must have been on comparatively rare occasions. such a practice is contrary to the traditions of the profession and it is also contrary to the best interests of the profession, and such a practice ought to be, and I feel sure would be, discouraged by all who have the interests of the profession at heart.

Chaudhuri, J.—I concur, but I want to add a few words in respect of one of the charges in this case, which was that the advocate concerned had nominated

his junior. Mr. Norton stated that it had become a somewhat frequent practice at the Calcutta Bar, for seniors to name their juniors, and he also said that juniors sometimes nominated their seniors and that in fact his name had once been struck out by a junior member of the Bar. This is a very serious matter, but as Judges of the Court, we can hardly do anything in our judicial capacity to prevent such gross breaches of the rules of the Bar. What was stated to us implied that work was thus being kept within a circle. The matter being mentioned to the Advocate-General, he agreed that it was reprehensible conduct, and assured us that he would take immediate action if the matter was brought to his notice. There is always great reluctance to bring these unpleasant matters to the surface, but I think the Bar owes it to itself to take action in these matters. The Calcutta Bar has justly prided itself on its strength and independence, and I appeal to it to see that its high position is always maintained. Work naturally gets into the hands of a limited circle and there is nothing improper, and it is quite legitimate, for a senior to ask a junior to hold a brief for him, but to form a group is entirely improper. I feel that any attempt to form such a group should be discouraged by the Bar. Mr. Norton's name being struck out by a junior shows, not only that a Bar rule was broken, but also want of respect for senior members of the profession. We honoured them when we we were at the Bar. The respect we show to our seniors results from the feeling of respect one ought always to have for one's profession. I worked as a member of the Calcutta Bar for over 25 years. Its interest and welfare are almost personal questions to me. Although I am now sitting as a Judge, I feel I am a member of the Calcutta Bar and I hope my appeal to them will not be in vain. I am glad to say the charge made in this case has not been substantiated. I regret to say that the day-book of the attorney in this case does not inspire the confidence such a document deserves, and I hope the attorney will take note of the fact and improve his methods of work.

V.B./R.K. *Rule discharged.*

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* A. I. R. 1918 Calcutta 276

WALMSLEY AND PANTON, JJ.

Sasi Sekhareswar Roy Bahadur — Plaintiff—Appellant.

v.

Hajirannessa Bibi and *others* — Defendants—Respondents.

Appeal No. 293 of 1917, Decided on 24th June 1918, from appellate decree of Dist. Judge, Rajshahi, D/- 7th November 1916.

*** Principal and Agent—Suit for accounts—Death of agent—Legal representatives are not exonerated from all liability to principal—Accounts.**

The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representatives from all liability to the principal. After the death of the agent the proper procedure in the suit would be that the statement of claim put in by the plaintiff should be investigated, preferably by a Commissioner in the presence of the representatives of the deceased agent. The onus would be on the plaintiff to prove each item in the sum which he claims, i. e., to prove that each item was actually realized by the agent and further that it was not paid to his credit. The representatives of the deceased agent would be at liberty to adduce such evidence as they please to show either that the money was not realized by the agent or that after realization it was paid to the plaintiff. The amount actually due being thus ascertained, the Court would pass a decree against the assets of the deceased agent in the hands of the representatives: 16 *I C* 742, *not Foll.* [P 277 C 1, 2]

Gunada Charan Sen—for Appellant.

Wahed Hossain—for Respondents.

Walmsley, J.—This appeal is preferred by the plaintiff. The case has had a long history. The deceased defendant Baharulla executed a kabuliyat in favour of the plaintiff, by which he undertook to pay to the plaintiff a sum of Rs 1,375 per annum and in return to collect the rents of a Mahal belonging to the plaintiff. He failed to carry out the conditions of the kabuliyat and the plaintiff instituted this suit in April 1908 as a rent suit. Baharulla filed a writen statement in which he objected that the sum to be paid by him could not be treated as rent, and a few months later the plaintiff amended his plaint and converted the suit to a suit for money instead of a suit for rent. The amendment was allowed. The first Court then decreed the suit in respect of the claim for damages for non-delivery of papers but dismissed it so far as the claim for money due under the kabuliyat was concerned, as not being maintainable in the form in which it was brought. The learned District Judge on appeal upheld that decision.

Then the case was brought to this Court and it was ordered by this Court that the suit should be treated as a suit for account and it was remitted to the first Court.

Before the case could be taken up by the learned Subordinate Judge Baharulla died. The plaintiff then brought his representatives on the record in his place. They objected that the suit could not be maintained as against them and both the lower Courts have upheld that contention. The learned District Judge purports to base his views upon the case of *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1). It has been urged before us on behalf of the plaintiff-appellant that, in spite of the death of the agent, he is at liberty to continue the suit against the representatives and that if the representatives cannot be asked to explain the papers kept by the deceased agent, at any rate, he, the plaintiff, is entitled to have his statement of claim against them investigated. It appears to me rather an extraordinary contention made on behalf of the defendants that the death of Baharulla should at once exonerate them from all further liability to the plaintiff. If the agent collected money belonging to the plaintiff which he ought to have made over to the plaintiff and failed to do so and died while such money was still due to the plaintiff, it is hard to believe that the agent's representatives are free from all liability, and the case of *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (1), to which I have just referred, appears to me to be an authority for taking this view.

In fact, the present case is a stronger one, because the suit was brought and the order of this Court in appeal was made against the agent himself, whereas the case to which I have referred was brought after the agent's death against the representatives. It appears to me that the proper order to pass in this case now is that the case should go back to the first Court and that the statement of claim which the plaintiff put in after the death of Baharulla should be investigated, preferably by a Commissioner, in the presence of the representatives of the deceased agent. The onus will be on the plaintiff to prove each item in the sum which he claims, that is, to prove that each item was actually realized by the agent and further that it was not paid to his credit. The defendants will be at liberty to adduce such evidence as they please, to show either that the money was not realized by the agent or that after realization it was paid to the plaintiff. The amount actually due will be ascertained and the Court will pass a decree against the assets of the deceased agent Baharulla in the hands of the representatives, that is to say, if any sum is found due to the plaintiff. The decree of the first Court with regard to the sum of Rs. 50 for damages will stand. The order of the first Court making the plaintiff liable for proportionate costs to the defendants is set aside. The plaintiff will get his costs in this Court and in the lower appellate Court from the contesting defendants. The learned vakil on behalf of the defendants asks that the plaintiff should be required to issue fresh processes against the minor defendants who have not entered appearance. This may be unnecessary but the plaintiff is directed to do so.

Panton, J.—I agree.

V.B./R.K. *Suit remanded.*

1. (1912) 16 I C 742.

A. I. R. 1918 Calcutta 277

WALMSLEY AND PANTON, JJ.

Felu Sarkar and *others*—Defendants—Appellants.

v.

Hemanta Kumari Debya—Plaintiff—Respondent.

Appeals Nos. 1544, 2084, 2085, 2086, 2087 and 2088 of 1919, Decided on 1st July 1916, from the appellate decrees of Addl. Sub-Judge, Rajshahye, D./ 30th March 1916.

Transfer of Property Act (1882) S. 52—Suit for ejectment against ijardar pending—Lease by ijardar after expiry of ijara is not valid.

A. who was the owner of 12-annas share and an ijaradar of the remaining four-annas share of certain lands, made a settlement of the lands on the expiry of the ijara, while a suit by the proprietors for his ejectment from the four-annas share covered by the ijara was pending:

Held: that the raiyats with whom *A* had settled the lands were liable to be ejected from the four-annas share covered by the ijara by the proprietors thereof, as *A* did not act in good faith in making the settlement. [P 278 C 2]

U. N. Sen Gupta, *Biraj Monan Majumdar* and *Probodh Kumar Das*—for Appellants.

Bepin Behari Ghose—for Respondent.

Judgment.—These appeals are preferred by the principal defendants, the

tenants. The plaintiff brought the suit from which they arise to recover khas possession of her share, approximately four annas, in certain land, by ejecting the principal defendants, and she made the Midnapore Zemindary Company, owners of the remaining interest, pro forma defendants. Her case was that she granted an ijara of her share to Messrs. Watson & Co., predecessors of the Midnapore Zemindary Company, and that at the expiry of the ijara she brought a suit against them in 1908, and obtained a decree, and that the tenant-defendants obtained settlement of the lands during the pendency of that suit. The suits were dismissed by the first Court, but they were decreed on appeal. The defence was that the defendants obtained settlement from Messrs. Watson & Co. in 1305 while the latter were in possession under their ijara lease. The contentions pressed by the appellants defendants are based mainly on the assertion that they obtained settlement in 1305, and I think it will be convenient to state them before turning to the findings recorded by the learned Subordinate Judge. They are as follows:

(1) The settlements were taken from Messrs. Watson & Co. who were owners to the extent of about 12 annas and ijaradars of the balance, and, therefore, it cannot be said that the defendants came upon the land other than in good faith; (2) even if it be held that the ijara lease came to an end before 1305, the suits are barred by limitation; (3) if Messrs. Watson & Co. were not ijaradars in 1305. they were at any rate proprietors to the extent of about 12 annas; the defendants obtained settlement from them and after being in possession for twelve years, they acquired rights of occupancy which cannot be assailed; (4) the tenants were not made parties to the suit of 1908, although the plaintiff could not get khas possession without obtaing a decree against them and, therefore, the present suit is barred by O. 2, R. 2; (5) as to the finding that the lands are proprietor's nij jote, this claim was not made in the plaint, it was not advanced in the first Court, and no evidence was adduced in regard to it. The proposition embodied in the first four arguments are elementary, and it is conceded on the one hand that if the defendants obtained settlements in 1305, the arguments are unanswerable, and on the other that they have no foundation if the defendants did not obtain settlement until several years later. The learned Subordinate Judge begins his judgment by an unfortunate misstatement: he says that the ijara expired before 1305, whereas it is admitted that there is no evidence to show when it expired. The mistake, however, does not vitiate his judgment, he goes on to record clear findings which are not affected by his belief that the ijara had undoubtedly come to an end before 1305. He points out that there are no kabuliyats in respect of the settlements said to have been made in 1305 and 1310: that the kabuliyats of 1317 were executed while the title suit was pending: and that the explanation offered for the absence of dakhilas during the period 1305 to 1310 is not satisfactory; he then holds that the settlements cannot be placed earlier than 1317 and points out that at least some of the defendants knew of the litigation that was in progress, and that at any rate the pro forma defendants who granted settlement cannot have been acting bona fide. These findings of fact dispose of four of the arguments advanced by the appellants, and it is unnecessary to say anything about the question whether the land is the proprietor's nij jote or not. The appeals are dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 278

MOOKERJEE AND WALMSLEY, JJ.

Secy. of State—Defendant—Appellant.

v.

Gangadhar Nanda—Plaintiff—Respondent.

Appeal No. 405 of 1914, Decided on 22nd August 1917, from original decree of Sub Judge, Midnapur, D/- 26th March 1913.

Limitation Act (1908), S. 15 (2)—S. 15 (2) does not apply to suits under Ben. Ten. Act, (1885), S. 104-H.

Section 15 (2), Lim. Act, cannot be applied to extend the period of six months provided for the institution of suits under S. 104-H, Ben. Ten. Act. [P 280 C1]

Ram Charan Mitra—for Appellant,

B. Chakravarti, Shib Chunder Palit, Kshirod Narayan Bhuiya and *Dhirendra Krishna Roy*—for Respondent.

Judgment.—This is an appeal by the Secretary of State for India in Council against a decree in a suit instituted by

the respondent on 16th May 1910, under S. 104-H, Ben. Ten. Act. The lands in suit are comprised in three villages—Dakhin Baraj, Uttar Dighe and Dhai Hukusria. The settlement roll, to which exception was taken by the plaintiff, was published, in the case of the first village on 2nd June 1910, and in the case of the other two villages on 17th June 1910. As regards the claim in respect of the first village, objection is taken that the suit is barred under sub-S. (2), S. 104-H, which provides that a suit under sub- S. (1) must be instituted within six months of the date of the certificate of final publication of the Record of Rights. This objection does not apply to the second and third villages, and for the reasons assigned in our judgment in *Secy. of State* v. *Digambar Nanda* (1) (Appeal from Original Decree No. 252 of 1913) the case must be remitted to the Subordinate Judge for investigation, whether the plaintiff is an occupancy raiyat or a non-occupancy raiyat in respect of the lands comprised in these two villages and for ascertainment of fair and equitable rent payable in respect thereof. In respect of the lands of the village Dukhin Baraj, however, the question of limitation requires careful consideration.

The Record of Rights was finally published on 2nd June 1910. The suit was instituted on 1st December 1910, after the expiry of the period of six months prescribed by S. 104-H, sub-S. (2). The plaintiff claims the benefit of S. 15, sub-S. (2), Lim. Act, which provides that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force the period of such notice shall be excluded. In the case before us the plaintiff served a notice as required by S. 80 of the Code of 1908, which provides that no suit shall be instituted against the Secretary of State for India in Council until after the expiration of two months next after notice in writing has been delivered or left at the office of a Secretary to the Local Government or the Collector of the District. Consequently if S. 15, sub-S. (2), Lim. Act, is held applicable to the case before us, it is plain that the suit is not open to objection on the ground of limitation. Now the term "prescribed" as used in sub-S. (2), S. 15, read with S. 3, obviously means "prescribed by Sch. 1 Lim. Act"; consequently, this provision cannot, by its own force, extend the period of six months mentioned in S 104-H, sub-S. (2), Ben. Ten. Act. The plaintiff-respondent has thus been forced to argue that S. 29, Lim. Act, and Ss. 184 and 185, Ben. Ten. Act make S. 15, sub-S. (2), Lim. Act, applicable to suits under S. 104 H. Ben. Ten. Act. In our opinion there is no force in this contention.

Section 29 (1) (b) provides that nothing in the Limitation Act, shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special law or local law now or hereinafter in force in British India. S. 184, Ben. Ten. Act, provides that the suits, appeals and applications specified in Sch. 3 annexed to the Act, shall be instituted within the time prescribed in that schedule for them respectively, and every such suit or appeal instituted or application made after the period of limitation so prescribed shall be dismissed, although limitation has not been pleaded. S. 185, sub S. (i), then lays down that Ss. 7, 8 and 9, Lim. Act. 1877, shall not apply to suits or applications mentioned in S. 184. S. 185, sub-S. (2), next provides that subject to the provisions of Ch. 16, Ben. Ten. Act. the provisions of the Lim. Act, 1877 shall apply to all suits, appeals and applications mentioned in S. 184; that is, suits, appeals and applications specified in Sch. 3. It is plain beyond reasonable controversy that S. 15 (2), Lim. Act, which is made applicable to suits, appeals and applications mentioned in Sch. 3, annexed to the Bengal Tenancy Act, by virtue of S. 185, sub-S. (2), cannot possibly apply to suits instituted under S. 104-H, which are not mentioned in Sch. 3. This view is supported by the decision in *Radha Shyam Kar* v. *Dinabandhu Biswal* (2), where it was ruled that S. 18, Lim. Act, does not apply to an application under S. 174, Ben. Ten. Act. Much stress, however, has been laid on the decision of a Full Bench of the Allahabad High Court in *Dropadi* v. *Hira Lal* (3) where a question arose as to the applicability of the provisions of the Limitation Act to proceedings in insolvency. That case is clearly distinguishable; but

1. A I R 1918 Cal 1=45 I C 43=46 Cal 160.

2. A I R 1914 Cal 46=20 I C 760.

3. (1912) 34 All 496=16 I C 149.

it may be observed that the decision has not always been regarded with favour: *Thakur Prasad* v. *Punno Lal* (4), *Munjuluri Sivarammayya* v. *Singumahanti Bujanga Rao* (5) and *Abu Baker Sahib* v. *Secy. of State* (6). There is also no analogy between the case before us and the decisions in *Sharoop Das Mandal* v. *Joggessur Roy Chowdhry* (7), *Dulhin Mothura Koer* v. *Bansidhar Singh* (8) and *Srinivasa Aiyangar* v. *Secy. of State* (9). A question of the description now before us must be determined by a reference to the terms of the special statute, and on a plain reading of the provisions of S. 185, Ben. Ten. Act, taken along with S 15. sub-S. (2), Lim. Act, we feel no doubt whatever that S. 15 (2) cannot possibly be applied to extend the period of six months provided for the institution of suits under S 104-H, Ben. Ten. Act. In our opinion, the suit is barred by limitation in respect of the lands comprised in village Dakhin Baraj.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The suit will stand dismissed in respect of the lands in village Dakhin Baraj. With regard to the lands of Utter Dighe and Dhai Kukusria, the decree of this Court will declare that the plaintiff is a raiyat and not a tenure-holder and the case will be remitted to the Subordinate Judge to determine whether the plaintiff is an occupancy raiyat or a non-occupancy raiyat and then to ascertain the amount of fair and equitable rent payable by him according to his status. Each party will pay his own costs both here and in the Court below up to the present stage. The costs after remand will abide the result.

V.B./R.K. *Appeal allowed.*

4. (1913) 35 All 410=20 I C 673.
5. (1916) 39 Mad 593=20 I C 70.
6. (1911) 34 Mad 505=5 I C 884.
7. (1899) 26 Cal 564.
8. (1911) 10 I C 380.
9. (1915) 38 Mad. 92=18 I C 617.

A. I. R. 1918 Calcutta 280

RICHARDSON AND BEACHCROFT, JJ.

Bhushan Chandra Dutta and *others*—Accused—Petitioners.

v.

Chairman of Kotechandpur Municipality—Opposite Party.

Criminal Revn. No 1137 of 1917, Decided on 30th November 1917.

(a) Bengal Municipal Act (1884), Ss. 6 (4) and 204—"House"—Meaning of, stated.

For the purposes of S. 204 the term "house" as interpreted in S. 6, Cl. (4), of the Act is not confined merely to the four walls and the roof within which a man dwells or carries on business, but it may well include the land or premises which are enjoyed or held with the building. It is a question in each case whether any particular land adjoining a building is part and parcel of the house or not. [P 281 C 1]

(b) Bengal Municipal Act (1884), S. 204—Patit land adjoining house—"Obstruction placed in front of house" illustrated.

Where on the west of a road the petitioner had a house, to the north of which there was a piece of patit land adjoining, which was acquired after the land on which the house stood had been acquired and the two plots were separated by a wall and a privy, and on the patit land was stacked a heap of khapra or broken pottery which extended from the land on to the road :

Held : that in the absence of a definite finding by the trial Court that the patit land was held and enjoyed along with the house as part of the premises, it could not be said that the stack of khapra was an obstruction placed in front of the house within the meaning of S. 204 so as to warrant the petitioner's conviction under S 218 of the Act. [P 281 C 1]

Dasarathi Sanyal and *Debendra Narain Bhuttacharji*—for Petitioners.

Tarakeswar Pal Chowdhury—for Opposite Party.

Judgment.—The petitioners were convicted under S. 218, Bengal Municipal Act of the offence of failing to comply with a notice issued to them under S. 204 of the Act. S. 204, in so far as it is relevant, runs as follows :

"The Commissioners may give notice in writing to the owner or occupier of any house requiring him to remove or alter any projection, encroachment or obstruction erected or placed against or in front of such house . . . . . if the same overhangs the road, or juts into, or in any way projects or encroaches upon or is an obstruction to the safe and convenient passage along any road."

Now the road in question runs from north to south. On the west of the road the petitioners have a house and to the north of the house there is a piece of land adjoining it, which is variously described as patit land or as an orchard. There is evidence that the land on which the house stands was acquired at some date prior to the date on which the adjoining piece of land was acquired. The two are separated by a wall and a privy —the privy standing partly on the old land and partly upon the new land. There is, however, no door in the wall or in the privy communicating with the new land. The obstruction complained of is a heap of khapra, or broken pottery.

which is said to extend from the new land on to the road. It has been found that the khapra or part of it is stacked on the road. Assuming, as we think we may do, that this heap or stack of khapra is an obstruction within the meaning of S. 204, the principal question that has been argued before us is whether this obstruction is in front of the petitioner's house Now, in S. 6, Cl. (4) of the Act, the word "house" is only interpreted to the extent that "it includes any hut, shop, warehouse or building" and we make no attempt to give a more precise definition.

The word is in some respects an ambiguous one, which may have different meanings according to the context in which it is used. We certainly do not say that for the purposes of S. 204 the term is confined merely to the four walls and the roof within which a man dwells or carries on business. There would seem to be no reason why the term should not include the land or premises which are enjoyed or held with the building. It may be a question in each case whether any particular land is part and parcel of a house or not. In the present case there is no definite finding that the patit land or orchard was held and enjoyed along with the house as part of the premises. The fact that the two pieces of land were acquired at different times is an element which we think may be taken into consideration. It is not clear, for instance, that a conveyance of the petitioner's house would pass the whole land, new as well as old. In our opinion, on the materials before us, it cannot be said that this stack of khapra is in front of the petitioner's house. In that view, we make the Rule absolute. The conviction of the petitioners and the sentence passed upon them are, therefore, set aside. The fine, if paid, will be refunded.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 281

MOOKERJEE AND BEACHCROFT, JJ.

Nilmoni Dey—Petitioner.

v.

Hira Lal Das—Opposite Party.

Rule Nisi No. 577 of 1917, Decided on 21st August 1917, against order of Sub-Judge, Third Court, Hooghly, in Exe. Case No. 67 of 1917.

Civil P. C. (1908), S. 73 and O. 31, R. 2—A, B and C appointed executors—X creditor of estate, getting decree against A and B only—A being himself creditor obtaining decree against B and C—Two decrees can be regarded as passed against same judgment debtor and X is entitled to rateable distribution along with A.

A testator appointed *A*, *B* and *C* as executors to his will, *X*, a creditor, instituted a suit against *A* and *B* only for recovery of his dues from the estate of the deceased testator and got an ex parte decree. *A*, one of the executors, who was himself a creditor of the estate, also obtained a decree against *B* and *C* for recovery of his dues:

Held: that notwithstanding the provisions of O. 31, R. 2, Civil P. C., the two decrees might be regarded as passed against the same judgment-debtor, and that under S. 73, *X* was entitled to claim rateable distribution of the assets along with *A*. [P 282 C 1]

Noni Lal Dey—for Petitioner.

Probodh Chandra Roy—for Opposite Party.

Judgment.—The events which led to the issue of this Rule may be briefly stated. One Bhusan Chandra Bhar appointed three persons *A* *B* and *C* as executors to his will. After his death, one of his creditors *X* instituted a suit against two of these executors *A* and *B* for recovery of his dues from the estate. The suit was not defended and an ex parte decree was made on 17th April 1917. *A*, one of the executors, who was himself a creditor of the estate, instituted a suit against *B* and *C* for recovery of his dues. The claim was decreed. The question now arises, whether these two decree-holders are entitled to rateable distribution of the assets under S. 73, Civil P. C. The Subordinate Judge has held that *X* is not entitled to claim rateable distribution along with *A*. In our opinion this view cannot be supported.

It may be conceded that O. 31, R. 2, Civil P. C., provides that where there are several executors, they shall all be made parties to a suit against one or more of them, provided that the executors who have not proved their testator's will need not be made parties. From this point of view, it is conceivable that the petitioner should have instituted this suit against *A*, *B* and *C*. No objection, however, was taken to the frame of the suit, and it is now impossible to hold in these proceedings that the decree made therein is not operative against the estate of the testator, merely because one of the executors was not joined as a party. The view, we take, receives some support

from the decision in *Hafizabai* v. *Kazi Abdul Karim* (1). What has happened in substance is that there are now two decrees against the estate, each obtained against two out of three executors. One of these two executors is common to the two suits. Each decree is prima facie capable of execution against the estate of the deceased testator. In these circumstances, we are of opinion that the twe decrees may, without unduly straining the language of S. 73, be regarded as passed against the same judgment-debtor, namely, they are both decrees against the estate of Bhusan Chandra Bhar, in one case represented by *A* and *B*, in the other case by *B* and *C*. We may add that we are not disposed to put a narrow construction upon the terms of S. 73, so as to defeat the ends of justice. We hold accordingly that the two decree holders must rateably divide the assets under S. 73. The Rule is made absolute and the order of the Court below set aside. The record will be returned to the Subordinate Judge in order that this order may be carried out. We make no order as to the costs of this Rule.

V B./R K. *Rule made absolute.*

1. (1885) 19 Bom 83.

A. I. R. 1918 Calcutta 282

RICHARDSON AND BEACHCROFT, JJ.

Jahadali and *others* — Defendants — Appellants.

v.

Ajimannessa Bibi and *others* — Plaintiff and Pro forma Defendants — Respondents.

Appeal No. 1891 of 1915, Decided on 11th January 1918, from appellate decree of Sub-Judge, Hooghly, D/- 3rd May 1915.

Legal Practitioner—Admission of fact by pleader is binding upon his client—Evidence Act, S. 18.

An admission of fact by the pleader of a party is binding upon his client and the opposite party cannot be arbitrarily deprived of the benefit of the admission. [P 282 C 2]

A Munsif made the following statement in the course of his judgment: 'The learned pleader for the plaintiff concedes in his argument that the land in suit is included in the lands mentioned in the sale certificate.' In decreeing the appeal from the decision of the Munsif, the appellate Court entirely ignored this admission or concession of the pleader made in his argument in the trial Court:

Held: that as the appellate Court did not appreciate or realize the legal effect of the admission by the pleader, the case must be remanded to that Court in order that the appeal thereto might be rebeard, on the footing that the admission in question was in fact made in the trial Court. [P 283 C 1]

Mohendra Nath Roy and *Jyotis Chandra Hajra*—for Appellants.

Dwarkanath Chakrabuty and *Phanindra Nath Das* for *Nishith Nath*—for Respondents.

Richardson, J.—This appeal turns upon a short point The contest relates to certain property. The plaintiff in the suit Srimati Ajimannessa Bibi makes a title to the property under a hiba-bil-ewaz dated 28th Chaitra 1316 B. S. (April 1910) executed in her favour by hsr deceased husband Kebad Ali. The principal defendant, defendant 3, on the other hand claims to have purchased the property in the year 1901 at a Court sale held in execution of a decree obtained against Kebad Ali. One of the questions which arose was, whether the property claimed by the plaintiff was identical with the lands specified in the sale certificate issued to defendant 3. On this point the learned Munsif in the trial Court makes the following statement in the course of his judgment:

"The learned pleader for the plaintiff concedes in his argument that the land in suit is included in the lands mentioned in the sale-certificate."

Now the learned Munsif is plainly speaking of an admission made by the plaintiff's pleader of the identity of the land claimed in the suit with the land mentioned in the sale certificate. In the Court of appeal below however the learned Subordinate Judge entirely gave the go by to this admission. He seems to have treated the admission or concession as an admission made for the purpose of the argument. That is clearly not the nature of the admission and it is impossible on the face of the record, regard being had to the whole tenor of the Munsif's judgment, to accept the learned Judge's view of what took place in the trial Court. Having disregarded the admission the learned Subordinate Judge has found that the property in question is not identical with the property mentioned in the sale certificate, and so finding he took what may be termed a short cut to the decision of the appeal. I am of opinion that he was not entitled to deal with the case in that way. An admission of fact by a learned pleader is binding on his client and the opposing party cannot be arbitrarily deprived of the benefit of

the admission. If any authority is required, reference may be made to the case of *Sreemutty Dossee* v. *Pitambur Pundah* (1). It is evident that the learned Subordinate Judge did not appreciate or realize the legal effect of the admission as an admission by a pleader on behalf of his client. I may add that if there was any mistake on the Munsif's part, it seems extraordinary that no steps were taken in his Court by way of review to correct the plain and clear statement in his judgment. The point again was not taken in the grounds of appeal filed in the lower appellate Court and it is impossible to suppose that if the admission had not in fact been made, that point would have been omitted. In the circumstances, I am of opinion that the judgment and decree of the lower appellate Court must be set aside and the case must be remanded to that Court in order that the appeal thereto may be reheard on the footing that the admission in question was in fact made in the trial Court. The costs of the appeal will abide the result.

Beachcroft, J.—I agree.

V.B./R.K. *Case remanded.*

1. (1874) 21 W R 332.

A. I. R. 1918 Calcutta 283

TEUNON AND NEWBOULD, JJ.

Sarada Charan Basar and *others* —Plaintiffs—Appellants.

v.

Juroram Mandal— Defendant —Respondent.

Appeal No. 191 of 1916, Decided on 11th January 1918, from order of Sub-Judge, Khulna, D/- 15th April 1916.

Bengal Tenancy Act (1885), S 66—Application for extension after expiry of period —Court can yet grant extension.

It is open to a Court to grant an extension of the time limited by S. 66 even where the application for extension is made after the expiry of the period prescribed by the section. [P 283 C 2]

Jadunath Kanjilal—for Appellants.

Satindranath Mukherjee—for Respondent.

Judgment.—This appeal arises out of proceedings in execution of a decree for rent made under the provisions of S. 66, Ben. Ten. Act. The order for ejectment could therefore not be carried into effect until after the expiry of the 15 days allowed for payment by sub S. 2 of the section which we have cited. The decree was made on 24th May. The order was drawn up and signed on 31st May. The arrears should therefore have been paid on or before 15th June. As a matter of fact the amount was not so paid into Court, and on 5th August the decree holder applied for execution. Notice was issued upon the judgment debtor, and on 7th September he appeared and applied for extension of time, it being his case that he had no notice of the decree and that no notice of the application in execution was served upon him. The first Court found no reason to extend the time and accordingly rejected his application. Against that order the tenant judgment-debtor preferred an appeal to the District Judge of Khulna, and at the hearing of the appeal the learned Subordinate Judge extended the time by a period of one week from the date of his order. We are informed that the payment has been made in accordance with the terms of that order, against which the decree holder now appeals.

His main contention is that inasmuch as before 7th September, on which date the judgment-debtor made his application for extension, the period of 15 days had already expired, it was no longer open to the Court to enlarge the time. In support of this contention he refers us first to the case of *Sunkar Singh* v. *Huree Mohan Thakoor* (1), in which it was held under the corresponding provisions of Act 10 of 1859 and Act 8 of 1869 that no extension of the period of grace could be granted. But under the law as contained in those two enactments the Court had no power, or at least was not expressly given the power, to extend the statutory period. Under the present Act by virtue of Sub-S. (3), S. 66, the Court is expressly authorized and empowered to enlarge the time. The appellant has next sought to distinguish the case of *Bodh Narain* v. *Mahomed Moosa* (2), in which it was held that under the provisions of S. 66, Ben. Ten. Act and the provisions of S. 244 now S. 47, Civil P. C., it was open to the executing Court to extend the time, on the ground that there the application by the judgment debtor was made before the expiration of the statutory period. That no doubt is so, but the reasoning which led the Judges to the conclusion at which they arrived would equally support an extension granted on an application made after the statutory period had expired.

1. (1874) 22 W. R. 460.
2. (1899) 26 Cal. 639.

We also find that in S. 148, Civil P. C. the principle that the Court may enlarge a period prescribed or allowed even though the period originally fixed may have expired has been expressly recognised, and we further find that even under the old Rent Act in the case of *Rao Banee Ram* v. *Prannath Shaha Koyal* (3) an extension of time was granted though the statutory period had expired before the application for enlargement was made. We can see no reason why the power of the Court to extend or enlarge the period allowed by law should be restricted in the manner suggested by the appellant. In so far as the exercise of the appellate Court's discretion is concerned, we are of opinion that for the extension of time the learned Subordinate Judge has given sufficient reason and has exercised his discretion in a proper manner. He points out that the decree here in question was an ex parte decree and there is nothing to show that it was in fact brought to the notice of the judgment-debtor until the proceedings in execution were taken. Further, as the learned Subordinate Judge has pointed out, in making the decree the first Court had omitted to specify, as he should have specified, the amount of the arrear and of the interest due. For these reasons we dismiss this appeal with costs. We assess the hearing fee at two gold mohurs.

V.B./R.K. *Appeal dismissed.*

3. (1872) 18 W R 142.

A. I. R. 1918 Calcutta 284

TEUNON AND SMITHER, JJ.

Prafulla Nath Tagore and *others*—Petitioners.

v.

J. Hodding and *others*—Opposite Parties.

Criminal Revn. No. 282 of 1917, Decided on 25th April 1917, against order of Subdivisional Magistrate, Patuakhali, D/- 3rd December 1916.

(a) Criminal P. C. (1898), S. 146—Order can be made only when possession cannot be determined.

An order under S. 146 can be made only where the Magistrate is unable to satisfy himself as to which of the contending parties is in possession. [P 285 C 2]

(b) Criminal P. C. (1898), Ss. 146 and 439—No effort to determine possession—Evidence leading to correct conclusion rejected and order under S. 146 passed—Order held to be without jurisdiction and involved material irregularity—Proper order indicated.

Where a Magistrate after having legally instituted proceedings under S. 145, Criminal P. C., made no effort whatsoever to ascertain the fact of possession, but after discarding and rejecting on erroneous grounds practically every piece of evidence that might have led him to a correct conclusion as to possession, made his final order under S. 146, Criminal P. C.

Held: (1) that the final order made by the Magistrate under S. 146 was either without jurisdiction or involved such gross and material irregularities as to seriously prejudice one of the parties to the proceeding: (2) that the final order must be set aside and the proceedings resumed from the point reached when the two parties closed their evidence, with liberty to them to adduce such further evidence as either of them may be advised [P 285 C 2; P 286 C 1]

(c) Criminal P. C. (1898), S. 145—Entry in Record of Rights under Ss 40 and 41—Bengal Survey Act is presumptive evidence of possession—Bengal Survey Act (5 of 1875), Ss. 40 and 41.

Where a previous dispute between the parties to a proceeding under S. 145, Criminal P. C., was terminated by an order under the provisions of Ss. 40 and 41, Bengal Survey Act 5 of 1875, and an entry in the Record of Rights was made in accordance with that order, the Magistrate in determining the question of possession should in the first instance presume that the possession of the land in dispute is with the party in whose favour the order under the Bengal Survey Act and the entry in the Record of Rights were made [P 285 C 1]

Dasarathi Sanyal and *Hira Lal Chakrabarti*—for Petitioners.

Surendra Nath Guha—for Opposite Parties.

Judgment.—This Rule is directed against an order made by the Sub-Divisional Magistrate of Patuakhali under the provisions of S. 146, Criminal P. C., by which he has attached a certain plot of land which is described as a partially excavated tank. The dispute which gave rise to the proceedings under S. 145, Criminal P. C., was one between the owners of a mauza called Algi towards the west and the owners of the neighbouring mauza called Chandkati on the east. Between these two mauzas there runs a khal now in a great measure silted up. In the map prepared in the course of the Record of Rights in connexion with these two mauzas that khal has been marked as plot No. 107. Of the partially excavated tank, part of it appears falls in plot marked No. 68, which it is not disputed is within the boundary of Mauza Algi, and another large portion is within the khal marked No. 107. Whether the tank does or does not extend also to some small extent on to three

plots of Mauza Chandkati, Nos. 1, 6 and 9, is a matter which has not been definitely determined.

We then find that in 1902 between the proprietors of these two mauzas there was regarding the khal a dispute which was terminated by an order under the provisions of Ss. 40 and 41, Bengal Survey Act 5 of 1875. The order which was made by the Collector was in favour of the owners of Mauza Algi, and it is not disputed that that order has the force of an order of the civil Court. In addition to that we have also the entry in the Record of Rights which is in accordance with that order and is also in favour of the owners of Algi. It is then practically conceded that up to the time when the work of excavation of this tank began, the site of the tank was lying fallow at least in so far as that site falls within the khal and the boundaries of Mauza Algi. That being so, it seems to us clear that when the Magistrate proceeded to determine the question of possession which arose between the parties, he should in the first instance have presumed that the possession of this fallow land was with the owners who had title as determined by the decision under S. 41, Survey Act, and which title was further to be presumed from the entry in the Record of Rights. If he had started his investigation upon that basis, he would then have next determined or proceeded to determine the exact position of this boundary line; and as a matter of fact in order to determine the boundary line he deputed a survey officer for the purpose. That officer, a kanungo, prepared a map in which he has shown the boundary line as ascertained by him on a comparison of the maps prepared in the course of the Record of Rights, that is to say, the map of Mauza Algi and the map of Mauza Chandkati.

Instead of proceeding in the way we have indicated, the Deputy Magistrate has first of all discarded in toto the decision arrived at under the provisions of the Survey Act, and for that he gives the following reasons: He says that it is not clear that the dispute in that decision was between the Mauza Algi on the one side and Mauza Chandkati on the other, and suggests that it was between Algi and another mauza of the name of Jamalkati. This reason or argument he founds on what appears to be an endorsement by a ministerial officer in the Collector's order made in 1902. That endorsement appears to have been made with a view to an entry in some register; and apart from the fact that Jamalkati appears to be a clerical error for Chandkati, for of the existence of any mauza of the name of Jamalkati there is no trace, the endorsement has no evidentiary value, and is indeed inadmissible in evidence. In the next place, he says, that the sudder kanungo in preparing his map has neglected to relay the revenue survey line, but here again he overlooks that the revenue survey line is of no importance in this case, because long after the revenue survey had taken place, the boundary line between the two mauzas was definitely decided and determined in the proceeding in 1902. He then discards entirely the results of the investigation made by the sudder kanungo and the map prepared by him, on the ground that the District Settlement Map of Algi and the District Settlement Map of Chandkati do not agree in all particulars. But that sort of discrepancy very frequently occurs in cases of survey of adjoining villages; and he has altogether overlooked the fact that the line ascertained by the kanungo is not one taken from either the map of Algi or the map of Chandkati, but is the result of the kanungo's reconcilement of the two.

An order under S. 146, Criminal P. C., can be made only when the Magistrate is unable to satisfy himself as to which of the contending parties is in possession. In this case for the reason that we have given above we can only say that the Sub-Divisional Magistrate has not applied his mind to the essential question and has made no effort whatsoever to ascertain possession. He has discarded and rejected on erroneous grounds practically every piece of evidence that might have led him to a correct conclusion. We do not say that in the first instance when he initiated the proceedings under S. 145 there was any lack of jurisdiction. It does not appear that there was any such lack of jurisdiction, inasmuch as it seems that there was a dispute. But having initiated the proceedings under S. 145, he has made his final order either without jurisdiction or after such gross and material irregularities as seriously to prejudice the second party. For these reasons we set aside his order and direct

that the proceedings be resumed at the point reached when the two parties closed their evidence, it being now open to them to adduce such further evidence as either of them may be advised.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 286

WALMSLEY AND PANTON, JJ.

Azimuddin Mandal and *others*—Defendants—Appellants.

v.

Tara Sankar Ghose and *others*—Plaintiffs—Respondents.

Appeals Nos. 1849, 1852, 1853, 1855, 1856, 1858, 1859, 1861, 1863 to 1868, 1870 to 1873, 1876, 1878, 1888 and 1895 of 1913, Decided on 8th July 1918, from appellate decrees of Special Sub Judge, Bogra, D/- 30th September 1912

Civil P. C. (1908), O 41, R. 4—Necessary party—Application for enhancement of rent by two landlords — Appeal dismissed as against one landlord for want of prosecution —Appeal fails in its entirety.

An appeal cannot proceed unless all the parties necessary for the determination of the case are brought before the Court. In a case which arose out of an application made under S. 105 by two landlords for settlement of fair rent and for enhancement, after the decision of the lower appellate Court one of the landlords died leaving two sons, of whom one was a major and the other a minor. The tenant defendants, who preferred an appeal to the High Court having failed to pay the costs of the Deputy Registrar who was appointed guardian of the minor son, the appeal as against him was dismissed at the risk of the appellants:

Held: that the appeal must fail in its entirety as all the parties necessary for the disposal of the case were not before the Court. [P 287 C 1]

Mahendra Nath Roy and *Banku Behari Bhaduri*—for Appellants.

Sarat Chander Roy Chowdhury and *Bhudeb Chandra Roy*—for Respondents.

Walmsley, J.—These appeals are by the tenants and they arise out of proceedings under S. 105, Ben. Ten. Act. The plaintiffs were the two landlords Tara Sankar and Kali Sankar. After the decision of the lower appellate Court, Kali Sankar died leaving two sons, Asutosh a major and Sudhansu a minor. The appellants applied to have the heirs of Kali Sankar substituted and caused a notice to be issued to Asutosh calling upon him to show cause why he should not be appointed guardian of his minor brother. Asutosh did not appear. Orders were then passed by the Court that the Deputy Registrar should be appointed guardian of Sudhansu. Defendants failed to pay the costs of the Deputy Registrar, with the result that on 12th June 1918 a Bench of this Court ordered that the appeals should stand dismissed as against the minor at the risk of the appellants. The only respondents, therefore, now before the Court are Tara Sankar, one of the original plaintiffs, and Asutosh one of the two sons of plaintiff 2. A preliminary objection is taken on behalf of the respondents that in the absence of Sudhansu the appeals cannot proceed on the ground that all the parties necessary for the determination of the case are not before the Court.

It is pointed out that the case arose out of an application made under S. 105, Ben. Ten. Act, for settlement of fair rents and for enhancement and that such an application must under S. 188 be made by all the landlords; but the result of what has happened in the course of the present appeals is that one of the landlords is now absent. Reference is made to the case of *Bejoy Gopal Bose* v. *Umesh Chandra Bose* (1), where a somewhat similar situation arose. The Judges there held:

"The decree was a joint decree in favour of all the plaintiffs, and if the defendant desired to question the correctness of that decree, he was bound to bring before the Court all the parties affected by that decree,"

and the appeal was dismissed as he had not done so. Another case is *Tarip Dafadar* v. *Khotejannessa* (2). A third case is *Basir Sheik* v. *Fazle Karim Biswas* (3). It is urged on behalf of the tenants that between the case of *Bejoy Gopal Bose* v. *Umesh Chandra Bose* (1) and that of *Basir Sheikh* v. *Fazle Karim Biswas* (3) the new Civil Procedure Code came into force; and the difference between O. 22, R. 4 of the new Code and S 368 of the old Code is emphasized. Under the law as it now stands the words "as against the deceased defendant" have been added after the words "the suit shall abate." It is also pointed out that in the case of *Basir Sheikh* v. *Fazle Karim Biswas* (3) the Judges proceeded very much on the ground that two of the plaintiffs being omitted from the appeal they would be able to execute the decree in its entirety. That is one of the reasons given. But the learned Judges also referred to the cases of *Bejoy Gopal Bose* v. *Umesh Chandra Bose* (1) and *Tarip*

1. (1902) 6 C W N 192.
2. (1906) 10 C W N 981.
3. (1915) 28 I C 703.

Dafadar v. *Khotejannessa* (2) which I have just mentioned, and it appears to me that those earlier cases proceeded not on the words of S. 368 but on the general principle that all the parties necessary for the disposal of the case must be brought before the Court. I think, therefore, that the preliminary objection must be sustained and the appeals referred by the tenants be dismissed with costs, one gold mohur in each case. The learned vakil on behalf of the landlords intimates that he withdraws the cross-objections filed in connection with these appeals. We make no order as to costs, in the cross-objections.

Panton, J.—I agree.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 287

FLETCHER AND SHAMSUL HUDA, JJ.

Haridas Dey—Plaintiff—Appellant.

v.

Kailash Chandra Bose and *others*—Defendants—Respondents.

Appeal No. 1703 of 1915. Decided on 30th January 1918, from appellate decree of Offg., Sub-Judge, Dacca, D - 22rd April 1915.

(a) Civil P. C. (1908), O. 41, Rr. 4 and 33—Appallate Court cannot vary decree in respect of persons who are not parties to appeal.

Except under O. 41, R. 4 an appellate Court cannot vary a decree of a lower Court as regards its adjudication on the rights and liabilities of the parties who have not joined in the appeal and who are not parties to the litigation in the appellate Court. [P 288 C 1]

(b) Civil P. C. (1908), O. 41, R. 33—Applicability of.

Order 41, R. 33, does not apply to a person who is not a party to the appeal. [P 288 C 1]

(c) Arbitration—Reference—Quaere.

Quaere.— Whether an order of reference to arbitration made by the Court on the application of the plaintiff and one of the defendants is legal? [P 288 C 1]

Sarat Chandra Roy Chowdhury and *Sasadhur Roy*—for Appellant

Upendra Lall, Dwarka Nath Chakrabarti and *Prokash Chandra Pakrashi*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Dacca, dated 23rd April 1915. modifying the decision of the Munsif of the same place. The plaintiff brought the suit to recover possession of a plot of land on the ground that the pro forma defendants who were his burgadars had been dispossessed by defendant 2 and defendants 1 and 3 to 7 all acting together. One defendant only, namely, defendant 2 contested the suit, and, therefore, it seems to have been assumed that under the terms of the Civil Procedure Code the plaintiff and defendant 2—were the only parties who were interested in the matter and accordingly those two parties—the plaintiff and defendant 2 agreed to refer the matter to arbitration. The arbitrators had made their award. The award was presented to the Court and no objection within the time allowed by the Limitation Act was preferred against the award so made. The case then came on for final disposal before the learned Munsif and the learned Munsif—whether it was noticed by the parties before or not I do not know and it does not matter—proceeded in this way: First of all, he recorded evidence as against the non-appearing defendants and then he decreed the suit in the terms following: The suit be decreed in accordance with the award of the arbitrators in so far as it relates to the plaintiff's title to the land, that the plaintiff's title to the land be declared and that he do recover possession of the disputed land as against the defendant. It is quite clear that it was a good order which all the defendants were bound to obey, namely, to deliver possession of the land to the plaintiff in accordance with the judgment of the learned Munsif. Thereupon defendant 2 alone preferred an appeal to the learned Subordinate Judge. The learned Subordinate Judge dismissed the appeal of defendant 2, but set aside the judgment of the learned Munsif so far as it related to the non-contesting defendants who had not joined in the appeal to the learned Subordinate Judge. Now, we have an appeal and a cross objection.

The cross-objection was preferred by defendant 2, who was one of the parties who went to arbitration. His case can be very shortly disposed of. He lodged no objection against the award made by the arbitrators and in accordance with S. 16, Sch. 2, Civil P. C., the Court passed a decree. It is not suggested that the decree so made is in excess of the award, nor is it suggested that it is not in accordance with the award. The provisions of the existing Code of Civil Procedure clearly prohibit questions as to the validity of the decree after it has been passed, except in cases where the decree is in excess of or is not in accordance with the

award. That being so, whatever may be one's own views with regard to the order of reference made in the suit between the plaintiff and defendant 2, it is much too late now to question the validity of the decree passed on the award. The cross-objection of defendant 2 must accordingly be refused. The appeal of the plaintiff may also also be disposed of in an equally short way. The non-contesting defendants were directed by the learned Judge of the primary Court to deliver over possession of the land to the plaintiff. They preferred no appeal against that order and it was not competent to the learned Judge of the lower appellate Court in the appeal to which the non-contesting defendants were not parties to vary the decree of the first Court in the manner he did as regards them.

It is suggested that he had power under O. 41, R. 33, Civil P. C. That obviously is not so. That section does not apply to a person who was not a party to the appeal. These non contesting defendants were not parties to the litigation in the lower appellate Court. Obviously, on first principles, the learned Judge in that Court could not vary the decree of the Court of first instance as regards their rights and liabilities as adiudjcated on by that Court. The appeal must therefore be allowed to this extent that the decree of the lower appellate Court, in so far as it concerns defendants 1 and 3 to 7, must be set aside and the decree of the Court of first instance as regards them will be restored. The appellant will be entitled to realize his costs in this appeal from defendants 1 and 3 to 7. The appeal as against defendant 2 will be dismissed. Defendant 2's costs in the appeal and the plaintiff's costs in the cross objection will be set off one against the other and neither of these two parties will be entitled to claim anything against the other.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 288

CHITTY AND WALMSLEY, JJ.

Fazarali Mahaldar and *others*—Appellants.

v.

Poroo Mian and *another*—Respdts.

Appeal No. 2262 of 1916, decided on 17th June 1918, from Appellate Decree of Sub-Judge, Murshidabad, dated 14th July 1916.

Bengal Tenancy Act (8 of 1885), Ss. 161 (a) and 167—Incumbrance—Interest of purchaser of portion of tenancy is not encumbrance.

The interest of the purchaser of a portion of a tenancy is not a incumbrance within the meaning of S. 161 (a) which the purchaser of the tenancy in execution of a rent decree would have to annul under S 167. An incumbrance implies a limitation of the rights of the tenant, and not a total extinction of them. [P 288 C 2]

Anilendra Nath Roy Chowdhury—for Appellants.

Shyama Churn Mitra—for Respondents.

Judgment.—This is an appeal by the plaintiffs arising out of a suit brought to recover a plot of land measuring 1 bigha 14 cottahs. Plaintiffs were the landlords and they purchased the land in execution of a rent decree obtained by them against their tenant Bandia Bewa. It is said that Bandia Bewa had sold 5 cottahs of the land to defendant 2. The question is whether that creates an incumbrance which the purchasers would have to annul. The learned Subordinate Judge relied upon the case of *Chundra Saki* v. *Kalli Prosanna Chuckerbutty* (1) and held that it was an incumbrance. He also referred to the case of *Jogeshwar Mozumdar* v. *Abed Mahomed Sirkar* (2). Those cases, however, have been distinguished in more recent cases. In *Tamizuddin Khan* v. *Khoda Nawaz Khan* (3) the case last cited was distinguished and it was held that an incumbrance must imply a limitation of the rights of the tenant and not a total extinction of them. In the case of *Abdul Rahman Chowdhuri* v. *Ahmadar Rahman* (4) the same view was taken. That was a case of sale of a portion of a putni tenure; but otherwise it was indistinguishable from the present case. We think that these recent decisions should be followed and that the judgment of the learned Subordinate Judge cannot be supported. The most recent case of *Abdul Rahman Chowdhuri* v. *Ahmadar Rahman* (4) does not seem to have been brought to his notice. We accordingly allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in this Court and in the lower appellate Court.

V.B./R.K. *Appeal allowed.*

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1. (1896) 23 Cal 254.
2. (1899) 3 C W N 13.
3. (1910) 5 I C 116.
4. (1906) 43 Cal 559=31 I C 554.

A. I. R. 1918 Calcutta 289 (1)

FLETCHER AND WALMSLEY, JJ.

Jogendra Nath Mallik—Judgment-Debtor—Petitioner.

v.

Shib Narayan Mukerjee—Decree-holder—Opposite Party.

Civil Rule No. 356 of 1918, decided on 19th August 1918, against the order of Munsif, 1st Court, Howrah.

Bengal Tenancy Act (1885), S. 170 (3)—Right of purchaser—Purchaser at rent sale cannot deposit decretal amount of subsequent rent decree against original tenant to which he was not party—If such purchaser is benamidar of original tenant he has no interest at all voidable or otherwise and has no right to make deposit.

A purchaser at a sale in execution of a rent-decree, who is not a party to a subsequent decree for rent obtained by the landlord against the original tenant, is not entitled under S. 170 (3) Beng. Ten. Act to deposit the decretal amount due under the latter decree, inasmuch as his interest is not voidable at the sale in execution of the decree against the original tenant.

[P 289 C 1]

If such a purchaser is a benamidar of the original tenant, he has got no interest at all in the holding, voidable or otherwise, and, therefore, has no right under S. 170 (3) to make the deposit.

[P 289 C 2]

Hemendra Chunder Sen for *Jotindra Lal Banerjee*—for Petitioner.

Surendra Nath Roy—for Opposite Party.

Judgment.—This is a Rule calling on the opposite party to show cause why the order complained of should not be set aside and the petitioner permitted to pay the amount of the rent decree into Court. The petitioner alleged that he had purchased the holding at a sale in execution of a rent-decree. Subsequent to that, the landlord opposite party brought a suit for rent agninst the original tenants and obtained a decree. Thereupon, the petitioner applied to deposit the decretal amount into Court under the terms of S. 170 (3), Ben. Ten. Act. The Court below has found that the present applicant was not a party to the rent suit and that the rent-decree was not passed against him and has accordingly refused the petitioner's application. Of course, the petitioner does not come under the purview of S. 170 (3), Ben. Ten. Act. If his story is true that he has got an interest, it is not an interest voidable on the sale because the sale of the judgment-debtor's property will not include the property purchased by the present petitioner. Therefore, if that is right, the applicant does not come under S. 170 (3).

The other allegation is that the present applicant is a benamidar. If he is a benamidar he has no interest at all, voidable or otherwise, and has got no right under S. 170 (3) Ben. Ten. Act to deposit the money. The present application is wholly misconceived. This Rule, therefore, fails and must be discharged with costs, one gold mohur.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 289 (2)

RICHARDSON AND BEACHCROFT, JJ.

Elahi Baksha Kazi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 713 of 1917, Decided on 29th January 1918, from the order of Addl. Sess. Judge, Dacca, D/- 26th September 1917.

Civil P. C. (1908), O. 18, R. 5-Non-compliance with provision of R. 5 does not make depositions entirely inadmissible—Object of provision is to ensure accuracy—Diposition not read over to witness is admissible in evidence—Evidence Act (1872), S. 80.

The provision in O. 18, R. 5 Civil P. C., requiring a dpeosition to be read over to the witness is in its nature directory; noncompliance with it does not make the deposition entirely inadmissible in evidence (even in a prosecution for perjury in respect of the deposition) and the deposition can be proved in some way other than by calling in aid the provisions of S. 80, Evidence Act : 6 *Cal* 762, *not Foll.*

Per *Beachcroft, J.*—The object of the provision of R. 5 O. 18, Civil P. C., requiring a deposition to be read over to a witness is to ensure accuracy. Non-compliance with it may create doubts as to whether the record correctly represents what the witness said, but it cannot affect the admissibility of the document in evidence if the making of the document is otherwise proved.

[P 292 C 1]

Dasarathi Sanyal and *Upendra Lal Roy*—for Appellant.

Monnier—for the Crown.

Richardson, J.—The appellant was tried before the Add. Sess. Judge of Dacca and a Jury on charges of abetment of forgery and abetment of the use of forged documents framed under Ss. 467 and 471, I. P. C., read in each case with S. 109 of the same Code. The Jury returned a unanimous verdict of guilty on both the charges and the learned Sessions Judge accepted the verdict and sentenced the appellant for each offence to six years' rigorous imprisonment, directing, however, that the sentences should run concurrently. The charges relate to a series

of seven bonds. The case for the prosecution is that these seven bonds were forged by or with the connivance of one Sridam in order to take the place of seven genuine bonds. It appears that Sridam and his brothers had borrowed money from Nakari Gope, the father of Mohim Chandra Gope, the complainant in the present case. It is alleged that on the 3rd Aswin 1316, (September 1909) Sridam executed seven bonds in favour of Nakari, on which Nakari's son Mohim, Nakari himself having in the meantime died, instituted a suit on the 15th August 1913. The suit was against Sridam and his brothers. On the 18th November 1913 the latter filed their written statement and with it they filed the bonds which are alleged to be forged. The endorsements on the back of those bonds, purporting to show that the bonds were satisfied by payment on the 31st Chaitra 1319, are also said to be forgeries. Mohim's suit was tried by the Munsif, who found that the bonds produced by the plaintiff were genuine and that the bonds produced by the defendants with the endorsements were forged. After that decision Mohim presented an application for leave to prosecute Sridam and his brothers for forgery and other offences. The learned Munsif who tried the suit refused to grant the sanction. Mohim then moved the District Judge who, under S. 476, Criminal P. C., directed that Sridam and his brother should be prosecuted for certain offences including forgery. A motion against that order was made to the High Court, but the Court refused to entertain it. Then followed further proceedings, the result of which was that Sridam and his brothers were tried for forgery and that Sridam was convicted of the offence. The order of the District Judge under S. 476, Criminal P. C., also directed the prosecution of the present appellant Elahi Baksha Kazi. The latter was tried for perjury and was acquitted of that offence. He was then placed on his trial on the charges of which he has now been convicted.

The learned pleader for the appellant has contended before us that the trial in the Court below is vitiated by the reception of evidence which is not admissible under the law. The contention relates to the deposition of the appellant in the suit brought by Mohim, and the point taken is that the formalities required by Rr. 5 and 6 of O. 18, Civil P. C., were not observed. It is not disputed that the evidence was given on oath. But it is said that after the deposition had been written down by the Munsif, it was not read over to the witness as R. 5 requires or at any rate that it was not read to the witness in the presence of the Judge. Upon that it is argued that the deposition it not legally a deposition at all and that the Judge was wrong in allowing it to go to the Jury. In support of the contention reference is made to the cases of *Mayadeb Gossami*, *In the matter of the petition of* (1) and *Kamatchinathan Chetty* v. *Emperor* (2). If as a matter of fact the appellant's deposition was not interpreted and read over to him in the prescribed manner, the cases cited support the contention advanced, unless the rule laid down is to be confined, as it seems to have been in the past, to prosecutions for perjury. Our attention, however, has also been drawn to the case of *Begra In re* (3), where a different note, and as it seems to me, the true note is struck. The cases of *Mayadeb Gossami*, *In the matter of the petition of* (1) and *Kamatchinathan Chetty* v. *Emperor* (2) have been followed in other cases, for instance, *Emperor* v. *Jogendra Nath Ghose* (4). Speaking for myself, however, with great respect I am not sure that I clearly understand the principle of those decisions. Under S. 80, Evidence Act, the deposition of a witness taken in accordance with law and purporting to be signed by a Judge or Magistrate proves itself. No other proof is required than the production of the deposition. I should have thought that a provision requiring a deposition to be read over to a witness was in its nature directory, and that if it were not complied with in a particular case, the deposition, while it might perhaps lose the benefit of S. 80, Evidence Act, might still be proved in some other way. No doubt S. 91 of the same Act says that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself. But even if a deposition comes within that enactment, no question arises of

1. (1881) 6 Cal 762.
2. (1905) 28 Mad 308.
3. (1911) 34 Mad 141=7 I C 414.
4. A I R 1914 Cal 789=24 I C 571=42 Cal 240.

proving the contents of a deposition except by the production of the deposition itself. The question is, how is the deposition to be proved. There is no provision in the Code of Civil Procedure which expressly precludes a deposition from being received in evidence unless it has been read over to the witness in the presence of the Judge.

In the case of a document which requires registration but is not registered, it is inadmissible in evidence not by reason of the provisions of S. 91, Evidence Act, but by reason of the express provisions on the subject contained in the Registration Act. As at present advised, I can see no reason why even in a prosecution for perjury failure to comply with the provisions of R. 5 and 6, O. 18 should render a deposition entirely inadmissible in evidence, or why, if S. 80 cannot be called in aid, the deposition should not be proved, for instance, by the Judge who took it down or by the admission of the deponent. If it can be proved in some such way, S. 91 will have no application. But it is not necessary to determine this question in the present case, because the learned pleader for the appellant has not been able to satisfy me on the record as it stands that the deposition of the appellant was not in fact read over to him as the Code requires. The Munsif was put in the witness-box for the prosecution. The pleader for Sridam's brother was also examined. Neither was asked in cross-examination whether the appellant's deposition was read over to him after it had been recorded by the Code. The deposition bears the signature of the Munsif. It also bears the signature in Bengali of the appellant. The persence of the appellant's signature at the end of the deposition certainly supports the inference that the document was read over to him. There is nothing in the record to show that this was not done. The signature was presumably affixed in token that deposition had been correctly recorded. No doubt the words which sometimes appear at the end of a deposition "read over and admitted to be correct" do not appear in the present case before the appellant's signature.

But the Code does not require that those words should be inserted. From my experience of the practice of the Courts below I may be more disposed to doubt whether the reading over of the depositon took place in the presence of the Munsif. But it still remains that there is no suggestion in the evidence that the law was not complied with. In my opinion, as the record stands, there is no ground for the contention that this deposition was not admissible in evidence. The point, I may add, was not taken in the Session Court. As to the substance of the matter, there is no shadow of a suggestion that the appellant did not say what he is recorded as having said. The objection taken to the trial is an entirely technical one, and it is conceded that apart from this technical objection, the propriety of the appellant's conviction cannot be contested. In view of the charge of the learned Sessions Judge there appears to be no doubt and in fact no dispute that the appellant was the writer of the documents which have since been found to be forged documents and if his deposition was, as I hold, properly received in evidence, the Jury had ample grounds for finding that the part which he took was a fraudulent and dishonest part. The learned pleader for the appellant has asked us to use our powers under S. 428, Criminal P. C., and to examine or to direct the examination of the Peshkar of the Munsif's Court at the time when the appellant's deposition was recorded in the civil suit. In support of that application the learned pleader has filed a copy of the deposition given by the Peshkar in the course of the trial for perjury. I have read that deposition and come to the conclusion that no useful purpose would be served by directing additional evidence to be taken at this late stage. In the result, I would affirm the conviction. As regards sentence, I think that four years' rigorous imprisonment would sufficiently meet the ends of justice. I would, therefore, reduce the sentence from six years to four years' rigorous imprisonment under each charge and maintain the order that the sentences are to run concurrently. With this modification, the appeal should be dismissed.

Beachcroft, J.—I agree. I have always felt doubt as to the correctness of the decision in the case of *Mayadeb Gossami In the matter of the petition of* (1) and take this opportunity of endorsing the opinion expressed by my learned brother on the point decided in that and other similar cases. S. 91, Evidence Act, is based on the principle that the only pro

per evidence of the contents of a document is the document itself. And the object of the provision in O. 18, R. 5, Civil P. C. requiring a deposition to be read over to a witness is to ensure accuracy. I confess I do not see why on principle a Court should be precluded from ascertaining what is in a document, from the document itself, merely because the contents of the document may not in fact be correct. Failure to take the necessary precautions to ensure accuracy may create doubts as to whether the record correctly represents what the witness said, but, in my opinion, it cannot affect the admissibility of the document in evidence if the making of the document is otherwise proved.

V.B./R.K. *Sentence reduced.*

A. I. R. 1918 Calcutta 292

FLETCHER AND RICHARDSON, JJ.

Amar Krishna Shaha—Defendant—Appellant.

v.

Abdul Jalel Miyan and *others*—Plaintiffs—Respondents.

Appeal No. 499 of 1913, Decided on 28th February 1917, from original decree of Sub-Judge, First Court, Chittagong, D/- 27th August 1913.

(a) Bengal Revenue Sale Law (1859)—Payment of May instalment of revenue by money order before due date not credited for error in description and number of taluk—Sale in default of payment of May instalment is invalid.

The proprietor of a Noabad taluk sent by a revenue money order on 13th May 1911 the instalment of the revenue payable on the 25th of that month. The money was received in the Collectorate on the 15th May, ten days before the due date, but it was not credited on the ground that there was a slight error in the description and number of the taluk as given in the revenue money order. The taluk was sold under the provisions of the Revenue Sale Law on 22nd August 1911 for default in the payment of the May instalment of the year:

Held: that the sale was not a valid sale, the payment of the May instalment having been made by the proprietor and the money having been received by the Collector before the due date, although for the want of making proper inquiries the officers in the Collectorate were not aware in respect of which taluk the payment had been made and therefore could not credit the payment to the taluk in question. [P 293 C 1]

(b) Bengal Revenue Sale Law (1859)—Applicability of caveat emptor—Civil P. C. (1908), O. 21, R. 93.

The rule of caveat emptor does not apply to sales made for Government revenue. [P 293 C 1]

(c) Bengal Revenue Sale Law (1859)—Sale set aside—Purchaser is liable for mesne profits.

When a sale under the provisions of the revenue sale law is set aside by a suit the purchaser has to give back to the proprietor the property purchased together with mesne profits and the costs of the suit. [P 293 C 2]

Jogesh Chandra Roy, Kshitish Chandra Sen, Chandra Sekhar Sen and *Bhagirath Chandra Das*—for Appellant.

A K. Fazlul Haq and *Charu Chandra Sen*—for Respondents.

Fletcher, J.—This is an appeal by the defendant from the judgment of the learned Subordinate Judge of Chittagong, dated 27th August 1913. The plaintiffs who were the owners of a certain taluk brought the suit to set aside a sale that had been made of their taluk on 22nd August 1911 for arrears of Government revenue under Act 11 of 1859 and Act 7 of 1868. The plaintiffs' taluk was Noabad taluk, Fateh Ali bearing Tauzi No. 1408/20626 of the Chittagong Collectorate. The Government revenue assessed on the taluk was a sum of Rs. 30 only payable by two instalment, namely, an instalment of Rs. 18-12-0 payable on the 25th February every year and an instalment of Rs. 11-4 0 payable on the 25th May every year. The sale which was made by the Government under the provisions of the revenue sale law was made on 22nd August 1911 and it was purported to be made for default in the payment of the May instalment of the same year. The evidence establishes it conclusively that on 13th May 1911 one Lalit Mohan Mukerjee who was the agent of the plaintiffs sent through post by money order, which is called revenue money order, the sum of Rs. 11-4-0 (that being the instalment of the revenue payable on the 25th May of that year) to the Collector. The money was received by the Collectorate on 15th May 1911, ten days before the due date; but it was not credited to the plaintiffs on two grounds, namely, that the taluk was described as Fateh Ali Nazir and that the number of the taluk as given contained a slight error. But the evidence of the clerk of the Sardar Khas Mahal was that the money was received, that he did not know in respect of what taluk it had been paid, and that therefore the amount was not credited to the plaintiffs.

That is a common fact and the subsequent letters to the postmaster at Fatikcherry, written by Lalit Mohan and the certificate granted by the postmaster are not material because there is evidence that without doubt the instalment was received in the Collectorate on 15th May 1911. The evidence seems to establish that the clerk of the Sardar Khas Mahal could have found out by reasonable inquiry in respect of what taluk the payment of Government revenue had been made. There were only two taluks bearing the name of Fateh Ali registered in the Collectorate. One bore a Government revenue of Rs. 2, so the payment obviously could not have been in respect of that taluk. The other taluk bearing the name of Fateh Ali was the plaintiffs' taluk and any reasonable inquiry between the 15th May and the date of the sale would have shown in respect of what taluk the money had been sent to the Collector. It is said that the number of the taluk as given was slightly wrong. But that could have been within the length of time that elapsed between the 15th May and the date of the sale easily checked even if there were a thousand odd mahals registered in the Collectorate. It has been laid down more than once that these powers the Government have of selling a property for default of the payment of Government revenue are stringent powers and can only be exercised when the cases mentioned in the Act have actually occurred. The payment having been made by the plaintiffs and the money having been received by the Collector, although for the want of making proper inquiries the officers in the Collectorate were not aware in respect of which taluk the payment had been made, the Government clearly was not entitled to sell the plaintiffs' taluk.

I agree in the conclusion of the learned Subordinate Judge that the sale of the plaintiffs' taluk to the defendant was not a valid sale. Then the defendant says that he having bought the property worth Rs. 6,000 for Rs. 1,650, it is hard to make him liable to pay mesne profits and the costs of the suit. I do not agree that caveat emptor applies to sales made for Government revenue and the defendant made the purchase with all the benefit and all the burden. If the sale had been supported he would have been the fortunate possessor of a property worth Rs. 6,000 for the sum of Rs. 1,650 only. When the contrary happens and the sale is set aside, he becomes the unfortunate loser of the property which he has got to give back to the plaintiff together with mesne profits and the costs of the suit. I agree in the conclusion arrived at by the learned Judge of the Court below. The present appeal, therefore, fails and must be dismissed with costs.

Richardson, J.—I agree with the learned Subordinate Judge that the sale should be set aside and accept his reasonings The appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 293

FLETCHER AND SHAMSUL HUDA, JJ.

Lakshmi Prasanna Mojumdar—Judgment-Debtor—Appellant.

v.

Rajindra Poddar — Decree-Holder — Respondent.

Appeal No. 293 of 1916, Decided on 27th May 1918, from the order of Sub. Judge, Noakhali, D/- 21st June 1916.

Evidence Act (1872), S. 115—On J. D's undertaking to waive objections sale postponed—Objections cannot be raised after sale.

A judgment-debtor, getting an execution sale of his properties postponed by giving an undertaking, would not raise any objection on the ground of illegality or irregularity, and cannot, after the sale has taken place on the postponed date, ask to set it aside on the ground of any illegality or irregularity of which he was cognisant at the time he gave his undertaking [P 294 C 1]

Troilakhya Nath Ghose — for Appellant.

Rupendra Lal Roy — for Respondent.

Fletcher, J.—This is an appeal by the judgment debtor against the decision of the learned Subordinate Judge of Noakhali, dated 21st June 1916. The point lies in a very narrow compass and it is this: The properties of the judgment-debtor had been attached and were to be brought to sale on 17th April 1916. On that date, the judgment-debtor put in a petition to the Judge asking that the sale might be postponed and that it might take place on the next sale day without a fresh proclamation of sale and the attachment subsisting. The petition shows that the Court was not satisfied with that and required that the judgment-debtor should add a further undertaking

to the petition, namely that the judgment-debtor should not raise any objection on the ground of illegality or irregularity. That being added, the Court granted a postponement of the sale and the properties were not sold until 16th May. Then the properties having been sold, the judgment-debtor preferred a petition on 17th June 1916 to the Judge asking that the sale should be set aside on the ground of illegality and irregularity. The learned Judge took the view that there was a distinct breach of the undertaking given to the Court on the footing of which the judgment-debtor obtained a postponement of the sale. I think the learned Judge was right and for this reason: whatever view may be taken of the terms of the undertaking given on 17th April 1916, it is quite clear that that undertaking covered all illegalities and irregularities of which the judgment-debtor was then aware. In the present case there is no allegation by the judgment-debtor that he was not aware of the matters stated in his petition at the time he gave his undertaking to the Court on 17th April 1916. It is quite clear that as regards all matters, at least of which he was cognizant at the time he gave his undertaking on 17th April, the judgment-debtor waived his right to object.

The case of *Dhanukdhari* v. *Nathuni Sahu* (1), that has been cited before us, is clearly distinguishable. In that case the learned Judge found that the judgment-debtor could not waive his objection as regards certain particulars on the ground that he had been kept out of knowledge of them by the fraud of the decree-holder, which is a totally different case from the present. The facts in the present case seem to be extremely simple. I think the learned Subordinate Judge came to a correct conclusion that, on the allegations made by the judgment-debtor, he precluded himself from going into these matters. That being so the present appeal fails and must be dismissed with costs, one hundred rupees.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1907) 6 C L J 62=11 C W N 848.

A. I. R. 1918 Calcutta 294

SANDERSON, C. J. AND MOOKERJEE, J.

Kali Das Chaudhuri and *others*— Defendants—Appellants.

v.

Danpadi Sundari Dassee—Plaintiff—Respondent.

Appeal No. 61 of 1916, Decided on 2nd February 1917, from original decree and judgment of Greaves, Judge, D/- 31st January 1916.

(a) Limitation Act (1908), Arts. 106 and 120—Suit for declaration of dissolution of partnership and for accounts is governed by Art 106 and not Art. 120 — Contract Act (1872), S. 253.

A suit for a declaration that the plaintiff retired from a partnership on a certain date and that so far as he was concerned the partnership was dissolved at that time and for accounts and the share of the profits found due to him on such accounts being taken is governed by Art. 106 and not Art. 120 [P 297 C 1; P 301 C 1]

(b) Limitation Act (1908), S. 19—Liability to account acknowledged in part—S. 19 does not operate to save entire right.

Where there is a liability to account and the liability is admitted in part, the admission does not under S. 19, Lim. Act operate to save the entire right.

Plaintiff sued beyond the period of limitation for taking accounts of a partnership up to the year 1910, and relied under S. 19, Lim. Act, upon a letter written by the defendants admitting their liability to account up to the year 1904:

Held, that the admission by the defendants only operated tosave the plaintiff's claim up to the year 1904 and not further. [P 298 C 1; P 301 C 1]

(c) Civil P. C, (1908), O. 6, R. 17 — Suit for account of partnership— Amendment to convert suit into one for remuneration of service is not permissible.

Leave to amend a plaint should be refused where the proposed amendment would introduce a totally different new and inconsistent case.

Where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation. [P 299 C 2]

Plaintiff sued for a declaration that a firm in which he was a partner along with the defendants was dissolved on a certain date and for accounts and got a decree. On appeal finding that his suit was barred by limitation he applied for leave to amend his plaint so as to base his claim on the relationship of master and servant and to sue for remuneration for services:

Held, that the amendment could not be allowed because (a) it would introduce a totally new case; (b) it was applied for too late; (c) if the plaintiff were to institute a fresh suit on the proposed cause of action it would be barred by limitation [P 297 C 2]

S R. Das and *B. D. Mitter* for—Appellants.

B. C. Mitter and *N. Sircar* — for Respondent.

Sanderson, C. J.—This is an appeal from a judgment of my learned brother Greaves, J., and the sole question which has been argued before us is whether the claim in the suit was barred by the Statute of Limitation. I will deal in detail with the nature of the suit directly. The suit was brought on 8th February 1913, and it was alleged to be in respect of a certain partnership of which the plaintiff Hari Prosad Saha was a member up to 27th June 1910. Before the case came on for trial it was discovered that a necessary party Mokshoda Sundari Chowdhurani had not been added and she was added on 12th February 1914 so that as regards the added party the claim was barred or was alleged to be barred and, consequently, as he was a necessary party, the claim was alleged to be barred against the other parties. Therefore when the case came on for trial the learned Counsel appearing for the defendant Mr. S. R. Das, according to the minutes said,

"the suit is barred as they had added Mokshoda Sundari as a party defendant after the lapse of three years,"

Mr. Mitter said

"I know nothing about it—my friend should have raised the point by a supplemental written statement. But there is an admission of liability by the letter dated 12th August 1913."

Then the learned standing counsel said further on,

"I shall put in a formal petition showing admission of liability but if I require any other amendment I shall then ask for an adjournment. But I do not think I shall require."

Then there were 2 para. added by way of amendment whereby

"the plaintiff submitted that there had been a valid admission of liability in writing signed by the defendants or their duly authorized agents within the period of limitation and such admission was contained in the letters of 5th July 1909, 2nd October 1912, 6th October 1912, 21st January 1913 and in the written statement filed in this suit and the plaintiff was advised and submitted that the proper period of limitation in the suit was six years from the time that the original plaintiff had retired from the partnership business."

Those paragraphs were added on the day of trial 31st of January 1916. Then the learned counsel for the defendant, Mr. Das, said that he did not rely any longer upon that part of the defence which set up the allegation that the plaintiff had only remained with the firm, to use a neutral expression, up to 1311 B. S, (corresponding with 1904-05) but that he simply relied upon the statute of limitation. The learned Judge held that as regards the Statute of Limitation Art. 120, Sch. 1, Limitation Act applied and therefore, the suit was not barred. The case now comes before us the learned counsel for the appellant urging that the learned Judge was wrong and that Art. 106 applies and consequently the suit is barred by the Limitation Act. It is necessary to refer perhaps once more to the words of the statute. S. 3 says,

"Subject to the provisions contained in Ss. 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by Sch. 1 shall be dismissed although limitation has not been set up as a defence."

Then in Sch. 1 one finds three columns which of course are familiar to everybody, the first column of which sets out the descriprion of the suit, the second the period of limitation, and the third, the time from which the period begins to run. Therefore, it is necessary to see what is the description of the suit in the first instance; and for that purpose I turn to the plaint. But before I turn to the plaint perhaps I might refer to two letters to see, quite apart from the plaint, what was the real nature of the suit. On 27th June 1910 the plaintiff's solicitor wrote a letter saying,

"We are informed by our client Babu Hars Prosad Saha. . , . . . that he has been acting ai gomastha of the firm of Dwarka Nath Makhan Lal Shaha since its constitution in the year 1279 B. S. on the express understanding that he should receive three annas share of the net profits as his remuneration . . , ... It is for this reason that our client has been obliged to have recourse to this letter in order to impress upon you the earnestness of his desire and has instructed us to give you notice, which we hereby do, that he retires from the firm and all his connection therewith will cease from the beginning of the ensuing business year of the said firm which commences in the Bengali month of Asar or Sraban every year."

That might be said to be a letter which cuts both ways; it may be said to be quite consistent with the position that the plaintiff Hari Prosad Saha was a mere gomastha and servant remunerated by a share in the profits, or there are some phrases in it which go to show that he was alleging that he was a partner of the firm. But looking at the next letter written by the plaintiff's solicitor on 10th January 1913, I find it is in these terms:—

"I understand from my client Babu Hari Prosad Shaha of Urapura in the District of Pabna that he was a non-capitalist partner in the firm of Dwarka Nath Makhan Lall Saha carried on

in Calcutta for several years and retired from the partnership sometimes on 27th June 1910 after giving you notice on that day through his then solicitors Messrs. Dutta and Guha. My client requested you several times to arrive at an adjustment of accounts up to the dissolution aforesaid of the said co-partnership firm of Dwarka Nath Makhan Lal Saha and to pay to him out of the assets of the partnership what on such adjustment should be found due to my client but nothing has yet been done in that direction. I am further informed that a large sum of money will be found to be due to my client on such adjustment being made as aforesaid."

"I am now instructed by my client to request you which I hereby do to adjust the said accounts and thereafter to pay the amount due to him within a week from the date hereof so that no unpleasantness may arise in this connection which my client is eager to avoid if possible."

I think nobody can doubt upon reading that letter that the plaintiff's solicitor was putting forward a position that his client, the plaintiff, had been a non-capitalist partner, that on 27th June 1910 he gave notice that he was retiring from the firm, and he treated it as a dissolution of the partnership which had existed upto 27th June 1910. Then, when we come to the plaint, as my learned brother pointed out in the course of the argument, this is a plaint apparently to which some extraordinary importance was attached, because although it was drawn by Mr. S. K. Chakravarty, yet the parties were not satisfied with that and they got it settled by the Advocate-General. Upon looking at the plaint, to my mind it is obvious that it was a plaint which was based upon the allegation that the plaintiff had been a partner in the partnership business, because it says in para. 1, that the defendants (setting out the names).

"and the plaintiff agreed to carry on business in Calcutta in copartnership: and that it was agreed that on the death of any of the Saha Chowdhury partners the heir or heirs of such deceased partner will take his place and become a partner or partners of such business and that the said business will not be dissolved by the death or deaths of any of Saha Chowdhury partners."

So that there is a distinct allegation that the parties agreed to be partners and that there was a term in the agreement —which is somewhat out of the ordinary —that as regards the Saha Chowdhury partners, the death of one of them would not put an end to the partnership. But there was no arrangement that if the plaintiff were to retire or were to die, his death would not as in the ordinary course put an end to the partnership.

Then in para. 3 it is further alleged that

"the plaintiff under the denomination of gadain gomastha contributed labour and skill for the promotion and carrying on of the said business but he did not bring in any capital, and it was agreed and arranged that the plaintiff should get 3/16th share of the profits and bear 3/16th share of the loss arising from the said business. The plaintiff is advised and submits that his position in the said firm was that of a non-capitalist working partner and that in any event"—

I suppose that means whether in point of fact or of law a partner or not—

"he is entitled to have the accounts of the said firm taken on the basis aforesaid and to receive from the defendant what may be found due upon the taking of such accounts."

Then in para. 6 it says that

"the plaintiff being desirous of retiring from the said business gave formal notice to all the partners on or about 27th June 1910 of such retirement through his then Attorneys, Messrs. Dutta and Guha, and called upon them to have the accounts of the said partnership adjusted and to pay the plaintiff his share of such profits as on such adjustment might be found due to him."

The plaintiff's prayer was that it might be declared that the plaintiff retired from the said firm of Dwarka Nath Makhan Lal Saha on or about 29th June 1910, and if necessary it might also be declared that so far as he was concerned, the said partnership came to an end and was dissolved at that time, and that the accounts of the said firm might be taken by and under the direction of this Court to ascertain what amount was due to the plaintiff as his share of the profits of the said firm at the time of his retirement. Therefore, when I consider what was the description of the suit which the plaintiff was bringing in this case, I have no doubt whatever that it was a suit which would come within the exact description of Cl. 106 which is as follows: "Suit for an account and a share of the profits of a dissolved partnership," as his prayer is, as I have said just now, for a declaration that he retired from the said firm on a certain date, that so far as he was concerned the partnership was dissolved at that time, that accounts might be taken and upon such accounts being taken, he might get what share of the profits would be found due to him.

If I had any doubt about this, that doubt would be removed by referring to the provisions of the Contract Act and seeing what the definition of the term "partnership" is in S. 239 of that Act, which provides:

"Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them."

Then S. 253 provides:

"In the absence of any contract to the contrary, the relations of partners to each other are determined by the following rules":

and R. (7) provides,

"if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members:"

R. (8) provides:

"unless the partnership has been entered into for a fixed term, any partner may retire from it at any time"

In this case there is no suggestion that the partnership was for a fixed term. That being so, the plaintiff might retire from the partnership at any time, and if he retired from it at any time, then he ceased to be a member of the partnership by reason of his retirement and the result was that by reason of the provisions of the Contract Act the partnership was dissolved not only as between him and and the other members but as between all the other members. To my mind there is no doubt whatsoever that that was the description of the suit which the plaintiff brought and that it came within Art. 106, and that inasmuch as the suit must be deemed to have been brought on 12th February 1914, it was brought after the period of limitation specified in the Schedule to the Limitation Act, and was therefore barred unless it can be said to have been brought within the provisions of S. 19 by reason of the alleged acknowledgment in the letters to which I have referred.

Now, before I deal with the acknowledgment, I have to deal with the point which was urged, and strongly urged by the learned standing counsel that even if this Court were of opinion that the suit did come within Art. 106, the plaintiff ought to have an opportunity to amend his claim. In order to see whether the plaintiff ought to have such leave, it is necessary to examine what it is that he wants to do.

The plaintiff as I have already said, brought his suit based upon the allegation that there was a partnership existing between him on the one hand and the defendants on the other. When it is found that that suit is barred by the Limitation Act, he then wishes to turn round and bring a suit which is based upon the allegation that he is not a partner but is merely a servant of the defendants although he was to be remunerated by receiving a share of the profits which would in fact, as was pointed out by the learned Counsel for the appellant, amount to this that he wants to abandon all the material allegations which are set out in his plaint, and adopt those which are set out in the defendants' written statement. If we were to grant his application for amendment, it would amount to granting him leave to bring a fresh suit of an entirely different nature, which suit, if brought now, would be barred by the Statute of Limitation. It has been said that every amendment ought to be granted if the party against whom the amendment is granted can be compensated by an order as to costs. But this is not one of the amendments which can be cured by the panacea of costs, because if we were to allow the amendment, we would be allowing the plaintiff to bring an action within the time specified in the Schedule; whereas if we were not to grant the amendment, his suit might be barred by the Limitation Act. For these reasons I do not think it right and just to allow the amendment to be made.

With regard to the question of acknowledgment, that depends upon S. 19, Lim. Act, which runs in those words,

"where before the expiration of the period prescribed for a suit or application in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

The letter upon which the real reliance was placed in this case was the letter of 21st January 1913, which was written by the solicitors of the defendants, and therefore it would be signed by a person who is "an agent duly authorized in this behalf" and no point arises in that respect: and it is also an acknowledgment of some liability to the plaintiff. But the question is whether it is an acknowledgment of the property or right which is the subject matter of the suit. Now what was said is this:

"Your client Babu Hari Prosad Saha was the gomastha at Calcutta in the employ of the firm of Dwarka Nath Makhan Lal Saha, remunerated by shares of the profits and being liable for a proportionate share of the losses. He was struck by paralysis in the Bengali year 1307, from which time he could not do active work. He however,

continued to be in Calcutta till 1311, when he left Calcutta and went away to his home at Uttara. Our clients have all along been ready and willing to have the accounts duly taken up to the time that your client retired from Calcutta. Your client as the managing gomastha has to make up and explain the accounts up to that time. Our clients will offer every facility in the matter of the adjustment of accounts. . . . It is not the fact that your client retired on 27th June 1910. He ceased to do active work in 1307 and retired in 1311. Our clients have no recollection of any notice from Messrs. Dutta and Guha. Our clients are ready to pay to your clients whatever may be found due on an adjustment of the accounts up to 1311."

Now as I read that letter that contains three material statements: it contains a statement that the plaintiff was gomastha of the defendants: the second statement is that he was employed up to 1311 B. S. (corresponding with 1904—05) and no longer, and the third statement is that the defendants were willing and ready to pay to the plaintiff whatever might be found due to him on an adjustment of the accounts upto 1311. Now what is the claim of the plaintiff in this case: He brought his suit in order to establish his right to have the accounts taken upon the basis that he was a partner, and that he was entitled to have the accounts taken down to June 1910.

The defendants' solicitors wrote that he was not a partner and that he was not entitled to have the accounts taken upto 1910, but that he was only entitled to have the accounts taken upto 1311 B. S. (corresponding with 1904—05). I cannot understand how that can be taken to be an acknowledgment of the right which the plaintiff was endeavouring to substantiate in his plaint. I can understand it being said and argued with considerable force that it was an acknowledgment of some part of the plaintiff's claim, inasmuch as his claim was to have the accounts taken up to June 1910 and inasmuch as the defendants admitted that he was entitled to have the accounts taken up to 1904—05: To that extent it is an acknowledgment, but in my judgment it is not an acknowledgment of the right alleged by the plaintiff, namely, that he was entitled to have the accounts taken up to June 1910. Inasmuch as the learned counsel for the appellants stated that they are willing that the accounts should be taken between the plaintiff and the defendants, upon the basis of the plaintiff being a partner in the firm down to the end of the Bengali year 1311, this Court will make an order that the accounts should be taken between the parties upon that basis.

The result is that this appeal is allowed and we direct that an account be taken upon the basis of the partnership upto the end of the Bengali year 1311. As regards costs, the appellants will have the costs of this appeal, but each party will pay his own costs of the suit in the Court of first instance. The decree of the Court of first instance will, therefore, be varied by substituting the words "end of the Bengali year 1311" for the words "twenty-seventh day of June, one thousand nine hundred and ten" (in line 25 of the decree at p. 36 of the paper-book) and also by substituting the words "each party do pay his, her or their own costs of this suit" for the words,

"the adult defendants personally and the infant defendant out of the assets of the said partnership firm do pay to the plaintiff her costs of this suit"

(to be taxed by the Taxing Officer of this Court on scale No. 2), with interest thereon at the rate of six per cent. per annum from the date of taxation until realization. The rest of the decree will stand.

Mookerjee, J. — I agree that the decree made by Greaves J., cannot be supported. The plaintiff, who has died during the pendency of this litigation, instituted the suit on 8th February 1913, for reliefs on the allegation that he was a partner in the firm of Dwarka Nath-Makhan Lal Saha and that as he contributed labour and skill but no capital, he was, as arranged amongst the partners, entitled to receive 3/16ths share of the profits and bound to bear 3/16ths share of the loss arising from the business. He further alleged that he had terminated his connexion with the firm by notice to the other partners on 27th June 1910. He accordingly asked for a declaration that he had retired from the firm on 27th June 1910, and that so far as he was concerned the partnership had come to an end and was dissolved at that time. On this basis, he prayed for an order that accounts be taken to ascertain what amount was due to him as his share of the profits of the firm at the time of his retirement and that the defendants do pay him the sum so ascertained. The defendants, in their written statement, raised substantially four grounds of objection. They contended, first that the suit was

defective in form as one of the original partners, Beni Madhab Saha Chowdhury, had died in 1895 and his representative had not been added as a party, secondly, that the plaintiff was not a partner as he alleged but a servant, thirdly, that his connexion with the business had terminated not in 1910 as he alleged but during the year 1904—05, and fourthly, that the claim was barred by limitation. The plaintiff thereupon applied to the Court on 12th February 1914 to add the representative of the deceased partner as a defendant.

The result was that under S. 22, Lim. Act, the suit had to be regarded as instituted on 12th February 1914, as against the added defendants, and, if as against him, the suit had to be dismissed on the ground of limitation, it was bound to fail as against the other defendant as well, because obviously no account could be directed in respect of a partnership business in the absence of one of the partners. Consequently, at the trial, the plaintiff found himself in a position of considerable embarrassment and so he asked for and obtained leave to amend the plaint by the insertion of two paragraphs. One of these paragraphs recited that the suit was saved from the bar of limitation by reason of the acknowledgment contained in four letters which had passed between the parties before the institution of the suit. Para. 2 recited that the proper period of limitation was 6 years from the time that the plaintiff retired from the partnership business. There was no prayer for amendment in any other respect, though the minutes show that the plaintiff indicated that further amendment might possibly be necessary. The case then proceeded to trial on the assumption that the plaintiff was a partner and had retired on 27th June 1910, as alleged by him, and the question was argued whether the suit was barred by limitation.

On behalf of the defendants, reliance was placed upon Art. 106, Lim. Act and it was contended that as more than three years (calculated from the date of retirement of the plaintiff) had expired on 12th February 1914, when the suit must be deemed to have been instituted, it was obligatory upon the Court under S. 3 to dismiss the suit. The plaintiff replied that Art. 120 which provides for a period of six years was applicable and that if this contention failed, S. 19 saved the suit from the bar of limitation. Greaves, J. has come to the conclusion that Art. 106 was not applicable and that the case was governed by Art. 120. In this view he has not discussed the question of the applicability of S. 19. On the present appeal, Mr. Das has contended on behalf of the defendants-appellants that Art. 106 is applicable and that the suit is obviously barred by limitation. On behalf of the respondent, Mr. Mitter has not seriously contested this position but he has argued that S. 19 saves the suit from the bar of limitation. He has also prayed that the plaintiff might be allowed at this stage to amend the plaint, on the footing that he was not a partner, as asserted by him in para. 3 of his plaint, but a servant as alleged by the defendants in para. 1 of their written statement. It is convenient to consider the application for amendment at the outset. In my opinion, the plaintiff should not be allowed to amend the plaint in the manner proposed at this stage of the litigation. It is well settled that where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation. This rule is only one aspect of the broader principle that leave to amend should be refused where the amendment would introduce a totally different, new and inconsistent case. Here the plaintiff came into Court deliberately on the allegation that he was a partner of the firm along with the defendants. The defendants denied that he was at any time a partner and asserted that he was a servant. The case has proceeded to trial on these pleadings : the plaintiff has succeeded and has got a decree for accounts on the footing that he was a partner.

He cannot now be permitted to abandon that decree, to discard the fundamental allegation made in the plaint, to adopt as the foundation of his claim the allegation made by the defendants in their written statement, and to seek relief on the basis thereof. There are further two weighty reasons why the application should be refused as made at a very late stage of the proceedings. In the first place, if the plaintiff were now to institute a suit on the allegation that he was a servant, it would be successfully met by the plea of limitation. It is not necessary to hold,

as the Allahabad High Court has done in the cases of *Balkaran Upadhya* v. *Gaya Din* (1) and *Muhammad Sadiq* v. *Abdul Majid* (2), that the Court is not competent to allow an amendment of the plaint so as to introduce a cause of action which at the moment is barred by limitation. But it is plain that the Court would be very reluctant to deprive the defendants in this manner of a valuable right which they have already acquired by the operation of the Statute of Limitation: see *Steward* v. *North Metropolitan Tramways Co.* (3) and the observations of Lopes, L. J., in *Weldon* v. *Neal* (4). This clearly is not a case where the other side can be compensated by award of costs which has been described by Bowen, L. J., as the one panacea which heals every sore in litigation: *Cropper* v. *Smith* (5). In the second place, the plaintiff has died during the pendency of the litigation and we can no longer have his testimony, which would have been of primary importance upon the question of his status. On these grounds I hold that the application for amendment should not be entertained. Two questions consequently require examination, namely, first, is Arts. 106 or 120, Lim. Act, applicable to this case? and, secondly, if Art. 106 is applicable, does S. 19 assist the plaintiff; and if so, to what extent? Art. 106 provides that

"a suit for an account and share of the profits of a dissolved partnership must be instituted within three years from the date of dissolution."

What then is the true meaning of the expression "dissolved partnership?" The defendants contend that this has reference to a partnership which so far as the plaintiff is concerned has been dissolved; in other words, the suit contemplated by Art. 106 is brought by a plaintiff who has ceased to be a member of the partnership and has consequently become entitled to claim an account, and a share of the profits. The plaintiff contends, on the other hand, that if the partners other than the partner who has retired carry on the business, there is no "dissolved partnership" within the meaning of the article. In my opinion the interpretation suggested by the defendants gives effect to the true intentions of the legislature, as is clear from the provisions of the Contract Act relating to the dissolution of partnerships [Ss. 239, 253 (7) and (8)]. In the case before us, the plaintiff alleges that he retired from the partnership on a specified date, he seeks a declaration that in so far as he is concerned the partnership was dissolved on that date. It is obviously immaterial whether the business was or was not carried on after his retirement by the other members; for if it was carried on, it was not a partnership in which he was interested as a partner. From this point of view, Art. 106 is obviously applicable *Ahinsa Bibi* v. *Abdul Kader Sahib* (6) and *Sudarsanam Maistri* v. *Narsimhulu Maistri* (7). In the second of these cases Bhashyam Ayyangar, J., formulates the law in terms with which I find myself in complete agreement:

"From the year 1894, the plaintiff ceased to be a member of the alleged partnership: (vide S. 253, Cl. 7, Contract Act), and in fact he retired from the partnership which had not been entered into for any fixed term (Cl. 8, S. 253, Contract Act). It is therefore clear that the present suit, viewing it as one for winding up the affairs of the partnership which terminated or was dissolved in 1894, is barred by the Law of Limitation. The fact that after retirement of one of two partners, the remaining partner carries on the same business makes no difference: *Knox* v. *Gye* (8). The case of *Noyes* v. *Crawley* (9), cited on behalf of the respondent, is in point and Vice-Chancellor Malins expresses his full concurrence in the following statement of the law by Lord Lindley in his treatise on Patrnership, Edn. 4, p. 966: 'So long indeed as a partnership is subsisting and each partner is exercising his rights and enjoying his own property the Statute has, it is conceived, no application at all; but as soon as a partnership is dissolved or there is any exclusion of one partner by others, the case is very different and the Statute begins to run.' The same learned author, on the authority of *Pearce* v. *Lindsay* (10), says that a dissolution of a partnership-at-will may be inferred from circumstances. . . .Having regard to the above authorities and Cls. 7 and 8, S. 253, Contract Act, it is impossible to accede to the contention of the learned Advocate-General that there has yet been no dissolution of the alleged partnership between the plaintiff and defendant 1, and that, therefore, the suit is not barred by Art. 106, Lim. Act."

The view attributed to Lord Lindley was emphasised by him in the case of *Betjemann* v. *Betjemann* (11). There a partnership had been carried on by

1. A I R 1914 All 80=24 I C 255=36 All 370.
2. (1911) 33 All 616=10 I C 476.
3. (1885) 16 Q B D 178.
4. (1887) 19 Q B D 394=56 L J Q B 621.
5. (1884) 26 Ch. D. 700=53 L J Ch. 891.
6. (1902) 25 Mad 26.
7. (1902) 25 Mad 149.
8. (1872) 5 H L 656=42 L J Ch 234.
9. (1879) 10 Ch D 31=48 L J Ch 112.
10. (1860) 3 De G J & S 139=46 E R 591.
11. (1895) 2 Ch, 474=64 L J Ch 641.

three persons *A*, *B* and *C*. Of these *A* died with the result that the partnership was determined by that event. The question arose whether the partnership which was subseqently carried on by *B* and C was the original partnership or a new partnership. Lord Lindley held that the two sons continued the partnership but it was in point of law a different partnsrship, namely, a partnership between the two: see also *Barton* v. *Narth Staffordshire Ry.* (12), *Miller* v. *Miller* (13). I hold accordingly that on his retirement the plaintiff ceased to be a member of the firm, that in so far as he was concerned, the partnership was then dissolved and that time must run under Art. 106 against him from that date. In this view the claim was prima facie barred on 12th February 1914, when the suit must be deemed to have been instituted. This renders necessary an examination of the effect of S. 19 Lim. Act. S. 19, Lim. Act.—I quote only so much thereof as is applicable to this case —provides that where before the expiration of the period prescribed for a suit in respect of any right, an acknowledgment of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Reliance is placed in this connexion upon a letter, dated 21st January 1913, in which the defendants admitted that they were liable to render accounts to the plaintiff up to the year 1904-05, and at the same time stated specifically that the plaintiff retired in 1904—05 and not on 27th June 1910, as he alleged. This letter consequently does embody an acknowledgment (given within three years from 27th June 1910 when the partnership was dissolved) of the right of the plaintiff to have an account of the profits of the firm from the defendants down to the year 1904—05. But it does not go further. I cannot accede to the contention that as there was a liability to account if the liability was admitted in part, the right was saved in its entirety. No authority has been mentioned which sustains the view that there cannot be an acknowledgment of a part of the right claimed.

12. (1888) 38 Ch D 453=57 L J Ch 800.
13. (1869) 8 Eq. 499.

The decision in *Prance* v. *Sympson* (14) undoubtedly does not support this broad proposition and is clearly distinguishable. On the other hand, the decision of the Judicial Committee in *Maniram Seth* v. *Seth Rupchand* (15), where reference is made in terms of approval to the judgment of Mellish, L. J., in *River Steamer Co., In re, Mitchell, Ex parte* (16) points to a different conclusion. Mellish L. J., held that an acknowledgment to take a case out of the Statute of Limitation must be, first, one from which an absolute promise to pay can be inferred; or secondly, an unconditional promise to pay the specific debt; or thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. Consequently, the effect of the acknowledgment must depend in each case, upon the nature of the particular right claimed and the terms of the acknowledgment. In this case, there was an unconditional promise to pay whatever might be found due upon accounts taken, down to the year 1904—05, coupled with an express denial of liability to account for the subsequent period. I hold accordingly that S. 19 saves that portion only of the claim which is admitted in the letter. The appeal must accordingly be allowed and the decree modified to the extent indicated.

V.B /R.K. *Appeal allowed.*

14. (1854) Kay 678=69 E R 289.
15. (1906) 33 Cal 1047 =33 I A 165 (P C).
16. (1871) 6 Ch 822=25 L T 319.

A. I. R. 1918 Calcutta 301

MOOKERJEE AND BEACHCROFT, JJ.

Nepusi Bewa—Appellant.

v.

Nasiruddin—Respondent.

Civil Ref. No. 1 of 1917, Decided on 30th August 1917, made by Munsif, Bogra in Suit No. 997 of 1916.

Succession Certificate Act (7 of 1889), S. 4—Death of original plaintiff — Substituted plaintiff is not entitled to decree without production of certificate—Principle whether applies to execution proceedings (*Quaere*).

Without the production of one of the certificates mentioned in S. 4, no decree can be passed in favour of a person who has been substituted as plaintiff in a suit for recovery of money due on a bond upon the death of the original plaintiff.

Quaere—Whether the same principle applies to execution proceedings. [P 303 C 1]

Judgment.—This is a reference under R. 1, O. 46, Civil P. C., 1908. The question referred has been framed by the Court below in these terms :

"Whether S. 4, Succession Certificate Act, would apply at all to the case of a person who has been substituted as plaintiff for one who has died pending the suit."

The reference however must be limited to the true scope of Cl. (a), sub-S. 1, S. 4, as we are concerned with a suit and not with an execution proceeding which is governed by S. 4 (1) (b). One Dalimullah Mandal instituted this suit on 28th August 1916 for recovery of money due on a bond. The plaint was registered, and the case was fixed for disposal on 21st September 1916. On that date it was reported that the plaintiff was dead and the case was adjourned. On 15th December 1916 the widow of the deceased plaintiff applied, for herself and on behalf of her infant sons and daughters, for leave to prosecute the suit and an order for substitution was accordingly made. The trial Court has now made this reference for the determination on the question, whether the substituted plaintiffs can obtain a decree against the defendant without the production of one of the certificates mentioned in S. 4, Succession Certificate Act. We are of opinion that a decree cannot be passed in favour of the substituted plaintiffs without the production of such a certificate.

The question raised is really concluded by authority. In the case of *Sahadev Sukl* v *Sakhawat Hossain* (1) a suit had been instituted on the mortgage for recovery of the dues of the mortgagee, first by sale of the mortgaged properties, and then by the sale of other properties of the mortgagor. The Court made the usual decree for sale ; the mortgaged premises were sold and the sale-proceeds proved insufficient to satisfy the judgment debt. Meanwhile, the mortgagee had died, and his legal representative applied to the Court to pass a personal decree against the mortgagor under S. 90, T. P. Act. Objection was taken on behalf of the mortgagor that a decree could not be made in favour of the applicant except on production of one of the certificates mentioned in S. 4, Succession Certificate Act. The Court of first instance overruled this objection and passed a decree under S. 90. Upon appeal this decision was reversed. On second appeal to this Court, it was argued that as the succession had opened out during the predency of proceedings in Court, a succession certificate was not necessary. This contention was overruled, and the view taken by the District Judge was affirmed, notwithstanding the doubt expressed in the case of *Baid Nath Das* v. *Shamanand Das* (2), where this particular point did not arise for decision. Precisely the same view was indenpendently adopted by Maclean, C. J. and Coxe, J., in *Abdul Sattar* v. *Satya Bhushan Das* (3), which was decided before the case last mentioned had been reported

Maclean, C. J., held that having regard to S. 4, Succession Certificate Act, the Court could not pass a decree under S. 90 in favour of the personal representative of the mortgagee, till a certificate had been granted to him under any of the Acts mentioned in that section and that the fact that a certificate had been subsequently granted was not sufficient to get rid of the difficulty in his path created by the clear language of S. 4. The view taken in these two cases is in accord with that of Farran, J., in *Torregrosa Vasquez* v. *Pragji Hurji* (4) where he held that upon the death of the plaintiff pendente lite, though the suit may be continued by his representative, a certificate in proof of his representative title must be produced before a decree can be passed in his favour. The comprehensive language used in S. 4 (1) (a), namely, that

"No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or any part thereof,"

is undoubtedly capable of the interpretation adopted in these cases. The claim contemplated by S. 4 (1) (a) is a claim made by a person in the capacity of and as a personal representative of a deceased person, and from the point of view of the purpose of statute as set out in the preamble, it is clearly immaterial whether the decree has to be made in favour of a personal representative who has himself instituted the suit or in favour of one who has taken the conduct of the suit in hand after its institution by the original creditor. The essence of the matter is that, in both the cases, when the decree is passed, it is passed in favour of a person who claims to be entitled to the effects of the deceased person and who must consequently produce proof of the represetative

1, (1908) 7 C L J 658.

2. (1895) 22 Cal 143,
3. (1908) 35 Cal 767.
4. (1892) 16 Bom 519.

title. Whether the same principle does or does not apply to execution cases, does not arise for consideration on the present reference, but it may be observed that there appears to be a substantial difference in phraseology between Cls. (a) and (b); the fomer contemplates the point of time when the decree is passed, the latter refers to the point of time when the Court is called upon to proceed on the basis of the application for execution: *Mahomed Yusuf* v. *Abdur Rahim Bepari* (5). We hold accordingly that S. 4 (1) (a), Succession Certificate Act, applies to the case of a person who has been substituted as plaintiff upon the death of the original plaintiff during the pendency of the suit.

The records will be returned to the Court below; if the trial Judge holds that the plaintiffs are entitled to a decree, a reasonable opportunity must be afforded to them to produce the requisite certificate.

V.B./R.K. *Order accordingly.*

5. (1899) 26 Cal 839.

A. I. R. 1918 Calcutta 303

TEUNON AND NEWBOULD, JJ.

Charu Chandra Bhattacharjee—Appellant—Petitioner.

v.

Hem Chandra Mookerjee and *another*—Respondents—Opposite Parties.

Civil Rule No. 219 of 1918, Decided on 24th June 1918.

Provincial Insolvency Act (3 of 1907).S. 22—Receiver attaching and taking possession of property as of insolvent—Person claming to be owner becomes "aggrieved"—Application should be made within 21 days from date of possession by receiver.

Where a receiver in insolvency at the instance of a creditor attaches and takes possession of a property as the property of the insolvent, a third person claiming to be the owner of the property becomes "aggrieved" within the meaning of S. 22, so that an application by him under that section should be made within 21 days from the date of the act of the receiver in taking possession.

[P 303 C 2]

Dhirendra Nath Mukerjee—for Petitioner.

Karunamoy Bose and *Bankim Chandra Mukherjee*—for Opposite Party.

Judgment.—The present Rule is one issued under the provisions of the proviso to S. 46 (1), Provincial Insolvency Act, 1907. It appears, and it has been found, that at the instance of one of the creditors and after the taking of evidence on 27th November 1917 the receiver, appointed in certain insolvency proceedings, took possession of certain boats as the property of the insolvent. It has further been found that the attachment and the taking of possession were to the knowledge of the petitioner. Thereafter, on 19th December, the petitioner before us made an application to the Court of the Subordinate Judge having jurisdiction in the insolvency proceedings in question, and therein prayed that the Court should reverse the act or order of the receiver and return the boats to him as being his property. The Subordinate Judge held that under the terms of the proviso to S. 22 the application was barred by limitation. On appeal the District Judge confirmed that order.

The argument of the petitioner before us is that limitation should run not from the date of the act of the receiver in taking possession but from the date, namely 14th December, on which he reported his action to the Court. On the facts found in this particular case we are unable to accede to that contention. It is quite clear that the attachment by the receiver and his taking of possession are acts by which, within the meaning of S. 22, Provincial Insolvency Act, a third person claiming to be the owner was, if the real owner, aggrieved. He should, therefore, have made his application under S. 22 within 21 days from that date. In support of his contention before us the petitioner refers us to the case decided by this Court and reported as *Hanseswar Ghose* v. *Rakhal Das Ghose* (1). But that decision may, we think, be distinguished as it is quite clear that by the act of the receiver in the present case the applicant, if the true owner, was deprived of the possession of his property. In support of the view we take we may further refer to the decision of the Allahabad High Court reported as *Thakur Prasad* v. *Punno Lal* (2) and a subsequent decision reported as *Mool Chand* v. *Murari Lal* (3). For these reasons we discharge this Rule with costs, one gold mohur, to be paid to the creditor who has appeared and one gold mohur to be paid to the receiver.

V.B./R.K. *Rule discharged.*

1. A I R 1914 Cal 885=20 I C 683.
2. (1913) 35 All 410=20 I C 673.
3. A I R 1914 All 212=36 All 8=21 I C 702.

A. I. R 1918 Calcuta 304 (1)

FLETCHER AND SHAMSUL HUDA, JJ.

Prionath Bose—Plaintiff—Appellant.

v.

Kusum Kumari Das — Defendant — Respondent.

Appeal No. 2228, of 1916, Decided on 16th May 1918, from appellate decree of Addl. Dist Judge, Midnapore, D/- 23rd August 1916.

Bengal Tenancy Act (8 of 1885), S. 87—Usufructuary mortgage of non-transferable occupancy holding—Landlord is not entitled to recover possession — Conditions when landlord entitled to possession laid down.

Where an occupancy raiyat executes an usufructuary mortgage of his non-transferable holding and puts the mortgagee in possession, the landlord is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment of the holding within the meaning of S. 87, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy.

[P 304 C 1]

Jyotish Chandra Hazra — for Appellant.

Satcowripati Roy—for Respondent.

Judgment.—This is an appeal by the plaintiff against the judgment of the learned Additional District Judge of Midnapur, dated 23rd August 1916, affirming the decision of the Munsif of the same place. The suit was brought for khas possession. The plaintiff was the landlord. The defendant was an usufructuary mortgagee of the recorded tenant who had been put into possession and the plaintiff therefore sued the defendant to recover possession. What the learned Judge of the lower appellate Court has found is this: He has found that the facts proved in this case do not show that the tenant abandoned the holding within the meaning of S. 87, Ben. Ten. Act. But it is laid down by the Full Bench of this Court in the case of *Dayamoyi* v. *Ananda Mohan Roy* (1) that where the transfer is the sale of the whole holding the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within the meaning of S. 87, Ben. Ten. Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy. The learned Judge in this case has only inquired into (a), namely, as to whether there had been an abandonment within the meaning of S. 87, Ben. Ten. Act. He has not inquired into either (b) or (c), as he ought to have, to find whether the landlord has a right of re-entry. The decree of the lower appellate Court must therefore be set aside and the case sent back to that Court for the learned Judge to come to a conclusion as to whether there was a relinquishment of the holding or a repudiation of the tenancy and to pass a proper decree. Costs will abide the result of the re-hearing by the lower appellate Court.

V.B./R.K. *Case sent back.*

1. A I R 1915 Cal 242= 42 Cal 172= 27 I C 19 (F B).

A. I. R. 1918 Calcutta 304 (2)

CHITTY AND WALMSLEY, JJ.

Chand Tarafdar—Petitioner.

v.

Shamsher Fakir—Opposite Party.

Criminal Revn. No. 1386 of 1917, Decided on 28th January 1918.

Criminal P. C. (1898), Ss. 350 and 16—Difference of opinion between even number of Honorary Magistrate — Case shall be referred back to District Magistrate — On reference, S. 350 will apply—Criminal P. C. (1898), S. 16, Rules under R. 6.

Rule 6 of the Rules framed by the Bengal Government under S. 16, provides that in case of a difference of opinion between an even number of Honorary Magistrates the case shall be referred back to the District Magistrate or Sub-Divisional Officer, as the case may be.

[P 305 C 1]

Where a case is thus referred back under this rule to the Sub-Divisional Officer, the provisions of S. 350, apply to the case, so that the Magistrate does not act without jurisdiction if in the absence of any demand for a de novo trial on the part of the accused he hears arguments and passes judgment without holding a de novo trial.

[P 305 C 1]

Manmatha Nath Mookerjee, *Jogendra Narain* and *Amulya Kumar Bhattacharjya*—for Petitioner.

Dasarathi Sanyal and *Provat Chandra Dutta*—for Opposite Party.

Judgment.—In this case the petitioner Chand Tarafdar was charged under Ss. 147 and 324, I. P. C, before a Bench of two Honorary Magistrates exercising 3rd Class powers. The two Magistrates differed in opinion and the case was under R. 6 referred back to the Sub-Divisional Magistrate. He did not try the case de novo but heard arguments and passed judgment convicting the accused under Ss. 147 and 324, I. P. C., and sentencing him to six months' rigor-

ous imprisonment. The accused appealed and his appeal was heard by the Second Additional Sessions Judge of Mymensingh. He held, on the authority of *Ulfat Sheikh* v. *Emperor* (1), that the Sub-Divisional Magistrate had no jurisdiction, and that the case should have been decided by the casting vote of the Chairman of the Bench of Honorary Magistrates, though at the same time he pointed out that no Chairman appeared to have been chosen. He accordingly set aside the conviction and sentence and remanded the case for re-trial by a Stipendiary Magistrate. Against that order the accused applied for and obtained this Rule. We must at once point out that the learned Judge was in error in supposing that the old R. 6 of the Rules framed by the Local Government under S. 16, Criminal P. C., was still in force in Mymensingh. The new R. 6, which provides that in case of a difference of opinion between an even number of Magistrates the case shall be referred back to the District Magistrate or Sub-Divisional Officer, has been made applicable to the whole of the Presidency of Bengal, as now constituted, by Government Notification 950-A, dated 30th January 1914. The Sub-Divisional Officer had therefore jurisdiction to deal with the case. The difficulty however does not end there. It is not quite clear what is meant by the concluding words of R. 6:

" the case shall be referred back to the District Magistrate or the Sub-Divisional officer, as the case may be. "

Does it mean that he is merely to hear arguments and record his opinion, as was done in this case, or is he to try the case again de novo? Though the word " back " might be taken to indicate that the case was to be sent back as an untried case, we do not think that this is the only possible interpretation. In any case we see no reason why the provisions of S. 350, Criminal P. C., should not apply to this case. Here the accused did not demand a de novo trial before the Sub-Divisional Officer : nor does he now express any such desire. On the contrary he begs that he may not be tried all over again, but that his appeal may be heard on the merits. To this the complainant, whose pleader we permitted to address us on the point, has no objection. We accordingly made the Rule absolute, set aside the order of the Second Additional Sessions Judge and direct that the appeal be heard on its merits. The accused may remain on bail pending the hearing of the appeal.

V.B./R.K. *Rule made absolute.*

1. A I R 1914 Cal 56=21 I C 1004.

A. I. R. 1918 Calcutta 305

CHITTY AND BEACHCROFT, JJ.

Bimal Chandra Banerjee—Petitioner.

v.

Tez Chandra Banerjee—Opposite Party.

Criminal Revn. No. 290 of 1918, Decided on 23rd March 1918, against order of Dist. Magistrate, Alipore.

Criminal P. C. (1898), Ss 181 (2) and 531—Criminal breach of trust by servant—Conviction cannot be set aside on ground that trying Magistrate had no jurisdiction if there has been no failure of justice.

Section 531 is imperative and the Court is required to see in every case, in which it is asked to set aside a conviction on the ground that the trying Magistrate had no jurisdiction to try the case, whether there has in fact been a failure of justice. The accused, a Tahsildar, realized a large sum of money from the tenants of his master at a place *M* and being bound to render accounts at a place *B* presented there a false account with false entries in his papers, showing that a much lesser sum than what he had realized was due from him:

Held: that it was doubtful whether the Court at *B* would have jurisdiction to try the offence of criminal breach of trust against the accused.

[P 306 C 1]

Manmatha Nath Mukherjee and *Satindra Nath Mukherjee*—for Petitioner.

Orr, *Atulya Charan Bose* and *Amarendra Nath Bose*—for the Crown.

Judgment.—In this case a rule was issued at the instance of the petitioner, Bimal Chandra Banerjee calling on the District Magistrate to show cause why the conviction and sentence upon him (the petitioner) should not be set aside on the ground that the Alipore Court had no jurisdiction to try the case. The petitioner was a Tahsildar in the employment of Mr. Beyomkesh Chakerbertty with reference to Mr. Chakerbertty's Jessore estates. The complaint against him was that he had misappropriated a sum of Rs. 800 which he had received by way of selami from tenants on three dates between January and March 1917. The charges, which are in identical terms, mutatis mutandis were that the petitioner at

" Gangralia Cutchery, Police Station Magura, District Jessore being a servant in the employment of Mr. B. Chakerbertty, in such capacity being entrusted with such and such a sum committed criminal breach of trust with respect to

the said amount by criminally misappropriating the same and thereby committed an offence punishable under S. 408, I. P. C., within my cognizance."

The case was being tried by an Honorary Magistrate with First Class powers at Alipore. Proceedings had been commenced against the petitioner before in the Alipore Court on the same charge and he was discharged under S. 203 on the ground that that Court had no jurisdiction. The District Magistrate however on application by the complainant was of a different opinion and directed the present trial. The charges may be objected to on the ground that they are not clear and precise; for instance, if the entrustment and criminal misappropriation took place at Gangralia as alleged in the charge, it is difficult to see how they could fall within the cognizance of the Magistrate at Alipore unless some other words were added as to the place of misappropriation. S. 181 (2), Criminal P. C., provides:

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed."

It has been argued here for the Crown that although the moneys were undoubtedly received at Magura, still the accused was bound to account to the complainant at the Sudder Cutchery at Bhawanipore and that he was actually so called upon to account in the month of May 1917. In presenting his account at that time he is said to have made certain entries in the rokar, and to have urged on the strength of those entries that only a small sum of 4 annas 2 pies was due by him to the complainant. It may be doubtful whether this would bring the case within the jurisdiction of the Alipore Court— whether it could be said that the offence was committed within the limits of that Court's jurisdiction. It is not however in our opinion, necessary to discuss that point, because it appears that the case may be decided on the provisions of S. 531, Criminal P. C. That section provides:

"No finding, sentence or order of any criminal Court set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong Sessions division, district, subdivision or other local area, unless it appears that such error has in fact occasioned a failure of justice."

That section is imperative and the Court is required to see in every such case whether there has in fact, been a failure of justice. Now in this case the accused undoubtedly demurred at the first opportunity to the jurisdiction of the Alipore Court. He again presented a petition just before the trial before the Honorary Magistrate commenced, in which he stated that he would be seriously prejudiced in his defence if the trial went on at Alipore instead of at Magura and that it would be almost impossible for him to produce all the necessary papers and witnesses from Magura That was his apprehension when the case was about to commence. But we do not find in his petition here a single statement to show that those apprehensions have been realized in any way whatever. So far as can be seen from the order sheet, he made no request to the trying Magistrate to summon any witnesses on his behalf from Magura or elsewhere, or to give him facilities for producing papers or documents. He does not appear to have intimated that he wished to call evidence in his defence. In his petition before this Court he does not allege that he did anything of the kind, or that it was refused or that he was in any way prejudiced by the trial having taken place at Alipore. He merely stated that he desired relief from this Court on the ground that the Magistrate of Alipore had no jurisdiction to take cognizance of the complaint. In these circumstances, we do not think that we should interfere. It does not appear that the petitioner has been prejudiced in the slightest degree. The Rule is accordingly discharged. The petitioner must surrender to his bail and serve out the remainder of his sentence.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 306

FLETCHER AND NEWBOULD, JJ.

Mahunta Bhagwan Das—Defendant—Appellant.

v.

Surendra Narain Singh—Plaintiff—Respondent.

Appeal No. 1786 of 1916, Decided on 18th July 1917, from appellate decree of Sub-Judge, Murshidabad, D/- 30th May 1916.

(a) Specific Relief Act (1877), Ss. 19 and 21 (b) —Contract to prepare and file set of jama wasil baki cannot be specifically enforced—

Damages for non-performance cannot be awarded in absence of actual loss.

A contract by a lessee for the preparation of a set of jama wasil baki and jama mufassil papers and filing them with the lessor at the close of every year cannot be specifically enforced by a Court as such a contract falls under S. 21 (b).

In a suit for specific performance of such a contract, the plaintiff cannot, on his alternative prayer for damages under S. 19, get a decree for damages, unless he gives evidence of the actual loss suffered by him for non-performance of the contract. [P 307 C 2]

(b) Contract—Whether it runs with land— *Quaere.*

Quaere.—Whether a contract for preparation of jama wasl baki runs with the land, or is a purely personal contract, or meant to be collateral. [P 307 C 1]

Karunamoy Bose for *Gunada Charan Sen* and *Surendra Nath Das*—for Appellant.

Dwarkanath Mitter—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned Subordinate Judge of Murshidabad dated 30th May 1916, reversing the decision of the Munsif of Lalbagh. The case is an interesting one. The question is:

"whether specific performance can be had against the defendant of a covenant contained in the lease under which he holds."

The covenant is in these terms:

"I shall file with you a set of jama wasil baki and jama mufassil papers at the close of every year."

Neither the plaintiff nor the defendant are the original lessor or the lessee. The lease is dated 1857 and the liability is sought to be enforced against the defendant purely by reason of the privity of estate. The first question, therefore, that has been argued is an important and, in many cases, a difficult question. I think, in this case it is a difficult question, namely, as to whether this particular covenant runs with the land. The rule in *Spencer's* case (1) is well-known. How far the second rule in *Spencer's* case (1) applies in India where the assignee is not named I do not know. I think, in this case the present purpose we may assume that this covenant does run with the land and that it is not meant to be purely a personal contract nor is it meant to be collateral. On that assumption I intend to decide this case. If that is so the next point that arises is "can the Court grant specific performance of a contract of this nature?" The contract that has been ordered to be specifically performed is a contract for the preparation of a set of jama wasil baki and jama mufassil papers. That, of course, seems to me to be a case clearly coming under S. 21 (b), Specific Relief Act. It is a contract which from its very nature is such that the Court cannot enforce specific performance. Also, I think it comes within the other words in the same subsection. I think no case has ever been shown to us of a Court either in this country or in England ordering specific performance of a contract of this nature. The Court cannot say whether the document to be prepared is a jama wasil baki and jama mofussil papers or whether it is a set of jama wasil baki and jama mufassil papers. No authority has been shown to us in which the Court has ever undertaken specific performance of a contract of this nature.

The alternative case for damages that is made in this case seems to be one that cannot be decided in this suit. Whether damages can be obtained on a contract of this nature under S. 19, Specific Relief Act, is not a matter to be considered, because it is clear on the evidence that the plaintiff at the time he instituted the present suit had not suffered any damage. The plaintiff in this case must give evidence on which the Court can assess damages. The plaintiff, if he has that right, will be able to enforce it in any other proceeding which he may be advised to take. In the present suit, it is admitted that there is no evidence of actual damage suffered by the plaintiff. In that view, we must set aside the decision of the learned Subordinate Judge and restore the decree of the Munsif. The respondent must pay to the appellant his costs in this Court as well as in the Courts below.

Newbould, J.—I agree.

V. B./R.K. *Decision set aside.*

1. (1908) 1 K B 629=77 L J K B 521.

A. I. R. 1918 Calcutta 307

SANDERSON, C. J. AND MOOKERJEE, J.

Bengal Stone Co. Ltd.—Defendants—Appellants.

v.

Joseph Issac Joseph Hyam and *another*—Plaintiffs—Respondents.

Appeal No. 52 of 1916, Decided on 16th January 1917, from original decree of Imam, J.

(a) Contract Act (9 of 1872), S. 15—Refusal by mortgagee to reconvey mortgaged

property to mortgagor except on certain terms does not amount to coercion.

A mortgagee, who refuses to reconvey the mortgaged property to the mortgagor except on certain terms, cannot be said to be unlawfully detaining or threatening to detain any property within the meaning of S. 15, Contract Act.

[P 309 C 2]

(b) Practice—Costs—Discretion — Appellate Court is averse to interfere—Solicitor acting on his own behalf is entitled to same costs as if he had employed solicitor—Legal practitioner.

The High Court is averse to interfere with the discretion of a Judge on the question of costs, but the discretion must be exercised judicially. The ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other.

[P 310 C 2; P 311 C 1]

A solicitor, who is a party to a suit and acts on his own behalf, is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary. [P 311 C 2]

Buckland and *Surita*—for Appellants.

Hyam and *S. N. Ghose*—for Respondents.

Sanderson, C. J.—This was an action brought by the plaintiffs for an account in respect of certain building transactions which were undertaken by the defendants for the plaintiffs, Mr. Hyam and Mr. Jones. Those building transactions were undertaken in pursuance of an agreement dated 21st January 1909. It is not necessary for me for the purpose of this case to deal in any detail with the terms of that agreement. It is sufficient for me to state that the defendants, the Bengal Stone Co. Ltd., were to erect two sets of premises, one in Park Street, and the other in Bow Bazar Street, and that they were not to be liable to spend on all accounts more than a specified sum of money, and the method of payment was that

"the owners (the plaintiffs in this case) should pay the Stone Company (the defendants) for all materials the actual cost price thereof plus all charges and expenses actually paid or incurred by the Stone Company in collecting and placing the same on site and also the actual cost of all labour employed by the contractors in or about the erection of the buildings and of completing and equipping the same in terms of the agreement."

There were provisions for the remuneration of their services in respect of supervision and other matters, and then the payment of a sum equal to ten per cent on the aggregate amount of all the items specified in the said clause of the agreement was provided for. The buildings were completed although not within the specified time. There was also a provision in the agreement that a mortgage should be given by the owners of one of the premises to secure a sum of money which was eventually agreed upon, Rs. 2,50,000. Now, this action was brought, as I have said, primarily for an account. When it came on for trial, there were really two main questions: first, the point raised by the defendants, that there had been an account stated between the plaintiffs and the defendants, and that consequently the plaintiffs were not entitled to an account; and, secondly, the point raised by the plaintiffs that a certain letter which was dated 22nd August 1911 was obtained from the plaintiffs by the coercion of the defendants. That was a letter in these terms:

"In consideration of the Bengal Stone Co., Ltd., this day reconveying and releasing the premises Nos. 294 and 295, Bow Bazar Street, mortgaged by us to the Bengal Stone Co., Ltd., we hereby admit and acknowledge that the said reconveyance and release only relates to the said premises Nos. 294 and 295, Bow Bazar Street, and we hereby undertake to pay the said Bengal Stone Co., Ltd., not later than 31st December 1911, any sum which may hereafter be found to be due from us to the said Bengal Stone Co., Ltd., under or in connexion with the agreement dated 21st January 1909 and made between the said Bengal Stone Co., Ltd., of the one part and ourselves of the other part. We hereby also agree to forgo any and all claims that we may have had or have against you in respect of delays in completion of the buildings at Park Street and Bow Bazar Street and will only make such corrections in your bills and accounts as we may find to be erroneously or excessively charged. All other items of the contract agreement dated 21st January 1909 to be considered as in force."

Now, those were the two main issues that were to be tried by the learned Judge, and I must say I am distressed to think that this action took no less than 16 days in trial. In my view it should have been obvious, unless the learned Judge was satisfied that there had been an account stated between the parties, that there must be a reference for the purpose of an account to be taken between the parties, and how the case which (with the exception of one or two subsidiary matters the facts relating to which lay in a small compass) was limited to these two questions: first, whether there had been an account stated; and secondly, whether the letter of 22nd

August 1911 which had been obtained by coercion could have taken 16 days for trial, is certainly beyond my comprehension. Now, with regard to the first point, the learned Judge has found that there was not an account stated. We have heard the arguments on the one side as well as on the other, we have read the learned Judge's judgment, and the facts to which he referred, and have heard the facts put forward by the learned counsel for the defendants and I think, even assuming the facts which he has stated, that there was not an account stated between the parties: and, for this reason we did not think it necessary for him to go through the evidence as he had offered to do. With regard to the other point, we agree with the learned Judge that the letter of 22nd August 1911 was not obtained by coercion. The section upon which this matter depends is S. 15, Contract Act. In order to understand that section, it is necessary to refer to Ss. 13 and 14. S. 13 says:

"Two or more persons are said to consent when they agree upon the same thing in the same sense."

Section 14 says:

"Consent is said to be free when it is not caused by—(1) coercion, as defined in S. 15, or (2) undue influence, as defined in S. 16, or (3) fraud, as defined in S. 17, or (4) misrepresentation, as defined in S. 18, or (5) mistake, subject to the provisions of Ss. 20, 21 and 22."

The only subsection of S. 14, which can be said to apply to this case is subsection (1), namely, "Coercion, as defined in S. 15." S. 15 says:

"Coercion is the committing, or threatening, to commit, any act forbidden by the Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

It is admitted that the present case does not come within the meaning of the first part of that section, namely "the committing, or threatening to commit, any act forbidden by the Indian Penal Code."

But it is said that what happened in this case, to which I will refer more in detail, directly brings the matter within the words:

"unlawfully detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."

What happened in this case was this: shortly stated, Mr. Hyam and Mr. Jones had mortgaged this property at Bow Bazar Street to the defendants for Rs. 2,50,000. Mr. Hyam was anxious—Mr. Jones was away and Mr. Hyam was acting on behalf of Mr. Jones—to sell the premises and apparently he got a purchaser, but he was not a very willing purchaser, and it was necessary for him to get the equity of redemption conveyed to him by the mortgagees. There was a discussion first of all as to whether Mr. Hyam would give a promissory note—I ought to have said that the defendants were alleging that the total of their bills would amount to a considerable sum, above Rs. 2,50,000. He was willing to give the promissory note. Then an arrangement was come to whereby Mr. Hyam agreed to pay over the balance of the purchase-money, after deducting the amount which would be required for the first mortgage of the property, and also a sum of Rs. 4,000 as brokerage. It would leave about Rs. 2,80,000 and he agreed to pay over that. Now, he alleges that that discussion amounted to

"a threatening to detain any property to the prejudice of any person with the intention of causing any person to enter into an agreement."

The property which Mr. Hyam, the learned counsel who argued the case on behalf of the respondents, relied upon was the equity of redemption; and, he said that the defendants threatened to detain the equity of redemption and there was an "unlawful detaining or threatening to detain," inasmuch as the defendants were refusing to convey the equity of redemption unless they were paid more than the sum secured by the mortgage. In my judgment, that was not unlawfully detaining or threatening to detain any property, within the meaning of S. 15.

With regard to the law of duress in England, it is well known that that was limited, and no doubt for very good reasons limited, to the duress of person: and I may quote the following passage which I find stated in a convenient form at p. 351 of the 3rd Edn. of Leake on Contract:

"Duress may also consist of threats of personal violence. But the fear must concern the safety of the person of a man; and not his house or goods, because he may recover the same, or damages to the value, without any corporal hurt. Again, if the fear do concern the person, yet it must not be a vain fear, but such as may befall a constant man. Fear of imprisonment is sufficient, for the law has special regard to the safety and liberty of a man."

(that is a quotation from Co. Lit. 2536). Apparently, when the legislature was considering this matter for the purpose of applying the law to India, they thought it right to extend it and not to limit the law of coercion to a coercion of a man's person but extended it beyond the law of England to unlawfully detaining or threatening to detain any property. I ask myself, can it ever have been intended to apply it to such a transaction as has occurred in this case? Can it be said that when a person who has refused to convey the equity of redemption except on certain terms has unlawfully detained or threatened to detain any property within the meaning of S. 15, Contract Act. Having regard to the ordinary meaning of the English language, I have no hesitation in saying that the refusal to convey the equity of redemption, except on certain terms, did not come within the meaning of S. 15. I think that the learned Judge was right in saying that what took place in this case did not amount to coercion. Therefore, I think that the plaintiffs' cross-objection upon the question of coercion fails.

Then Mr. Hyam for the plaintiffs raised two other points which I may describe as less important points. The first one was that the learned Judge was wrong in finding that the defendants were not bound to charge the rates of labour which were specified by the letter of 22nd December 1908. I think that the learned Judge was right. That letter, as I have said, was written on 22nd December 1908, and the contract was not made until 21st January 1909. I have read the clause which relates to the rate of labour I read it again to make my meaning clear.

"The owners should pay also the actual cost of all labour employed by the contractors in or about the erecti n of the buildings and of completing and equipping the same in terms of this agreement."

In my judgment that is a clause with governs this matter, inasmuch as it was made subsequently to 22nd December 1908; I do not think it is possible for us to say that it was implied that the rates of labour specified in the letter of 22nd December were to be incorporated in the contract. If it had been so intended, one would have expected the contract to contain some such words as these

"that the owners should pay also the actual cost of all labour, having regard to the rates of labour which had been agreed upon between the parties on 22nd December 1908."

The other point was that the learned Judge misunderstood the evidence with regard to the steam-plant. What he says is this :

"In respect of the steam-plants I accept the version put forward by the defendant Company, and I hold that they are entitled to charge the plaintiffs Rs. 150 per plant per month for the actual period during which the steam-plants were working on the sites"

We have been referred to the evidence. In my judgment there was sufficient evidence on which the learned Judge could arrive at that conclusion, and I see no reason for interfering with his decision upon a question of fact in that respect. That disposes of the main points that were raised in this appeal. As I have already said, it must have been obvious from the beginning of the case, as it was obvious from the beginning of the appeal, that the matter must ultimately go to reference : and the result is that the matter must now go to the Official Referee, unless the parties agree upon some other person who can take an account quicker and more expeditiously : and, after considering the arguments on both sides, I think that the learned Judge was right in the form of the order by which he directed it. It has been read by Mr. Buckland at my request, and I do not propose to read it again. I do not think that the form of the order as to the account ought to be interfered with at all. Then comes the question of costs. The learned Judge made an order as to the costs in these terms :

"It is furtber ordered and decreed the defendant Company do pay to the plaintiffs their costs of this suit up to and including this decree to be taxed by the Taxing Officer of this Court under the heading 'Class 2 ordinary causes'."

In my judgment that was not a correct direction as regards the costs. There was a clear and distinct issue raised by the plaintiffs that the letter of 22nd December 1911 had been obtained by the coercion of the defendants. The learned Judge has not given any direction as to the costs of that issue: and, although the plaintiffs failed upon that issue, he has given the plaintiffs the costs of the whole trial of the action. Now, it is quite true that this Court is most averse to interfere with the discretion of a learned Judge upon the question of costs. But the discretion of the learned Judge

upon the question of costs has to be exercised judicially, and the ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other. That is not the case here: it was a quite clear and distinct issue in this case, quite apart from the rest of the case. I have asked myself what good cause there was for depriving the defendants of the costs of that issue. I find none. Therefore I think the learned Judge was not right in the exercise of his discretion in depriving the defendants of the costs of that issue without a good cause. In my judgment, the defendants out to have the costs of the issue relating to the question whether the letter of 22nd August 1911 was obtained by coercion. But it would be difficult in view of the protracted nature of the trial, as pointed out by Mr. Hyam, the learned counsel for the plaintiffs, for the Taxing Officer at this stage, without going into the matter at length and putting the parties to a considerable expense, to come to a satisfactory conclusion as to what costs should be allocated to the issue of coercion, and I think we shall be doing substantial justice if we direct that one-third of the costs of this suit ought to be allocated to the issue of coercion and two-thirds of the costs ought to be allocated to the other issues.

Therefore as regards the costs of the suit, I think the plaintiff ought to have two-thirds of the costs of the suit and the defendants ought to have one-third; and, the costs ought to be taxed upon that basis, for the reason that the defendants have succeeded on the issue of coercion and the plaintiffs have succeeded upon the issue whether there was an account stated. As regards the costs of this appeal, I think that each party ought to bear his own costs, for the reason that the plaintiffs have failed in part and the defendants have also failed in part and both the defendants and the plaintiffs have succeeded to some extent. As regards the costs of the reference those costs will be in the discretion of the Official Referee or the person who takes the reference. As regards the last point taken by Mr. Buckland on behalf of the defendants, mainly that there ought to be a special direction as regards the costs of Mr. Jones, the point is this: It appears that Mr. Jones is a solicitor, and that at one time he was in partnership with Mr. Mitter, carrying on business under the name of Jones & Co.; Mr. Mitter died early in these proceedings, it is said before the affidavit of documents was put in. Therefore substantially we may say that Mr. Jones was acting as solicitor in this case on behalf of the plaintiffs. The question is whether we ought to give a direction to the Taxing Officer to tax the costs upon the principle of the rule which is laid down in the case of *London Scottish Benefit Society* v. *Chorley* (1). That was an action brought against the solicitors for money not accounted for. The learned Judge, Sir William Brett, Master of the Rolls, said this:

"It is true however to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccesstul adversary of a solicitor appearing in person cannot be charged for what does not exist; he cannot be charged for the solicitor consulting himself or instructing himself or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction: that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances."

The report says "an ordinary litigant appearing in person," which is a mistake as appears from the title of "errata" and should "read by an ordinary litigant appearing by a solicitor." The rule laid down by this case and affirmed in *Tolputt* v. *Mole* (2) is that the solicitor is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly rendered unnecessary. We propose to give a direction to the Taxing Officer that he should tax the costs of Mr. Jones upon the principle laid down in that case. We think that the costs of the paper-book in the appeal should be equally divided between the parties in this case.

Mookerjee, J.—I agree.

V.B /R.K. *Decree varied.*

1. (1884) 13 Q B D 872=53 L J Q B 551.
2. (1911) 1 K B. 836=80 L J K B 686.

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FLETCHER AND CHATTERJEA, JJ.

Umesh Chandra Dutta and *another*—Plaintiffs—Appellants.

v.

Joy Nath Das and *others*—Defendants—Respondents.

Appeal No. 1519 of 1915, Decided on 24th August 1917, from appellate decree of Addl. Dist. Judge, Mymensingh, D/-29th March 1915.

Landlord and Tenant—Occupancy holding—Portion cannot be devised by will.

A portion of a non-transferable occupancy holding, apart from custom or local usage, cannot be devised by will: *A I R* 1915 *Cal* 242, *Diss.* and *A I R* 1915 *Cal* 43. *Foll.* [P 312 C 1; P 314 C 1]

Per *Chatterjea, J.* The validity of a transfer of the whole or part of an occupancy holding made voluntarily appears to depend upon the principle of estoppel, and that of a transfer made involuntarily upon the principle of acquiescence and waiver. No such principles are applicable to the case of a testamentary disposition. [P 313 C 2]

Brajalal Chukerburty for *Govinda Chander De Roy* and *Jatindra Mohan Chowdhury*—for Appellants.

Jogesh Chunder Roy—for Respondants.

Fletcher, J.—The only question arising for decision in this case is whether a portion of a non-transferable occupancy holding can be devised by will. The facts are extremely simple. The holding in question belonged to three brothers, Ram Jiban Das, Jugal Kishore Das and Lob Narain Das. Lob Narain died on 23rd Baisakh 1314, having by his will dated 30th Baisak 1298 (which was duly admitted to probate), bequeathed his share to his widow, Jagat Tara. The widow subsequently made a gift of the property sued for to the plaintiff. The defendants claim through the other brothers. So the claimants to the property are on the one hand a person claiming through the Will of Lob Narain and on the other hand persons claiming through his heirs. Now it was decided in this Court in the case of *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (1) that a non transferable occupancy holding is not capable of being devised by will. This case was followed in the case of *Kunja Lal Roy* v. *Umesh Chandra Roy* (2). These cases are clearly binding on us and govern this case, unless a different rule applies with reference to a portion of a non-transferable occupancy holding.

Reliance in the present case has been placed by the appellant on the decision of a Full Bench of this Court. But as Mookerjee, J., points out, the validity as against the raiyat of transfers by him of his holding for value depends on the doctrine of estoppel and in cases of involuntary transfer by sale in execution where the raiyat does not apply to have the sale set aside on the doctrine of acquiescence or waiver. It is suggested that the decision of the Full Bench above referred to has modified considerably the remarks of the learned Judge, but I am unable to agree to this view. The learned Judges in *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (1) lay down definitely that a raiyat has no right of testation with regard to a non-transferable occupancy holding and the principles enunciated by the learned Judges apply equally to the whole or a portion of occupancy holding. The principles laid down by the Full Rench on which transfers inter vivos for value of a holding are supported do not apply to the case of a bequest by will. The present case does not in any way involve the consideration of the rights of the landlord. The only question is one of competition between a person claiming under a will of an occupancy raiyat and a person claiming under his heir.

I am of opinion that the present case is governed by the principles laid down in *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (1). That being so, in my opinion, the present appeal fails.

It is conceded that the plaintiff-appellant is entitled to a declaration that he is entitled to the share in the khanabari which belonged to Lob Narain and was transferred to the plaintiff by the deed of gift executed by Lob Norain's widow but that his claim for possession of the khanabari lands should be disallowed. It is also agreed that the mesne profits, instead of being ascertained in the execution proceedings as directed by the lower appellate Court, should be ascertained in this suit. Subject to these slight variations the decree appealed from is confirmed and the present appeal stands dismissed with costs.

Chatterjea, J.—The question involved in rhis appeal relates to the validity of testamentary disposition of a part of an occupancy holding, not transferable by custom. It appears that a certain occupancy holding belonged to three bro-

1. A I R 1915 Cal 43=42 Cal 254=27 I C 235.
2. A I R 1915 Cal 320=27 I C 352.

thers one of whom Lob Narain by his will bequeathed his share in the holding to his wife Jagat Tara absolutely, and the latter made a gift of the share of the jote to her brother's son the plaintiff. The defendants, the sons of the other two brothers of Lob Narain (who are the heirs of the latter on the death of Jagat-Tara), dispossessed the plaintiff and hence the suit. The only reference in the Bengal Tenancy Act to the testamentary power of an occupancy raiyat over his holding is contained in S. 178. Sub-S. 3, Cl. (d), of that section provides that nothing in any contract between a landlord and a tenant, after the passing of the Act, shall take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage. It is not suggested in the present case that there is any local usage under which a raiyat can bequeath his holding. S. 26 of the Act deals with the devolution of occupancy rights on the death of a raiyat dying "intestate" in respect of an occupancy holding, but no implication arises from the section in favour of testamentary disposition generally, because a raiyat has the power to bequeath his holding in accordance with local usage. In two recent cases in this Court, it has been held that a raiyat is not competent to make a testamentary disposition of a non-transferable occupancy holding: see *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (1) and *Kunja Lal Roy* v. *Umesh Chandra Roy* (2). In these cases the entire holding appears to have been devised.

In the first case it was pointed out that in the case of a transfer inter vivos for value, there is an estoppel in favour of the transferee as against the transferor or persons claiming under the latter and that even assuming for the sake of argument that the same principle applies to the case of a gift, the principle can have no operation in the case of a testamentary devise and the contrary view taken in the case of *Hari Das* v. *Udoy Chandra* (3), by Doss, J., was dissented from. As observed in *Amulya Ratan's case* (1) it is open to the testator to change his mind up to the last moment of his life and revoke his will, and the right of the heir to the holding under the law comes into operation immediately on the death of the testater. That being so, the grounds upon which a testameutary disposition of an entire holding is invalid would apply equally to such a disposition of a part of the holding. It is contended, however, on behalf of the appellant that the case of *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (1) was decided before the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (4), and that the Full Bench has held that the occupancy raiyat has a property in his holding which can be transferred. One of the questions (in the third case) referred to the Full Bench no doubt was whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all, and the answer was in the affirmative.

But the Full Bench did not lay down that an occupancy raiyat has an absolute power of disposal over his holding. If it were intended to hold that he had such a right, it would have been wholly unnecessary to consider or lay down in what cases a transfer is operative against the raiyat. The answer must be read with the question referred, viz., whether it can be transferred at all, and subject to what was said in the earlier part of the judgment where the Full Bench laid down that in certain cases a transfer by an occupancy raiyat of his holding is operative against him. A transfer for value of the whole or a part of an occupancy holding apart from custom or local usage is, according to the Full Bench, operative against the raiyat (a) where it is made valuntarily, (b) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside, and the transfer of the whole or part is operative against all persons (other than the landlord) where it is operative against the raiyat. The Full Bench did not deal with the power of an occupancy raiyat to bequeath his holding nor lay down any principle contrary to that upon which the case of *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (1) proceeded. The validity of a transfer of the whole or part of an occupancy holding made voluntarily appears to depend upon the principle of estoppel, and that of a transfer made involuntarily upon the principle of acquiescence and waiver. No such principles are applicable to the case of a testamentary disposition. That being so, the grounds upon which a testamentary disposition of an entire holding is invalid, would apply

8. (1908) 12 C W N 1086.

4. A I R 1915 Cal 242=27 I C 61=4al 172C2.

equally to such a disposition of a part of the holding. It is true the Full Bench laid down that in the case of a transfer of a part of a holding, the landlord is not ordinarily entitled to re-enter. But the considerations upon which the right of the landlord as against a transferee of a part of a holding have to be determined have no bearing upon the question of the validity of a bequest of a part of the holding as between the devisee and the heir-at law. I am accordingly of opinion that a portion of an occupancy holding, apart from custom or local usage, cannot be devised by will, and the appeal must, therefore, be dismissed with costs subject to the slight variation agreed to between the parties as mentioned in the judgment of my learned brother, Fletcher, J.

V.B./R.K. *Appeal dismissed.*

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TEUNON AND SHAMSUL HUDA, JJ.

Ashraf Ali—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 267 of 1917, Decided on 5th July 1917, against an order of Sess. Judge., Chittagong, D/- 26th February 1917.

(a) Evidence Act (1872), S. 114—Prima facie case made out against accused—Accused withholding evidence in disproof—Inference unfavourable to accused may be drawn.

Per *Teunon, J.*—Where after a prima facie case of circumstances, making out or tending to support a charge against the accused, having been established, the accused withholds evidence in disproof or explanation available to him and not accessible to the prosecution, inference unfavourable to the accused may legitimately be drawn. [P 315 C 2]

(b) Criminal Trial—Duty of Prosecution.

The prosecution is not required to produce and examine a witness whom the Crown regards and has resonable grounds for regarding as an acomplice. [P 315 C 1]

(c) Criminal Trial — Proof — Standard of proof does not vary with enormity of crime.

In criminal cases the standard of proof does not vary with the magnitude or enormity of the crime. [P 316 C 1]

(d) Criminal P. C. (1898), S. 297—Misdirection — Murder committed in boat—Failure to bring to notice of jury indications appearing in prosecution evidence of accused having left boat some time before occurrence amounts to misdirection.

Where in a trial by a Jury on a charge of murder committed in a boat, it appeared from the prosecution evidence that the accused had left the boat sometime before the alleged time of the murder, but the Judge did not bring that portion of the evidence specifically to the notice of the Jury;

Held: that the omission of the Judge amounted to misdirection. [P 315 C 1]

(e) Criminal P. C (1898), S. 297—Omission to draw attention of Jury that eye-witness is not examined by prosecution amounts to misdirection,

Per *Shamsul Huda, J.*—The Judge should draw the attention of the Jury to the fact that an eye witness to the occurrence has not been examined by the prosecution and whether there was sufficient justification for the non-examination of that witness. The omission of the Judge to do so amounts to a misdirection. [P 317 C 1,2]

(f) Criminal P. C. (1898), S. 297—Whole evidence circumstantial — Direction not to acquit accused because in their opinion he may possibly not be guilty is misdirection.

It is also a misdirection on the part of the Judge, in a case where the whole of the evidence is circumstantial, to direct the Jury that they must not acquit the accused simply because in their opinion he may possibly not be guilty, but that they should do so if they think the prosecution exidence is for good reasons not satisfactory. [P 317 C 1,2]

(g) Criminal Trial—Jury—Case resting entirely on circumstantial evidence—Jury must be satisfied that facts are inconsistent with any other conclusion than that person is guilty.

Where a case rests entirely on circumstantial evidence, before the Jury can find the prisoner guilty, they have to be satisfied not only that those circumstances are consistent with his having committed the act but that the facts are such as to be inconsistent with any other rational conclusion than that the prisoner is the guilty person. [P 318 C 1]

(h) Evidence Act (1872), S. 106—Trial for murder — Presumption under S. 106 is extremely weak in comparison with dominant presumption of innocence.

Where in a criminal case there is a conflict between the presumption of innocence and any other presumption, the presumption of innocence prevails. The strength of this presumption varies according to the seriousness of the charge upon which an accused person is put on his trial. [P 317 C 2]

Whatever force a presumption arising under S. 106 may have in civil or less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence. [P 318 C 2]

Jacob, Khitish Chandra Sen and *Probhat Chandra Dutt*—for Appellant.

Camell—for the Crown.

Teunon, J.—In this case the appellant before us has been convicted under S. 302, I. P. C. and sentenced to transportation for life. The trial was by Jury and in finding the appellant guilty, the learned Judge has agreed with the majority in their verdict. We have anxiously considered this case and have come to the conclusion that there are defects in the trial which render it necessary to set aside the conviction and sentence and direct a re-trial. In the first place there

is evidence that at the place spoken of as Bharamba the appellant left the boat now in question with the clerk Jogendra at about 6 to 7 p. m. and followed the latter up to Munsihat, a distance of some 1½ to 2 miles from the ghat. It is not clear from the record of the heads of charge that this portion of the evidence was brought specially to the notice of the Jury. At the same time it would seem to be clear that the appellant could be convicted only if the Jury were satisfied that the appellant returned to the boat, and returned in time to take part in causing the disappearance of the peon whose death is in question. The second contention urged on behalf of the appellant was based on the non-examination of the second boatman Abdul Majid. On the case for the prosecution the Crown regarded and had reasonable grounds for regarding Abdul Majid as an accomplice. I am unable to read the case of *Dhunno Kazi, In the matter of the petition of* (1) as an authority for the proposition that the prosecution is required to produce and examine such a witness. But as this person has been examined as an approver on the former trial of the accused Raham Ali, it would doubtless have been more satisfactory if the prosecution had at least secured his attendance, and failing in this had given detailed evidence of the efforts made in that direction.

A third matter touched on in course of argument was the question of the coat said to have been found in the Manjhi Raham Ali's possession. On this point, I find no misdirection. In my judgment evidence of Raham Ali's conduct in regard to the coat is not admissible against the appellant but the evidence going to show that this coat was found in Raham Ali's possession and identifying the coat as belonging to the deceased is in my view admissible as corroborating the other evidence regarding the identity of the boat.

With regard to the further observations of my learned brother in the judgment which I have had the advantage of perusing, I may remark in the first place that it has not been suggested and indeed cannot be suggested here that the learned Judge failed sufficiently to impress upon the Jury that a person placed on his trial for a criminal offence must be presumed to be innocent until the contrary has been established to the satisfaction of the Jury. Similarly, it has not been here said or suggested that a prima facie case of circumstances making out or tending to support the charge against the accused having been established, the accused has withheld evidence in disproof or explanation available to him and not accessible to the prosecution. In such a case inferences unfavourable to the accused may legitimately be drawn but so far as appears it was not urged on behalf of the Crown that the present is a case of that nature and there is no such suggestion in the charge. On the contrary the learned Judge clearly instructed the Jury that it was not incumbent upon the accused to adduce evidence. On the other hand, under the provisions of S. 342, Criminal P. C., it is open to the Court and the Jury to draw such inferences as they may think just from the answers made by the accused to the necessary questions put to him by the Court. The Jury were sufficiently instructed that they were the sole judges of fact, and, therefore, of the value of the evidence given. It was certainly open to them to draw inferences unfavourable to the accused from his false denial of his presence on the boat (if they believed the denial to be false) and from his failure in that view to offer any explanation of the deceased's disappearance. If in the opinion of the learned Judge (an opinion which, as had been clearly explained, Jury were at liberty to disregard) this false denial and this failure to explain were strong points against the accused, it was no misdirection in him to say so.

In short the question in the present case was not one of adducing or of withholding evidence but one of the inferences to be drawn from conduct of which the omission and the denial above referred to are but items. That there was no direct evidence, that the evidence was purely circumstantial and that such evidence to the minds of reasonable and prudent men must satisfy certain conditions were all clearly explained to the Jury, and to say that these directions were all neutralised by the concluding sentence of the heads of charge as recorded is in my judgment to detach that sentence from its context and to misapprehend its meaning. No doubt the sentence might have been more happily worded, but it follows immedi-

1. (1882) 8 Cal 121=10 C L R 151.

ately upon the customary warning that the Jury must give to the accused the benefit of doubt and as I read it embodies concisely the Judge's further explanation that such doubt must be a reasonable and not a fanciful and fantastic doubt, and his further warning that they should acquit if they, as reasonable and prudent men for good reasons, thought that the prosecution evidence was "not satisfactory", i. e., (as is apparent from the preceding sentences) did not satisfy them that guilt had been brought home to the accused.

I am also unable to hold that there has been any misdirection in the charge regarding the crime committed. There appears to be no evidence or suggestion that the deceased was an unhealthy man suffering from enlarged spleen or any other form of disease and if from the evidence as a whole, e. g., from the presence of the mill-stone tied round the neck of the deceased and the other circumstance, the Jury were satisfied that the death was due to violence (neither accidental nor self-inflicted), it was also open to them to conclude that the crime committed was murder. With such hypothesis as arose on the evidence the learned Judge has, in my opinion, sufficiently dealt. Lastly, I must emphatically dissent from the proposition that in criminal cases the standard of proof varies with the magnitude or enormity of the crime. No doubt in the charges of certain learned Judges observations to that effect may be found, but such observations cannot be regarded as embodying the true or accepted view of the law. For the differing reasons given in our respective judgments, we agree in setting aside the conviction of and sentence imposed upon the appellant and direct that he be re tried.

Shamsul Huda, J.—The appellant Ashraf Ali was tried by the Sessions Judge of Chittagong with the aid of a Jury and the learned Judge agreeing with 3 out of 5 jurors convicted him of the offence charged, viz., that he on or about 10th January 1916 on the Karnafuli river or at a place near about it committed murder by causing the death of one Saroda Charan Dey, a peon of the Superintendent's Office at Rangamati, and thereby committed on offence punishable under S. 302, I. P. C. Ashraf Ali as a result of the conviction was sentenced to transportation for life. The points argued on either side involve a consideration of the facts, which are shortly these. The Assistant Superintendent of Chittagong Hill Tracts was travelling by road from Chandraghona to Bunderban. His clerk Jogendra Mohan Biswas had to follow him with furniture, papers etc., accompanied by the peon Saroda Charan Dey. Saroda impressed two boats out of which Jogendra selected one. The present accused and Abdul Majid were the mallas and Raham Ali was the manjhi of that boat. At about midday Jogendra and Saroda started from Chandraghona on the boat. On reaching Berbambha Jogendra left the boat to spend the night at his house, which was at a short distance from that place. He left instructions with the boatmen and Saroda to take the boat next morning to a bridge of the Boalkhali khal where he said he would rejoin them. Next morning Jogendra went to the appointed place, but did not find the boat though he waited long for it, nor did Saroda appear. On 14th January he gave information to the Police.

The next day, i. e,, on 15th January the dead body of Saroda was found with a grinding stone tied round the neck at a place near the mouth of the Boalkhali khal, and was subsequently recognized as that of Saroda. The post mortem took place on 18th January but the body was then too decomposed to allow auy opinion to be expressed as to the cause of death. Saroda is said to have written on a slip of paper the names and addresses of the 3 boatmen and to have kept it in a box which was in the boat. This box was caught in a a fishing trap sometime on the morning of 11th January, but no information was received in the thana about the finding of the box till 17th January. The slip containing the names and addresses of the boatmen was found in the box and with the clue furnished by it the Police went to Gurdawara and searched for the accused but could not find them. On 28th January the boat was found sunk in the river close to the house of Raham Ali with its number obliterated. Warrants were issued against Raham Ali, Abdul Majid and Ashraf Ali on 7th February 1916; the first two surrendered on 21st February 1916 and were placed on their trial and one of the boatmen Abdul Majid was tendered a pardon by the committing Magistrate on 23rd May 1916 and was examined as a witness

under S. 337, Criminal P. C. Ultimately Raham Ali was convicted. The present appellant, Ashraf Ali, was arrested subsequently and placed on his trial on a charge of murder. In his statement before the learned Sessions Judge he stated that he was innocent, that he knew nothing about the case and that he did not go to Chandraghona in Raham Ali's boat. He examined no witnesses in support of his defence.

In appeal it has been contended by Mr. Jacob on behalf of the appellant that the learned Judge misdirected the Jury on several important points. The evidence shows that when Jogendra left the boat to visit his house at Sarwatoli, Ashraf Ali had accompanied him for some distance up to Munshi's Hat. Jogendra however told him not to come as he could go alone, but Ashraf Ali went upto Munshi's Hat as it was a Hat day. It is argued that there is no evidence that the appellant ever returned to the boat from Munshi's Hat and that this was an important point in his favour to which the learned Judge failed to draw the attention of the jury. In reply the learned counsel, appearing for the Crown has referred to the evidence of two prosecution witnesses, Mukhlesur Rahaman and Abdul Aziz (Nos. 15 and 16), to the effect that Ashraf Ali had left Gurdawara on a Sunday in Pous and had returned on the Tuesday following with the boat and the other two boatmen. A reference to the heads of charge shows that the learned Judge placed this evidence before the jury and made a pointed reference to it. I do not therefore think that there is much force in this objection.

The next objection to the charge by the learned counsel for the appellant relates to the absence of Abdul Majid from the witness box. It is contended on the authority of *Dhunno Kazi, In the matter of the petition of* (1) that it was the clear duty of the prosecution to examine this witness, specially as he was the only witness who could give direct evidence of the complicity of the accused in the crime the rest of the evidence being wholly circumstantial, that no sufficient reason was shown for not calling this witness, that the learned Judge should have told the jury that from this omission on the part of the prosecution they would be justified in drawing an inference adverse to the prosecution and favourable to the accused. In reply it is urged that the evidence of witness 15 Mukhlesur Rahaman shows that Abdul Majid had left the village apparently on the conclusion of Raham Ali's trial, saying he would go to Calcutta, that this evidence must have been placed before the jury as an explanation of Abdul Majid's absence from the witness box. There is, however, nothing to show that the attention of the jury was at all directed to this aspect of the case. Assuming that Abdul Majid was absent from his village and was in Calcutta or somewhere else, in the absence of anything to show that an effort was made to ascertain his whereabouts and to produce him in Court his absence from the village can hardly be said to be a sufficient explanation for his non production. This omission was all the more prejudicial to the accused by reason of the fact that the learned Judge told the jury that the accused had said nothing about what had happened to Saroda and had given no explanation as to how Saroda came by his death and that this was a strong point against the accused. I think the learned Judge pressed the case unduly against the accused. Regarding the presumption arising from the accused's inability or unwillingness to give an explanation of Saroda's death it may be observed, as pointed out by the learned Judges in the case already cited:

"that the accused is merely on the defensive and owes no duty except to himself that he is at liberty as to the whole or any part of the case against him to rely on the witnesses for the prosecution or to call witnesses or to meet the charge in any other way he chooses and no inference unfavourable to him can properly be drawn because he takes one course rather than the other."

Reliance is placed on behalf of the Crown on the provisions of S. 106, Evidence Act, which places the onus of proof as regards facts specially within the knowledge of a person on that person. But it seems well established that where in a criminal case there is a conflict between the presumption of innocence and any other presumption the presumption of innocence prevails [*R.* v. *Twyning Gloucestershire* (*Inhabitants*) (2)]. The strength of this presumption varies according to the seriousness of the charge upon which an accused person is put on his trial. It has been said that the "greater the crime the stronger is the

2. (1819) 2 B & Ald 386=106 E R 407.

proof required for conviction." [*Re Hobson* (3)]. The same principle was laid down by Tindal, C. J., in *Bland, Re* (4).

In this Court it was laid down in the case of *Nibaran Chandra Roy* v. *Emperor* (5) that the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence agairst the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under S. 106, Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence. Wills, in his Treatise on Circumstantial Evidence (Edn. 6, p. 308), referring to the observation of Tindal, C. J.

"that in civil as well as in criminal cases where there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon for his own sake and his own safety to state and bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence,"

says:

"It has been well observed that 'this doctrine is to be cautiously applied and only in cases where it is manifest that proofs not accessible to the prosecution are in the power of the accused."

As the case rested entirely on circumstantial evidence before the Jury could find the prisoner guilty they had to be satisfied not only that those circumstances were consistent with his having committed the act but that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person: *Rex* v. *Hodge* (6). The learned Judge, however told the jury in concluding the charge that they must not acquit the accused simply because in their opinion he may possibly not be guilty, but that they should do so if they thought the prosecution evidence was for good reason not satisfactory. The prosecution evidence, so far as it goes, may be quite satisfactory and yet may leave ample room for doubt regarding the complicity of the accused in the crime.

Upon the evidence on the record the possibility or even the probability of the deceased having met his death as the result, for instance, of a rupture of the spleen caused by a kick by one of the three boatmen and many other probabilities of the same kind have not been excluded, and I am not satisfied that this aspect of the case was present in the minds of the Jury when they gave their verdict. It was the duty of the Judge to have given the jury clear and unambiguous directions on these points. The directions given in the beginning of the charge were neutralised by what the learned Judge said in concluding it. For all these reasons I hold that the learned Judge misdirected the Jury on material points. I would therefore agreeing with my learned brother set aside the conviction and sentence and as there is some evidence to go to a Jury, I would direct that the appellant Ashraf Ali be retried.

V.B./R.K. *Conviction set aside.*

3. (1827) 1 Lew. C C 261.
4. 18 State Trials, 1186.
5. (1907) 11 C W N 1085.
6 (1829) 2 Lew. C C 227.

A. I. R 1918 Calcutta 318

FLETCHER AND SHAMSUL HUDA, JJ.

Durga Prasad Jana—Plaintiff—Appellant.

v.

Dinabandhu Jana and *others*—Defendants—Respondents.

Appeals Nos. 216 and 330 of 1914, Decided on 8th January 1918, from original decrees of Sub-Judge, First Court, Midnapur, D/- 30th January 1914.

Specific Relief Act (1877), S.21—Per *Fletcher, J.*; *Shamsul Huda, J.* Dissenting.—**Agreement to refer to arbitration—Mere filing of suit is not refusal on part of plaintiff to perform his contract—Suit is not barred by provision to S. 21.**

Per *Fletcher, J.* (*Shamsul Huda, J.* dissenting). The mere filing of a suit by a plaintiff who has entered into an agreement with the defendant to refer the matter in dispute to arbitration is not a refusal on his part to form his contract within the meaning of S. 21, Specific Relief Act. [P 319 C 1]

The plaintiff and the defendants who were brothers entered into a registered agreement whereby to avoid litigation, they agreed to refer their dispute to arbitration. The plaintiff, however, shortly afterwards instituted a suit in respect of the matter covered by the agreement;

Held, per *Fletcher, J.*—That the suit was not barred by the proviso to S. 21, Specific Relief Act, inasmuch as its mere institution did not amount to a refusal within the meaning of that section. [P 319 C 2]

Per *Shamsul Huda, J.*—That the institution of the suit amounted to a refusal on the part of the plaintiff to perform the contract he had en-

tered into to have the dispute settled by arbitration instead of by suit, so that the suit was barred by the proviso to S. 21, Specific Relief Act.

[P 322 C 1]

Bepin Behari Ghosh, II, and *Sajani Kant Sinha*—for Appellant.

Manmatha Nath Roy, Jyotish Chandra Hazra and *Gopendra Nath Das* — for Respondents.

Appeal No. 330 *of* 1914.

Fletcher, J.—This is an appeal by defendant 1 against the judgment of the learned Subordinate Judge of the First Court at Midnapur. The plaintiff brought the suit for partition of properties alleged to be joint family properties. Eight issues were framed in the lower Court, all of which except as to a property in the Sunderbans to which appeal No. 216 of 1914 relates the learned Judge decided in favour of the plaintiffs. On the hearing of the present appeal the first point argued was that raised by issue No. 7 in the Court below. It appears that two days before the institution of the suit the parties entered into an agreement to refer the matter to arbitration. The appellant, therefore alleges that the suit is barred under the provisions of S. 21, Specific Relief Act. There is no allegation in the written statement that the plaintiff refused to perform the contract to refer to arbitration, nor was any evidence given to prove such a refusal. The question is, therefore, whether the filing of the suit amounts to a refusal within the meaning of S. 21, Specific Relief Act. The authorities in this Court appear to me to be quite clear that the filing of a suit is not a refusal within the meaning of S 21. The first decision I would refer to is the case of *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1). which is exactly in point. No doubt that case was a decision of a single Judge sitting on the original side but the decision which was given in the year 1879 has never been questioned. The next decision I would refer to is that of *Crisp* v. *Adlard* (2), which was an appeal from the Recorder of Rangoon. Against these decisions of the Court which have stood for many years the appellant relies en the decision in *Ram Chandra Pal* v. *Kyishna Lal Pal* (3).

That decision can be supported on the ground that the learned Judges held that the suit was not cognizable by a Court of Small Causes. But in so far as it held that the mere filing of a suit was a refusal within S. 21, Specific Relief Act, I must respectfully dissent from that decision. Such a view, having regard to the fact that the learned Judges held that the suit was not cognizable by a Court of Small Causes, was unnecessary for their decision. Moreover, the learned Judges do not consider the terms of S. 21 or the earlier decisions of this Court which apparently were not cited to them. I agree with the learned Subordinate Judge that it is not shown that the plaintiff has refused to perform the agreement to refer to arbitration and that S. 21, Specific Relief Act is not a bar to the present suit. I regret that my learned brother is of a different opinion on this issue. The only other point argued in this appeal is the question raised by issue No 4. This matter can be dealt with shortly. The defendants set up a false case of an earlier separation between the parties, which the learned Judge found against them in the Court below and which they have not attempted to support in this Court. The appellant has also in this Court not challenged the finding of the learned Judge that the pucca house is joint family property.

Nor is it challenged in this appeal that on the death of Narahari, the grandfather of the parties, certain properties passed to them as joint. There is also the admitted fact that after the death of Narahari certain lands were purchased on behalf of the family although the defendants have tried to explain away this purchase. I agree with the learned Judge that there was a nucleus of joint family property out of which other properties could be acquired. Moreover the karbars appear to have been carried on in the joint house of the parties and no reliable books of account have been produced to show that they were the property of the defendants. The evidence establishes that either the properties in question were acquired out of the joint family properties or were brought into the common stock by the parties. It is much too late now for any of the parties to attempt to get back portions of the property as his self-acquired property. I agree with the conclusion of the learned Subordinate Judge. But as I have already stated my learned brother and I are not agreed as to whether S. 21, Specific Re-

1. (1880) 5 Cal 498.
2. (1896) 23 Cal 956.
3. (1912) 17 I C 600.

lief Act is a bar to the suit. Accordingly under the provisions of S. 98, Civil P. C., the present appeal is dismissed with cost, three hundred rupees.

Appeal No. 216 *of* 1914.

This is an appeal by the plaintiff against the finding of the learned Judge that a property in the Sunderbans did not form a portion of the joint family property. Part of the property was transferred by deed of gift by Prasanna Kumar Jana to the son of defendant 2. The plaintiff's case was that the transfer was really one in favour of the family in consideration of debts due by Prasanna to the family. But there is no reliable evidence that such debts were in fact due. There is no reason to dissent from the finding of the learned Judge in this respect. As regards the Sunderbans Lot No. 153, which was acquired in the name of defendant 2, there is nothing to support the plaintiff's case with regard to this. On the other hand the mortgage to Ram Prasad Bera on 28th February 1911 appears to support the case of defendant 2. I am not disposed to differ from the learned Judge on his findings as to the Sunderbans properties. The appeal of the plaintiff must accordingly be dismissed with costs, three hundred rupees.

Appeal No. 330 *and* 216 *of* 1914

Shamsul Huda, J.—I regret I am unable to agree with any learned brother in the construction he has placed on S. 21, Specific Relief Act. It may be convenient before going further shortly to state the facts so far as they bear on this question. Plaintiff and the defendants are brothers. A dispute seems to have arisen between them regarding the partition of their ancestral properties and properties subsequently acquired. Matters seem to have reached a climax seven or eight days before 5th August 1911, when plaintiff sent his son to Midnapur to institute a suit against the defendants. However, on 3rd August they entered into an agreement called the Salisnamah, whereby to avoid litigation they agreed to refer their dispute to the arbitration of Babu Shib Prasad Jana and two others and to be bound by the decision of the arbitrators. The document was registered on the same day and remained in the Sub-Registry Office at least until 9th August. It appears that the plaintiff changed his mind almost immediately after the execution of the document and we have it on the record that the very next day, i. e. on Friday at 11 o'clock he sent a telegram to his son to file the suit and the suit was accordingly filed on Saturday 5th August. There is no doubt that the suit and the agreement cover the same ground. Upon these facts the question arises whether the institution of the suit amounted to a refusal on the part of the plaintiff to perform the contract he had entered into to have the dispute settled by arbitration instead of by suit. I think it did.

It is, however, urged that a refusal presupposes a demand and as in the present case defendants did not call upon the plaintiff to go to arbitration, the institution of the suit cannot amount to a refusal. I cannot accede to this contention. In the first place, neither the demand nor the refusal need be express and they may both be implied. It is true the defendants did not expressly call upon the plaintiff to perform his part of the contract but it may safely be inferred, and there are no circumstances leading to a contrary conclusion, that the defendants were insisting on the plaintiff to go to arbitration and would have made an express demand upon him if only they had the opportunity of making one. The time for submitting the case to the arbitrators had not come, for it would have been necessary for the arbitrators to refer to the terms of the agreement and as I have said the document was still in the Sub-Registry Office. In the second place, it seems to me that there may be a refusal in anticipation of a demand. If, for instance, a contractor builds a house for me and before he has made the necessary measurements to prepare his bill and submit it for payment I write to him saying that he has done the work so badly that I refuse to pay him anything, I do not think I would be using inaccurate or inappropriate language. The institution of the suit in the present case conclusively showed that plaintiff was determined not to go to arbitration.

This is also apparent from his subsequent conduct. When defendant 1 pleaded in the written statement that S. 21, Specific Relief Act was a bar to the suit, plaintiff tried to meet the objection by stating that he had executed the agreement on blank paper, had registered it without understanding its contents and that he had agreed to the arbitration of seven persons and not of three. He also

pleaded that one of the arbitrators had refused to arbitrate. The learned Subordinate Judge, whilst holding that the institution of the suit did not amount to a refusal, has not accepted this story of the plaintiff and I agree in thinking that it is untrue. Its inherent improbability makes it unnecessary for me to enter into a detailed examination of the evidence bearing on the point and I hold that plaintiff's conduct in asking his son to institute the suit and its subsequent institution and plaintiff's attempt to repudiate the agreement are susceptible of one explanation only, namely, that plaintiff had made up his mind not to abide by his agreement and such determination on his part coupled with the institution of the suit, in my opinion, amounted to a refusal to perform the contract embodied in the salisnamah. I am fortified in this view by the decision of two learned Judges of this Court in the case of *Ram Chandra Pal* v. *Krishna Lal Pal* (3). In that case Brett and Richardson, JJ., held that where a person has agreed with another that all matters in controversy between them should be referred to arbitration, it is not open to that person to resile from the agreement unless for good and sufficient cause. It has been urged however that this decision is an obiter dictum.

What happened was this. The defendant in a suit instituted in the Court of Small Causes pleaded that the suit could not proceed, as there was a subsisting agreement to refer the dispute to arbitration. The plea was overruled and a decree passed in favour of the plaintiff. Defendant then moved the High Court under S. 25, Mofussil Small Causes Courts Act and obtained a Rule upon the plaintiff to show cause why the decree should not be set aside on the ground that it was barred by S. 21, Specific Relief Act. The learned Judges made the Rule absolute and they expressly stated to have done so on the ground on which it was issued. Then they apparently proceeded to strengthen their position by an expression of opinion that the suit was not cognisable by the Court of Small Causes at all. But the principal basis of the decision was the construction which the learned Judges placed on S. 21, Specific Relief Act. It cannot, therefore be said that the decision is an obiter dictum so far as it concerns the present question. In support of the opposite view reliance has been placed on the decision of Wilson, J , in the case of *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1). In my opinion the law laid down in that case has reference to its particutar facts. In that case defendant not only had opportunities for calling upon the plaintiff to submit to arbitration but as observed by the learned Judge in the course of argument, an occasion arose before the institution of the suit when, if the defendant wanted to insist on arbitration, he ought to have made a demand

but he omitted to do so. That is a fact which seems to distinguish that case from the present. I do not think that decision was intended to lay down an abstract proposition of law without reference to the facts. In view, however, of the seeming conflict between this decision and the decision of Brett and Richardson, JJ., referred to above, I would have been glad if my learned brother had agreed to refer the case to a Full Bench, but if I have to follow one or other of these two decisions I prefer to follow the decision of the two learned Judges of this Court. Any other view of law will have the effect of unduly narrowing the scope of S. 21, Speific Relief Act and making the provisions of that section practically nugatory.

On behalf of the plaintiff reliance has also been placed on the case of *Tahal* v. *Bisheshar* (4). In this case plaintiff's suit was instituted more than a year after the agreement to refer to arbitration. The learned Judges found that the arbitrators did not decide the case because the parties "were contentious among themselves," and they expressed the opinion that the contract the existence of which would bar a suit under the circumstances contemplated by S. 21, *must be an operative contract and not a contract broken up by the conduct of all the parties to it.* I think the words underlined (italicised) by me lay down the true test to be applied to all such cases. It has also been urged that the refusal must be antecedent to the suit and reliance has been placed on the case of *Crisp* v. *Adlard* (2). In that case after the institution of the suit the defendant had called upon the plaintiff to go to arbitration in accordance with a previous agreement and this

4. (1886) 8 All 57.

the plaintiff refused to do, and the learned Judges held that this refusal could not bar a suit previously instituted. In that case the question was not raised and perhaps having regard to the facts of the case it could not be said that the institution of the suit itself amounted to a refusal, and the learned Judges were not called upon to express an opinion on that point nor did they express any. It has also been urged that it is inexpedient to refer the parties to arbitration after the case has been fully gone into and a decision obtained on the merits. The words of the section are, however, peremptory and leave no room for exercise of any discretion. In the view that I take, Appeal No. 330 of 1914 should be decreed with costs and the decree of the Subordinate Judge reversed. I agree with my learned brother on the other points discussed by him in his judgment and also in dismissing Appeal No. 216 of 1914 with costs.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 322 (1)

WALMSLEY AND PANTON, JJ.

Monohar Mukherjee— Plaintiff—Appellant.

v.

Kali Das Nandi and *others*—Respondents.

Appeal No. 2261 of 1916, Decided on 1st July 1918, from appellate decree of Sub-Judge, 2nd Court, Burdwan, D/-4th August 1916.

Land Tenures—Chowkidari Chakran Lands within putni belong to patnidar on resumption—Putnidar enjoying services of Chowkidar before resumption is not liable to pay rent or cess in excess of what zamindar has to pay to Chowkidari fund unless latter is entitled to profit by terms of putni lease—Bengal Village Chowkidari Act (1817) S. 51.

Chowkidari chakran lands situate within the ambit of a putni belong, on their resumption, to the putnidar, and where the putnidar has been enjoying the services of the chowkidar before the resumption, he is not liable to pay for those lands any rent or cesses in excess of what the zemindar has to pay to the chowkidari fund, unless by the terms of the putni lease the zemindar is entitled to a profit in respect of such lands. [P 322 C 2]

Hira Lal Chuckerburty and *Taradaz Chatterjee*—for Appellant.

Bepin Behari Ghose and *Sajani Kanta Sinha*—for Respondents.

Walmsley, J.—The suit out of which this appeal arises was brought by the plaintiff against his putnidars for a declaration that he was entitled to khas possession of some chakran lands which had been resumed or, in the alternative, for a declaration that the putnidars must pay him rent at the rate of Rs. 3 per bigha. Both the lower Courts dismissed the plaintiff's claim for khas possession, and with regard to his claim for rent, they limited him to the sum which the zemindar had to pay to the chowkidari fund and cesses. The plaintiff has preferred an appeal to this Court. So far as his original prayer for khas possession is concerned, the case of *Ranjit Singh* v. *Kali Dasi Debi* (1) is conclusive against him. With regard to his other claim, the Courts below proceeded, first, on the wordings of the Pattahs granted to the putnidars and, secondly, on the fact that it was the putnidars who enjoyed the services of the chowkidars prior to the resumption. The Pattahs have been placed before us and the passages which relate to the matter of the chowkidari chakran lands and the contingency of resumption have been discussed in detail. It appears to me that the Courts below have put a right interpretation upon the words used in those Pattahs, and on that ground alone I think that the zamindar's claim cannot be sustained. The further fact that it was the putnidars who were enjoying the services of the chowkidars makes it even more impossible to allow the zemindar more than has been awarded to him. On these grounds I think that the appeal should be dismissed with costs.

Panton, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. A I R 1917 P C 8=44 Cal 841=40 I C 981=44 I A 117 (PC).

A. I. R. 1918 Calcutta 322 (2)

RICHARDSON AND WALMSLEY, JJ.

Basiruddin—Plaintiff—Petitioner.

v.

Sadhu Tanti — Defendant — Opposite Party.

Civil Rule No. 85 of 1918, Decided on 18th February 1918, against order of Dist. Judge, Midnapore, Misc. Appeal No. 169 of 1917.

Civil P. C. (5 of 1908), O. 9, R. 13 and O. 43, R. (1) (d)—Application to set aside decree on ground of no authority to file petition for compromise is within the scope of R. 13—Order of rejection is appealable.

Per *Curiam* (*Richardson, J., dubitante.*)An application to set aside compromise decree on the

ground that the applicant was no party to the compromise and that he had given no authority to file the petition of compromise, is an application within the scope of O. 9, R. 13, Civil P. C. An appeal lies from an order refusing such application. [P 323 C 2]

Jyotish Chandra Hazra — for Petitioner.

Sarada Chandra Maity—for Opposite Pary.

Richardson, J.—The petitioner in this rule brought a suit against the opposite party and others. In that suit a petition of compromise was filed, to which the opposite party was apparently a party. Accordingly a consent decree was made founded on the petition. When the petitioner took steps to execute the decree, the opposite party applied to the trial Court to set aside the decree on the ground that as against him it was an ex parte decree. The learned Munsif on the merits refused the application. The opposite party then appealed to the District Judge, who took a different view of the facts and set aside the decree by his order of 4th January 1918. That order is the subject-matter of this rule. It is contended that the proceedings were not proceedings under O. 9, R. 13, as they purport to be and that the appeal was incompetent. Now it is not disputed that it was open to the opposite party to apply to the trial Court to set aside the compromise decree on the ground that he was no party thereto and that he had given no authority to file the petition of compromise. The question is, what is the nature of such an application. Is it an application to the Court in its inherent jurisdiction or is it an application within the scope of O. 9, R. 13. It appears to have been held in the cases of *Koroona Moyee Dossee* v. *Nubo Kishore* (1) and *Bholai Naskar* v. *Alach Naskar* (2) that it is open to the Court to deal with such an application as an application to set aside an ex parte decree. The case of *Hemmo Mayee Dayee* v. *Watson & Co.* (3) has perhaps an opposite tendency but that case was distinguished in the case of *Bholai Naskar* v. *Alach Naskar* (2). The subsequent case, however, of *Damodar Misra* v. *Hirnashi Naik* (4) is in direct conflict with the decision in *Bholai Naskar* v. *Alach Naskar* (2).

1. (1866) 6 W R Mis 36.
2. (1906) 3 C L J 158.
3. (1870) 14 W R 299.
4. (1915) 27 I C 227.

It was held in *Damodar Misra's* case (1) that a petition to set aside a consent decree, obtained in circumstances similar to those which exist in the present case, could not be treated as a petition under O. 9, R. 13. Speaking for myself, if there had been no previous decision I should have preferred to adopt the view expressed in that case by Stephen, J. and Mullick, J. The previous cases, however, were apparently not brought to their notice. There is also this to be said that the case of *Bholai Naskar* v. *Alach Naskar* (2) has been cited with approval in the subsequent cases of *Kunjo Behari Ghose* v. *Durgamoni Dasi* (5) and *Golab Koer* v. *Badshah Bahadur* (6). In the circumstances regard being had to the state of the authorities on a question which is one of procedure and not of principle, I think we ought to follow the decision in the case of *Bholai Naskar* v. *Alach Naskar* (2). If the application to the Munsif was capable of being dealt with under O. 9, R. 13, then an appeal lay to the District Judge from the Munsif's order rejecting the application and District Judge's order cannot be successfully challenged on the merits. We cannot go behind the District Judge's finding. The result, therefore, is that this rule must be discharged with costs, one gold mohur.

Walmsley, J.—I agree that the rule should be discharged. I only wish to add that I do not share my learned brother's preference for the view expressed in the case of *Damodar Misra* v. *Hirnashi Naik* (4).

V.B./R.K. *Rule discharged.*

5. (1906) 3 C L J 160.
6. (1909) 2 I C 129.

A. I. R. 1918 Calcutta 323

CHITTY AND RICHARDSON, JJ.

Muga Khan—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 907 of 1917, Decided on 30th August 1917, against the conviction of Dist. Magistrate.

Police Act (1861), Ss. 17 and 19—Failure by person appointed special constable to obey lawful order amounts to neglect or refusal to serve as special constable.

The failure of a person, appointed a special constable under S. 17 to obey a lawful notice issued to him to attend a police station to receive his belt and to take charge of his appointment amounts to a neglect or refusal to serve as a special constable within the meaning of S 19: 28 *Cal* 411 *Dist.* [P 324 C 1, 2]

Kali Prosonno Piplai—for Petitioner.
Camell—for the Crown.

Judgment.— This is a Rule issued at the instance of Muga Khan calling on the District Magistrate to show cause why the conviction and sentence passed on the petitioner under S. 19, Police Act (5 of 1861), should not be set aside, on the ground that the mere failure to attend the police station to receive his belt and take charge of his appointment as a special constable did not amount to a refusal to serve within the meaning of that section. Other grounds were put forward by the petitioner before us but the Rule was confined to the ground above stated. It appears that on 17th April 1917 a notice was issued to the petitioner reciting the necessity for the appointment of special constables and informing him that he was appointed a special constable for three months under S. 17, Act 5 1861. The notice concluded as follows:

"Be it stated that you should appear in police station Barguna within three days of the receipt of this notice and take belt and orders of your duties; otherwise the law will be enforced."

The petitioner deliberately refrained from attending at the police station; and as appears from the judgment of the Magistrate, his mukhtear frankly stated that he did so in order to raise the legality of the order under S. 17, Police Act. That matter was gone into before us and there can now be no question as to the legality of that order. We have, therefore, to determine whether the refusal or neglect of the petitioner to attend at the office in pursuance of this notice brought him within the purview of S. 19. It is argued that a mere refusal to go to receive orders could not be a refusal to serve. But the section says:

"If any person, being appointed a special police officer as aforesaid shall, without sufficient excuse, neglect or refuse to serve as such, or to obey such lawful order or direction as may be given to him for the performance of his duties, he shall be liable to fine."

In this case it would appear that the notice quoted being a proper notice and the order on the petitioner requiring him to appear at the police station being a lawful order, it was disobedience of that order for the petitioner to remain at his house and decline to go to the police station. We are also of opinion that it would be a neglect if not a definite refusal to serve as a special constable, because undoubtedly his service in that capacity was to commence by his attendance at the police station in order that he might be properly instructed in his duties and receive the necessary orders for their performance. The case of *Raman Singh* v. *Queen Empress* (1) was relied upon by the learned Pleader for the petitioners. That case is distinguishable in its facts from the present and the remarks of the Court given at p. 414 must be read with reference to the particular facts of that case. There the Court considered that the conduct of the accused in that case in declining to accompany the Police Inspector to Bakhtiarpore did not amount to a refusal to serve. The learned Judges thought that it was simply a refusal to go to Bakhtiarpore and that that would not fall within S. 19, of the Act. That case, whether rightly or wrongly decided, is distinguishable from the present. We think that in this case there has been an offence committed within the purview of S. 19, Police Act and we accordingly discharge the Rule.

V.B./R.K. *Rule discharged.*

1. (1901) 28 Cal 411.

A. I. R. 1918 Calcutta 324

FLETCHER AND SHAMSUL HUDA, JJ.

Sashi Bhusan Panignahi and *others*—Plaintiffs—Appellants.

v.

Labanyabati Debya and *others*—Defendants—Respondents.

Appeal No. 312 of 1915, Decided on 6th December 1917, from original decree of Sub-Judge, 2nd Court, Midnapur, D/- 23rd June 1915.

Hindu Law—Partition—Intention to separate communicated to others is sufficient to effect separation—Will admitted to probate cannot be questioned in suit—Statement in Will is sufficient evidence of intention—Will.

In a Mitakshara family any member may exercise his intention without the assent of the other members to go out of the family and to have his share of the property; and if at any rate that intention is communicated to the other members of the family, there is a good separation. [P 325 C 2]

A, a member of a Mitakshara Hindu family executed a will which was admitted to probate. *B*, a brother of *A*, brought a suit for a declaration that the alleged will was fraudulent, invalid and could not affect the plaintiff's right by survivorship to joint family property:

Held: (1) that the will having been admitted to probate must be taken to be a valid document; [P 325 C 1]

(2) that the statement in the will that there had been a separation was a sufficient evidence of intention to separate and to go out of the family. [P 325 C 2]

Dwarkanath Chakrabarty and *Mohini Nath Bose*--for Appellants.

Mohendranath Roy and *Mohini Mohan Chatterjee*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs from the judgment of the learned Second Subordinate Judge of Midnapur, dated 23rd June 1915, dismissing their suit. The suit was brought by the father of the present appellants asking for a declaration that the will, said to have been executed by the brother of the original plaintiff dated 1st Assar 1316, was fraudulent and invalid and could not affect the plaintiffs' right by survivorship to the joint family property. The defendants were the widows of the deceased brother of the original plaintiff and they raised more than one defence, the chief amongst them being that this family was not governed by the Mitakshara School of the Hindu law and that a separation had taken place between the original plaintiff and his brother, the deceased Chandra Mohan. As I have already stated, the original plaintiff died and the present plaintiffs were substituted in his place. The learned Judge of the Court below came to this conclusion: First of all, he found that this family was governed by the Mitakshara School of the Hindu law and secondly, he found that, although there had been no partition in fact, yet the deceased Chandra Mohan had before his death expressed his intention of separating, from his brother Sasi Bhusan and that that intention had heen communicated to the original plaintiff prior to the death of Chandra Mohan. The will, which was alleged to be fraudulent and which was executed by Chandra Mohan, has been established in certain Probate proceedings which were opposed by the original plaintiff. So that there can be no doubt that there was a will and that that will was properly executed in the manner required by law and it must be taken to be a valid document..The only question, therefore, is,

"what property does that will operate upon? Had there been a separation between the deceased Chandra Mohan and the original plaintiff Sasi Bhusan, so that separate property would pass under the will of Chandra Mohan that has been admitted to Probate ?"

There has been a certain amount of discussion as to what is sufficient to effect a separation in a Mitakshara family. Mr. Dwarkanath Chakrabarty on behalf of the plaintiff has argued that a declaration of intention even when communicated to the other side, unless it is assented to or followed by a suit, is not sufficient to effect a separation. That won't do on the state of the authorities. The authorities, in my opinion, are quite clear in this respect. It is not necessary to go further than to recite the recent decision of the Privy Council in the case of *Mt. Girja Bai* v. *Sadashiv Dhundiraj* (1), and it seems to me not open to doubt that any member of a Mitakshara family may exercise his intention without the assent of the other members to go out of the family and to have his share of the property and if, at any rate, that intention is communicated to the other members of the family, there would be a good separation. There cannot be any doubt about this. The only question, therefore, in this case is,

"does the evidence show that Chandra Mohan did prior to his death express his intention of going out of the family and enjoying his share separately?"

The will that has been admitted to Probate does, in fact, state that there had been a separation and that I take is a sufficient evidence of intention to separate, and in a document that was to take effect after the death of the testator, the testator would not have made a statement like that unless he intended to separate from the other members of the family. The question is,

"was that intention communicated to the other adult member of the family, the only other adult member being Chandra Mohan's brother, the original plaintiff?"

In this case, the evidence is not difficult, because there is a gentleman who has given evidence in this case and whom the learned Judge of the Court below has believed implicitly and the learned vakil for the appellant stated that he did not intend to challenge his evidence. That gentleman is a member of the legal profession and his name is Kumuda Churn Ghose. He is described in some part of the proceedings as an old and renowned pleader. By that I suppose he is a person well-known in the district he comes from. His evidence is that he was called in to prepare this will for the deceased Chandra Mohan, that he went and saw the original plaintiff Sasi Bhusan and informed him of the intention of Chandra Mohan to make a

1 A I R 1916 P C 104=43 Cal 1031=37 I C 321=43 I A 151 (P C).

will of his 8 anna shares of the property and that, instead of insisting that Chandra Mohan could not make a will, Sasi Bhusan approached the pleader Kumuda Babu and asked him to prevail on his brother Chandra Mohan to make a disposition of half of his 8 annas share of the property in his favour; and what is more, according to the pleader's evidence, the original plaintiff remunerated Kumuda Babu with a fee of Rs. 4 for what he asked him to do. Kumuda Babu then approached the deceased Chandra Mohan; but Chandra Mohan was not willing that any share of his property should go to his brother Sasi, but he did, in fact, make a disposition of a quarter of his property in favour of Sasi's son Profulla. It seems to me that, on these facts, if that evidence is accepted, it cannot be doubted that Sasi Bhusan, the original plaintiff, was well aware of the intention of Chandra Mohan to separate and go out of the family. These facts are not in doubt.

Whatever may be the question as to the earlier separation, whether we believe that or not, namely that the deceased Chandra Mohan when he contemplated marrying a second time told his first wife that he would not leave his wives unprovided for and that he would separate and make a will of his 8 annas share of the property in favour of the two ladies, the other portion of the evidence, namely, as to what took place at the time the will was being made is not, in the circumstances, open to doubt, as Mr. Dwarknath Chakrabarty stated that he did not challenge the evidence of Kumuda Babu, the pleader. If that is so, it seems to me that the intention of the deceased Chandra Mohan that Kumuda Babu, pleader, communicated to Sasi, namely, that Chandra Mohan intended to make a will of his 8 annas share, which could only be on the footing that there had been a separation and the request by Sasi, the original plaintiff to Kumuda Babu that he should prevail upon his brother Chandra Mohan to make a disposition of half of his property in his favour, are only consistent with the fact that there was an intention to separate and it was communicated to the plaintiff of which he was fully aware at the date of the will. I think the learned Judge of the Court below came to a correct conclusion in this case. The present appeal must, therefore, fail and be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 326

MOOKERJEE, AND WALMSLEY, JJ.

Sivanarayan Mukhopadhga—Plaintiff—Appellant.

v.

Bhutnath Guchait and *another*—Defendants—Respondents.

Appeals Nos. 2176 and 2177 of 1915, Decided on 30th May 1917, from Appellate decrees of Dist. Judge, Hooghly, D/- 15th June 1915.

(a) Landlord and Tenant—Custom of remission of entire rent on inundated lands is not valid.

A custom set up by a tenant that the entire rent in respect of a certain quality of land must be remitted when the lands are inundated, irrespective of the extent of the flood or its destructive effect on the crops, is vague and unreasonable and therefore cannot be valid according to law. [P 327 C 2 P 328 C 1]

(b) Custom—"Unreasonable" explained.

Where the validity of a custom is challenged on the ground that it is against reason, the reason referred to is not to be understood as meaning every unlearned man's reason but artificial and legal reason warranted by authority of law. Consequently when it is said that the custom is void because it is "unreasonable," what is meant is that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times. [P 327 C 2]

(c) Custom — Custom prejudicial to class and beneficial to individual is unreasonable —Test of.

A custom which is prejudicial to a class and is beneficial only to a particular individual is repuguant to the law of reason. [P 327 C 2]

The test applied is whether the custom alleged to exist could have a lawful commencement. [P 327 C 2]

Rash Behari Ghose, Dwarkanath Chakrabarty, Surendra Nath Roy, Surendra Chandra Sen, Biraj Mohan Mazumdar and *Satyendra Nath Roy*—for Appellant.

Bepin Behari Ghose and *Krishna Kamal Maitra*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The case for the plaintiff is that rent is payable at the rate of Rs. 77-10-0 per annum for the disputed holding, which comprises 25 bighas 18 cottahs and two chhataks of land. The defendants allege that the area com-

prises two classes of land, namely, three cottahs and seven chhataks of nihaja lands, for which a rent of Re. 1 is payable and 25 bighas 14 cottahs and 11 chhataks of hajabad lands, for which a rent of Rs. 76-10-0 is payable. It is thus clear that there is no dispute between the parties either as to the area or the annual rent payable in respect thereof. The defendants however set up a customary right to abatement of rent on account of the hajabad lands. They assert that the nihaja lands are free from inundation and are always subject to payment of rent, while the hajabad lands are liable to inundation and are exempt from payment of rent when the crops thereon are destroyed by inundation. They allege that this custom has prevailed in the estate of the plaintiff as also in adjacent estates from time immemorial and from generation to generation. The custom is formulated in the following terms in the written statement:

"In the years of inundations, the zamindar never gets rent on account of the hajabad portions, nor do the tenants pay them; in the years of inundations, the tenants only pay rents for the nihaja portions."

The defendants assert that, during one of the four years for which rent is claimed, there was inundation and they are entitled to reduction of rent, not as a matter of favour but on the basis of customary right. On these pleadings, the point arose for determination:

"whether there is any custom in Mauza Kumdhara (where the defendants' lands are situate) of remitting rent in the year in which there is haja or inundation."

The Courts below have found on this question in favour of defendants and have partially decreed the claim accordingly. On the present appeal, the decision of the District Judge has been assailed on the ground that the custom alleged is unreasonable and uncertain and that there is no evidence to show that it is compulsory on the landlord to allow abatement of rent on account of inundation. It has not been disputed before us on behalf of the tenants that the alleged custom, in order that it may be deemed valid in law, must be proved to be reasonable and certain: *Tyson* v. *Smith* (1) and *Mahamaya Debi* v. *Haridas Haldar* (2). The landlord-appellant urges that the custom is unreasonable.

1. (1838) 9 Ad & El 406=1 P & D 307.
2. A I R 1915 Cal 161=27 I C 400=42 Cal 455.

As explained in the second of the two cases just mentioned, if the validity of a custom is challenged on the ground that it is against reason, the reason referred to is not to be understood as meaning every unlearned man's reason, but artifical and legal reason warranted by authority of law. Consequently, when it is said that "a custom is void because it is unreasonable," what is meant is that the unreasonable character of the alleged custom conclusively proves that the usage, even, though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times *Salisbury* v. *Gladstone*(3). It is obvious that a custom which is prejudicial to class and is beneficial only to particular individual is repugnant to the law of reason.

On this principle, it has been ruled that a custom in a manor that the commoner cannot turn in his cattle until the lord has put in his own, is bad, for it is injurious to the multitude and beneficial only to the lord: *Tanistry's* case (4). Similarly, it is no good custom that the lord of the manor shall detain a distress taken upon the demesne till a fine at his will is paid for the damage. Various other instances of customs between landlords and tenants, which have been considered unreasonably and consequently unenforceable in law, will be found collected in Viner's Abridgment (Vol. 7, pp. 180-185, Customs E. G.). The test applied is whether the custom would have a lawful commencement. Now, in the case before us, the custom pleaded is that the rent must be abated when the lands are inundated; in other words, the entire rent for the hajabad lands must be remitted, irrespective of the extent of the destructive effect of the inundation on the crops. The alleged custom is obviously unreasonable. It is also uncertain, if the landlord is bound to grant a remission without reference to the actual effect of the flood on the holding. The custom pleaded is thus of a very vague character, and, read literally, would lead to this ridiculous and unreasonable result that the entire rent for what is called the hajabad lands must be suspended irrespective of the extent of the flood or its actual destructive effect.

3. (1861) 9 H L C 692=34 L J C P 222.
4. (1674) Davis 29=80 E R 516.

We are of opinion that the alleged custom does not afford a valid defence to the claim. The result is that this appeal must be allowed and the suit decreed with costs in all the Courts. This judgment will govern the other appeal in which a similar order will be drawn up.

V.B./R.K. *Appeals allowed.*

A. I. R. 1918 Calcutta 328

RICHARDSON AND BEACHCROFT, JJ.

Lakshmi Narayan Roy and *others*—Plaintiffs—Appellants.

v.

Secretary of State—Defendant—Respondent.

Appeal No. 2465 of 1915, Decided on 30th January 1918, from appellate decree of District Judge, Midnapur, D/- 4th June 1915.

Bengal Tenancy Act (1885), S. 74—Peshkash cannot be regarded as imposition in nature of abwab—Right to it is interest in land—From antiquity and purpose of payment legitimate origin can be inferred.

The levy of peshkash by the proprietors of the two estates known as Jalamutha and Majnamutha in the District of Midnapore from the nisfidars (holders of resumed lakheraj lands) and lakherajdars of those estates is not illegal, as peshkash cannot be regarded as an imposition in the nature of an abwab but a right to it is an interest in the land to which a title may be made out by prescription. [P 329 C 1]

From the peculiar situation and character of the lands of the estates and the antiquity and purpose of the payment of peshkash, it may be inferred that a right to levy it had a legitimate contractual foundation at its inception. [P 329 C 1]

Jyotish Chandra Hazra—for Appellants.

Ram Charan Mitter—for Respondent.

Judgment.—This appeal is preferred by the plaintiffs in a suit against the Secretary of State and relates to a charge described as peshkash which the Collector has levied from the plaintiffs in execution of a certificate issued under the Public Demands Recovery Act (Bengal Act 1 of 1895). The plaintiffs sue for a declaration that the levy of peshkash is illegal and they further pray for the cancellation of the certificate, for the refund of the amount levied thereunder and for a perpetual injunction restraining the Secretary of State from levying peshkash in future. It appears that there are two estates, known as Jalamutha and Majnamutha in the District of Midnapore, the history of which is adverted to in the judgments of the Courts below. At the time of the Permanent Settlement the proprietors refused to accept the settlements offered to the mand the estates have ever since been temporarily settled. Their situation renders them liable to inundation and grambheries or village embankments are maintained to protect the cultivable lands. It is asserted for the Secretary of State that peshkash is a fixed annual sum payable by the nisphidars (holders of resumed lakheraj lands) and lakherajdars of these estates as a contribution towards the not inconsiderable expense which has to be incurred every year by the proprietors for the time being in repairing the embankments. As the estates are at the present time under direct management that expense is now met by the Government. Both the Courts below have found as a fact that the practice of levying and paying peshkash has existed from a very long time. The learned Munsif in the trial Court says that the proprietors from time out of memory have been realising peshkash from lakherajdars and nisphidars and in some cases from tenants of lakherajdars and nisphidars. The learned District Judge in the lower appellate Court says similarly:

"There can be no doubt from the oral and documentary evidence adduced for the defendant that peshkosh, although its actual origin is unknown, was being realised by the proprietors of the two estates from lakherajdars (whether their title was valid or not) and from mal tenants from 1207 (1800 A D) and that it was taken as a contribution by the aid of which the proprietors were to repair the village embankments within the estate."

The inference which the District Judge has drawn from the evidence is that the practice has existed for so long that it must be referred to some legal origin, and he holds that there must at sometime have been an agreement between the proprietors of the two estates and those who hold land therein that the former should maintain and repair the grambheries in the estates with the aid of funds contributed by the latter. He refers to Mr. Bayley's report on the Settlement of Majnamutha in 1844 as authority for the statement that prior to that year, probably in 1827, in the case of mal tenants or tenants of rent paying lands, peshkash was amalgamated with rent. In the case of the lakherajdars no such amalgamation could take place and when some of the lakheraj lands were afterwards resumed the nisphidars continued to pay under a separate head and apart from their rent the sum which they had previously paid

on this account as lakherajdars. The annual payment for which the plaintiffs have been found liable was fixed in 1844 or before at Rs. 13-1-8 gandas. The main contention of the learned pleader for the plaintiffs is that peshkash is an abwab and as such is prohibited by the tenancy law in this country. If that contention has any substance it is somewhat surprising that the fact was not discovered before this.

The collection of abwabs has not been prohibited for a great number of years. So far as we are aware, the objection taken on this ground has only once been taken before and then unsuccessfully in a case to which I shall shortly refer. We are satisfied that peshkash cannot be regarded as an imposition in the nature of an abwab within the meaning of the various provisions which have been enacted from time to time on that subject. The plaintiffs' own kabuliyat of 1844 shows that the amount due on account of peshkash was deducted from the assets of the land and that rent was assessed only on the balance of the assets after this deduction had been made. That indicates that the payment comes out of the land and that the right to it is an interest in the land to which a title may be made by prescription. The peculiar situation and character of the land and the antiquity and purpose of the payment all point to its having a legitimate contractual foundation. If the statutory law governing the relations of landlord and tenant must be applied, the modern analogue is to be found, not in S. 74, Ben. Ten. Act relating to illegal cesses, but rather in the provisions of that Act relating to improvements [Ch. 9 and S. 30 (c)].

We are supported in the view we take by an unreported decision of Sir Lawrence Jenkins, C. J., and Holmwood, J., (Second Appeal No. 44 of 1912 decided on 30th July 1915). Sir Lawrence Jenkins, referring to a claim for peshkash in the Majnamutha estate, said that the basis of the claim was long-continued payment beyond the memory of man, which was in itself a title in favour of the recipient of the payment. He referred to *Sambhoo Lal* v. *Collector of Surat* (1), where the payment in question might have had a vicious origin and added that there was no vice in the origin of peshkash, the consideration for which on the contrary was most beneficent work. It was suggested in the argument that in the case of the plaintiffs it has not been shown that they have regularly paid peshkash. It is in evidence, however, that peshkash was levied from them under the certificate procedure in the year 1904 and peshkash is mentioned in their kabuliyat of 1844. We are satisfied that there are materials on the record upon which the Court below was entitled to come to the conclusion that peshkash is payable in respect of the land held by the plaintiffs. The learned pleader for the appellant has not pressed the point taken in the Court below that the Public Demands Recovery Act was not applicable for the purpose of enforcing the payment. The terms of the Act of 1895 are sufficient to meet the point and it could not have been urged with success. The appeal must accordingly be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. (1859-61) 8 M I A 1=4 W R P C 55 (P C).

A. I. R. 1918 Calcutta 329

RICHARDSON AND BEACHCROFT, JJ.

Jogendra Kumar Ghose and *others*—Appellants.

v.

Ananda Chandra Mozumdar and *others*—Respondents.

Appeals Nos. 1710 of 1915 and 3818 of 1914, Decided on 17th January 1918, from appellate decrees of District Judge, Noakhali, D/- 21st March 1914.

Civil P. C. (1908), O. 7, Rr. 14 and 18—Document not filed with plaint nor within time fixed by Court—Document in existence at time of institution of suit—Rejection of document held not proper exercise of discretion.

The plaintiff brought a suit for enhancement of rent on the basis of a kabuliyat which was not filed with the plaint as required by O. 7, R. 14 but was filed in Court after the time within which parties were directed by the Court to file their documents, and was therefore not received in evidence at the hearing of the suit;

Held: that as there was no doubt that the document was in existence at the date of the institution of the suit, and also having regard to the proceedings which had taken place in the suit, the rejection of the document by the Courts below was not a proper or judicial exercise of the discretion conferred by O. 7, R. 18: 2 *I. C.* 946 and 8 *Bom.* 377, *Foll.* [P 330 C 1, 2]

Probodh Kumar Das—for Appellants.

Surendra Nath Das Gupta—for Respondents.

Judgment.—*In S. A. No.* 1710 *of* 1916. This is an appeal by the plaintiff from the judgment and decree of the District Judge of Noakhali, dated the 21st

March 1914 confirming the decree of the Munsif of Lakhipur, dated the 27th April 1913. The suit is a suit for rent at an enhanced rate on the footing that the tenants, defendants, are in possession of an area in excess of that for which rent had previously been paid. The suit was instituted on 15th April 1912. The first date for hearing was 3rd July 1912. But thereafter there were a number of adjournments and on 10th August 1912 the parties were directed to file their documents within seven days and the kabuliyat to which this appeal relates was in fact filed by the plaintiff on 9th September 1912. The order then made was that the documents should be kept on the record. Further proceedings followed, including a local enquiry by an amin. The case did not come on for hearing till 21st April 1913. Then in the course of the examination of one of the witnesses the kabuliyat to which I have referred was tendered in evidence on behalf of the plaintiffs. The learned Munsif refused to admit it on the ground that it had been filed out of time. He decreed the suit for rent at the previous rate but dismissed it in so far as it related to the claim for increase of rent. The learned District Judge agreed with the Munsif that the kabuliyat was filed out of time and dismissed the plaintiff's appeal preferred in his Court. It appears that the Courts below refused to accept this kabuliyat in evidence on the ground that being a document on which the suit was in part based, it was not filed along with the plaint under R. 14, O. 7. In such cases R. 18 of the same O. gives these Courts a discretion to accept a document not filed with the plaint. The rule says that a document which ought to have been produced in Court by the plaintiff when the plaint was presented and was not so produced

"shall not without the leave of the Court be received in evidence at the hearing of the suit."

Now the cases of *Devidas Jagjivan* v. *Pirjada Begam* (1) and *Mewa Lal Sahu* v. *Kumerji Jha* (2) illustrate the principle applicable to the exercise of the discretion thus conferred. The kabuliyat in question appears to have been exhibited in a previous suit and no doubt is suggested that the document was in existence at the date of the institution of the present suit. Having regard, moreover, to the proceedings which had taken place and expense which had been incurred in connexion with the local enquiry by the amin, we find ourselves unable to say that the rejection of this document by the Courts below was a proper or judicial exercise of the discretion which R. 18 confers. The result is that the decrees of both the lower Courts must be set aside and the suit remitted to the first Court in order that it may be re-tried on the evidence on the record and such other evidence as the parties may produce. The costs of this appeal will abide the result. This judgment will govern the analogous appeal (Second Appeal No. 3818 of 1914).

V.B./R.K. *Suits remanded.*

1. (1884) 8 Bom. 377.
2. (1909) 2 I C 946.

A. I. R. 1918 Calcutta 330

FLETCHER AND NEWBOULD, JJ.

Durga Kanta Sarma—Petitioner.

v.

Anto Koch and *another* — Opposite Parties.

Rule Nisi No. 237 of 1917, Decided on 3rd August 1917, against order of Dist. Judge, Assam in Misc. Appeal No. 11 of 1916.

Civil P. C. (1908), O. 9, R. 9, O. 17, R. 3, and S. 115—Application for postponment on ground of illness of plaintiff rejected—Suit dismissed—Application to set aside dismissal is to be disposed of under O. 9, R. 9—O. 17, R. 3 is anapplicable.

An application under O. 9, R. 9, must be disposed of on the evidence, whether viva voce or by affidavit, after it has been properly recorded, and not on a view of the Judge as to whether the application is bona fide or not. [P 331 C 2]

On the day fixed for the hearing of a suit, plaintiff's Pleader applied for postponement on the ground that the plaintiff could not attend owing to his illness. The Court rejected the application and ultimately dismissed the suit. Subsequently an application made under O. 9, R. 9, to set aside the order of dismissal was also dismissed by the Court without recording any evidence. An appeal against this order was dismissed, on the ground that O. 17, R. 3, applied to the case and not O. 9, R. 9. On an application to the High Court for revision under S. 115.

Held: (1) that O. 17, R. 3, did not apply to the case, as no evidence had been recorded, no pleadings had been opened and the Judge in the Primary Court was ignorant of what the suit was brought for and what was the evidence the parties were going to adduce in support of or against the case, (2) that the application to the Primary Court was clearly an application within the terms of O. 9, R. 9, and the case ought to have been decided on that footing [P 331 C 2]

Nitish Chandra Lahiri for *Kshitish Chandra Chakerbutty*—for Petitioner.

Prokash Chandra Majumdar—for Opposite Parties.

Fletcher, J.—This is an application by the plaintiff in a title suit under the provisions of S. 115, Civil P. C., asking that the order of the learned District Judge of the Assam Velley Districts as well as the order of the Munsif of Gauhati should be set aside, on the ground that they have improperly exercised the discretion vested in them by law. The suit that had been instituted by the plaintiff was apparently, what is called, set down for hearing. That I take it, means, appeared in the peremptory list of causes for disposal in the Primary Court on 19th April 1916. The case without being formally before the Judge was adjourned on the ground that the witnesses were not available that day. That is a common form of application in the Courts of any country and it is not unknown in the Courts of this country. I have seen hundreds of applications like this—perhaps more. The case was accordingly directed not to appear in the list until 16th May 1916.

On 16th May 1916 the case again appeared in the list of causes for disposal by the learned Judge of the Primary Court and a further application was made by the petitioner's Pleader for postponement, on the ground that the plaintiff could not attend owing to his illness. That application was refused by the Munsif, and the case, I suppose, being reached in the ordinary course, was dismissed. Then on 8th June 1916, an application was made to the learned Judge of the Primary Court under the provisions of O. 9, R. 9, Civil P. C., to set aside that order of dismissal. It is said that the learned Munsif, who was the Judge in the Primary Court dismissed that application summarily without recording any evidence. Thereupon an appeal was preferred against that order to the learned District Judge, asking him to review the reasons that had been given by the Munsif in dismissing the application under O. 9, R. 9, Civil P. C, summarily. The learned District Judge considered the application as an application under O. 17, R. 3, of the Code., holding that the suit had been decided within the meaning of that rule. Of course, nobody on either side suggests that such a view is capable of being supported. No evidence had been recorded; no pleadings had been opened. Judicially the learned Judge in the Primary Court was ignorant of what the suit was brought for and what was the evidence the parties were going to adduce in support of or against the case. It is quite clear in a case like this that the learned Judge of the Primary Court could not have decided the suit forthwith as mentioned in O. 17, R. 3, Civil P. C. The application was clearly an application within the terms of O. 9, R. 9, Civil P. C., and the case ought to have been decided on that footing.

The question, is "what ought we to do now." It is quite clear that the judgment of the learned Judge of the lower appellate Court cannot stand. That has not been sought to be supported by anybody except the learned vakil of the defendant, who says that the learned Judge expressed an opinion on the merits. He has made some observations on the merits; but he has not found whether the absence of the plaintiffs was or was not due to a sufficient cause, which after all was a material matter for consideration as the application was made on the ground that the plaintiff was ill. Of course, in these applications for postponement, the grounds set forth of some illness or some domestic tragedy in the family are not always found to be accurate. I have tried many cases where postponement was sought for on the ground of the death of a member of the family. In one of these cases, the person said to have died was seen walking along the Post Office Street about the time of the hearing of the application. Other applications of similar nature have been made to other Courts also. But still the case has got to be disposed of on the evidence, and not on the view of the learned Judge as to whether these applications are bona fide or not.

The rule is also directed against the order of the learned Judge in the First Court, dated 2nd September 1916, by which he summarily rejected the application under O. 9, R. 9, Civil P. C. The learned Judge observed that he was not going over the same grounds again. Of course, an application under O. 9, R. 9, Civil P. C., must be disposed of on the evidence after it has been properly recorded. Whether the procedure of the Court is to take the evidence viva voce or by affidavit, the Court must deal with an application like this after the evidence is taken. The learned Munsif's view that he was not going over this matter again because it was really the same ground that was urged by the pleader on the

former occasion, cannt be supported. I think we must set aside the orders both of the learned Judge of the First Court, dated 2nd September 1916, and of the District Judge, dated 25th January 1917, and send the case back to the first Court in order that the learned Judge in that Court may proceed to hear and determine the application under O. 9, R. 9, Civil P. C., on the evidence that may be adduced by the parties bofore him. The opposite party must pay the costs of the petitioner in this Rule. We assess the hearing fee at one gold mohur.

Newbould, J.—I agree.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 332

RICHARDSON AND WALMSLEY, JJ.

Midnapore Zemindary Co. Ltd.—Decree-holders— Appellants.

v.

Dina Nath Sahu and *others*—Judgment-debtors—Respondents.

Appeal from Order No. 35 of 1917, Decided on 25th January 1918, from order of Dist. Judge, Midnapore, dated 14th November 1916.

Execution—Dismissal for default — Fresh application beyond 3 years' period of limitation under Bengal Tenancy Act is not maintainable—Application is not one in continuation of previous execution application dismissed in default— Bengal Tenancy Act (8 of 1885), Sch. 3, Cl. (6).

In execution of rent-decree the property of the judgment-debtor was sold but the sale was afterwards set aside on the latter's application. The decree-holder taking no further steps the executing Court thereupon passed the following order: "Sale set aside: the decree-holder taking no further steps the case is dismissed for default." On a second application for execution being made by the decree-holder, beyond the three years' period limited by Cl. (6), Sch. 3, Ben. Ten. Act:

Held: that the second application could not be regarded as one in continuation of the previous application for execution which ended with the order of the Court dismissing that execution case for default of the decree-holder.

[P 332 C 2]

U. N. Sen Gupta and *Probodh Kumar Das* —for Appellants.

Santimoy Majumdar— for Respondents.

Judgment.—This appeal arises out of proceedings in execution of a rent decree and the question for determination is whether an application for execution of the decree is or is not out of time. An application for execution of a rent decree must be made within the period limited by Cl. (6), Sch. 3, Ben. Ten. Act. For the present purpose that period is 3 years from the date of the decree, which was made on 14th June 1911. The relevant dates are as follows: The first application for execution was made on 6th March 1914; on the 25th April of the same year the property of the judgment-debtor was sold by the Court. On the 23rd June following the judgment-debtor applied to have the sale set aside and on the 16th September the sale was set aside. On the 28th September the Court made this order: "Sale set aside decree-holder taking no further steps, case dismissed for default." The decree-holder appealed from the order setting aside the sale. It does not appear whether the appeal was filed before or after the 28th September but the appeal was dismissed on 2nd January 1915. The decree-holder took no further step for over a year. Then on 16th February 1916 he made the application to which the appeal relates. The Courts below held that the application is out of time because it was made more than three years after the date of the decree.

It is contended, however, for the decree-holder that this application is merely a continuation of his previous application of 6th March 1914. His learned pleader relies on the case of *Abdul Khayar Abdul Haque* v. *Reazuddin Ahmad Chowdhury* (1) and if it were not for the order of 28th September 1914 dismissing the previous application for default, there might be something to be said in decree-holder's favour. But there is that order on the record. It is not a mere order striking a case off the file for the convenience of the Court. It is an order by which the decree-holder was bound. He took no steps by way of review to have the order set aside or modified and he waited for more than a year before he came into Court with his present application. In my opinion the previous application ended with the order of 28th September 1914, and in that view there can be no continuity between the previous application and the present application. I agree with the conclusion arrived at by the Courts below and would dismiss this appeal with costs, one gold mohur.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1909) 1 I C 341,

A. I. R. 1918 Calcutta 333

TEUNON AND NEWBOULD, JJ.

Nafar Chandra Chandra—Plaintiff—Appellant.

v.

Bejoy Chand Mahatab Bahadur and *others*—Defendants—Respondents.

Appeal No. 3168 of 1913, Decided on 19th December 1917, from appellate decree of Dist. Judge, Murshidabad, dated 4th August 1913.

(a) Lease—Construction—Putni granted in respect of whole mouza—Chowkidari chakran land forming part of zemindar's estate in the mouza is included in it.

Where a putni is granted in respect of a whole mouza, unless there is a provision to the contrary in the terms of the putni lease, the chowkidari chakran lands which form part of the zamindar's estate in the mouza must be held to be included in the putni. [P 333 C 2]

(b) Lease—Construction—Putni lease—Clause conferring right on zemindar to appoint or dismiss chowkidars—Chowkidari chakran lands are not excluded.

A clause in the putni lease of a whole mouza which reserves to or confers upon the zemindar the right to appoint or dismiss chowkidars, has not the effect of reserving to the zamindar and of excluding from the putni the chowkidari chakran lands in the mouza. [P 334 C 1]

Mohendra Nath Roy and *Monmatha Nath Roy*—for Appellant.

Rash Behari Ghose, Basanta Kumar Bose, Dwarka Nath Chakrabarty, Bepin Behari Ghose (Jr.) Broja Lal Chakrabarthi and *Gurudas Sinha*—for Respondents.

Judgment.—In this appeal we are concerned with the chowkidari chakran lands of Mouza Someparah. These lands were resumed by Government in 1898, and were thereafter transferred to the zamindar (the Maharajah of Burdwan) subject to an annual assessment of Rs. 51-5.0. By a lease, dated 10th Chait 1308, the Maharajah next let out the lands to respondent 2 at a yearly rent of Rs. 77, and he in his turn has settled upon portions thereof cultivating tenants who in this appeal are respondents 3 to 26. The plaintiff-appellant is the owner of an eight-anna share in the putni of Mouza Someparah and the only question argued before us is whether the chowkidari chakran lands of the Mouza were excluded from the putni. It is now common ground that the terms upon which the grant of the putni was made are embodied in a kabuliyat (Ex. B) executed by one Radharaman Thakur in favour of the zamindar on the 21st Ashar 1216, corresponding with 3rd July 1809.

The grant is in respect of the whole Mouza and unless we find provision to the contrary the chowkidari chakran lands, being part of the zemindar's estate in the Mouza, we must hold to be included. The kabuliyat expressly reserves or excepts certain lands falling under three descriptions, namely, (1) the house, garden and tank in the zamindar's khas possession, (2) tanks and the like covered by sanads granted prior to the date of the putni, and (3) aymahs antecedent to the zamindari. Between the provisions relating to the second and third of these three classes we find a clause which has been properly translated thus:—

"If any chowkidar attached to the Police Cutchery die or go away . . . . . and if it be necessary to make a change (i. e. appoint or dismiss you (i. e. the zamindar) shall make the same and with that I shall have no concern."

With this clause the Judges of both Courts below have considered the question whether the services expected of chowkidars in addition to the performance of their duties as village watchmen were rendered to the zamindar, or to the putnidar. Their findings, as we read them, appear to be that such services were rendered neither to zamindar nor to putnidar and, in any event, that of the rendering of such services to the putnidar no satisfactory evidence has been given. Even then if such evidence be admissible the findings arrived at are of no assistance to us in the present case. The contention of the respondents which found favour in both the lower Courts is that the clause set out above imports the exclusion of the chowkidari chakran lands. In at least three cases kabuliyats of about the same period, and in terms very similar to those contained in the one now under consideration, and all executed in favour of the Burdwan Raj, have been construed by this Court. Of these cases one reported as *Nitya Nund Hazra* v. *Maharajadhiraj Bejoy Chand Mohatab* (1) lends support to the contention of the respondents, while in two, the decisions, namely, the first in an unreported case Second Appeal No 2114 of 1906 and the second in the case reported as *Girish Chandra Roy* v. *Hem Chandra Roy* (2), assist the contrary contention of the appellant.

Those decisions not being between the same parties and the documents also being different are not of course binding upon

1. (1908) 7 C L J 593.
2. (1907) 5 C L J 28.

us in the present case. We, however, agree with the view taken in *Girish Chandar Roy* v. *Hem Chandra Roy* (2) that the clause which reserves to or confers upon the zamindar the right to appoint or dismiss chowkidars has not the effect of reserving to the zamindar and of excluding from the putni the chowkidari chakran lands. In the result this appeal succeeds. The decrees of the lower Courts are set aside and there will be a decree declaring that to the extent and in respect of his 8 annas share plaintiff-appellant is entitled in putni right to the lands in suit subject to the annual assessment fixed or approved by the Collector. To the same extent he will recover possession from and jointly with respondents 2, 27 and 28. The decree will not authorize him to disturb the possession of tenant respondents 3 to 26, but will entitle him to receive rent from the said defendants in respect of his share. He will further recover mesne profits for the three years prior to suit from respondents 1 and 2; such profits to be ascertained in the manner provided in the Civil Prosedure Code, O 20, R. 12 (1), Cl. (b). The plaintiff appellant will further have his costs throughout from respondents 1, 2 and 28. The decree for costs in favour of original respondent 27 who has not been made a party to this appeal remains unaffected by this decision.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 334

FLETCHER AND SMITHER, JJ.

Lal Gopal Dutt Chowdhury—Plaintiff—Appellant.

v.

Biswa Nath Roy and *another*—Defendants—Respondents.

Appeal No. 2723 of 1914, Decided on 12th March 1917, from appellate decree of Dist. Judge, Khulna, D/- 9th April 1914.

(a) Contract Act (1872), S. 74—Stipulation to pay interest at exorbitant rate in event of rent being in arrear may amount to penalty.

There is nothing in the law, as contained in the Contract Act, to prevent a man of full age and of ordinary understanding from contracting, if he is at arm's length, to pay interest at an exorbitant rate. [P 334 C 2]

But a stipulation in a kabuliyat to pay interest at an exorbitant rate in the event of the rent being in arrear may amount to a penalty under S. 74. [P 335 C 1]

(b) Civil P. C. (1908), S. 100—Whether stipulation to pay exorbitant interest is penalty is mixed question of fact and law—Contract Act (1872), S. 74.

Whether a stipulation to pay interest at an exorbitant rate is a penalty or not is a mixed question of fact and law to be decided on a consideration of all the circumstances relating to the case. [P 335 C 1]

(c) Contract Act (1872), S. 74, Expl.—Explanation is not exhaustive.

The explanation to S. 74 is not exhaustive, so that a contract for the payment of interest which does not fall within the terms of the explanation may amount to a penalty. [P 334 C 1]

Dwarka Nath Mitter—for Appellant.

Brojo Lall Chakravarty and *Sarat Comar Bose*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against a judgment of the learned District Judge of Khulna, dated 9th April 1914, affirming the decision of the Subordinate Judge of the same place. The plaintiff sued to recover the rent due to him on the basis of a kabuliyat for a four annas share of a jalkar. The contract of tenancy provided that interest was to run on the rent in arrear at the rate of 25 per cent. per mensem, that is, 300 per cent. per annum. The plaintiff likes interest at 300 per cent. per annum and, therefore the learned Judges in the Courts below having deprived him of that rate, he has appealed to this Court.

The law, of course on this matter is not settled with reference to the plaintiff's likes or dislikes but is contained in the Contract Act, and there is nothing to prevent a man of full age and of ordinary understanding from contracting, if he is at arm's length, to pay interest at a higher rate. But there are provisions in the law such as S. 74, Contract Act, and that section has reference to compensation when there has been a breach of the contract and a penalty has been stipulated for. The question in the present case is:

"Is this 300 per cent. per annum, stipulated to be paid in the event of the rent not being paid in due time, a penalty."

Unfortunately in an otherwise well-considered judgment, the learned District Judge has fallen into an error as to what would be a penalty. The learned Judge considered that the explanation to S. 74, Contract Act, was exhaustive and that there was no case with reference to the payment of interest which could be penal if it did not fall within the terms of the explanation. That is clearly not so. The case reported as *Krishna Chandra Bar-*

man v. *Sanat Kumar Das* (1) was a case where the interest was held to be penal, notwithstanding that there was no increased rate as referred to in the explanation to S. 74. The learned Judge found himself in a difficulty because he considered that he could not hold the interest to be penal and attempted to support the judgment of the Court of first instance by an equitable doctrine as to a person standing in a fiduciary position and dominating the will of another. Those principles do not apply in the circumstances of the present case. The case must stand or fall on the terms of S. 74, and that is a mixed question of fact and law to be decided on a consideration of all the circumstances relating to the case. In that view, I say with regret, because the judgment of the learned District Judge is otherwise a well considered judgment, that this case must go back to the lower appellate Court to be re-heard. The learned Judge of the lower appellate Court must come to a definite conclusion whether the interest of 25 per cent. per mensem stipulated to be paid by the kabuliyat in the event of the rent being in arrear was or was not by way of penalty as mentioned in S. 74, Contract Act.

The judgment of the learned Judge of the lower appellate Court is accordingly set aside and the case is sent back to him to be re-heard as stated above without disturbing the findings of fact on the other points raised in the case. Costs will abide the result of the re-hearing by the lower appellate Court.

Smither, J.—I agree.

V.B./R.K. *Case sent back.*

1. (1917) 44 Cal 162=34 I C 609.

A. I. R. 1918 Calcutta 335

CHATTERJEA, J.

Madan Mohan Dey — Plaintiff—Appellant.

v.

Nogendra Nath Dey — Defendant—Respondent.

Ref. in Misc. Appeal File No. 281 of 1916, Decided on 23rd February 1917.

Civil P. C. (1908), Ss. 47 (1) and 144—Order under S. 144 is one deciding question falling under S. 47—Appeal to High Court is charageable with Court fee of Rs. 2.

An order under S. 144, is an order deciding a question falling under S. 47 (1) and, therefore, an appeal to the High Court from such an order is chargeable with a Court-fee of Rs. 2 under Cl. (6) of the Notification of the Government of India No. 4650, dated 10th September 1889: 6 *I. C.* 125; *Ref. to.* [P 335 C 2 P 336 C 1]

Jadu Nath Kanjilall, Nani Lall Dey and *Kali Das Sarkar*—for Appellant.

Ram Charan Mitter—for Government.

Judgment.—This is a reference by the Taxing Officer under S. 5, Court-fees Act. The question for determination is, what is the Court-fee payable on an appeal from an order under S. 144, Civil P. C. Cl. 6 of the Notification of the Government of India No. 4650, dated 10th September 1889, prescribes a Court-fee of Rs. 2 on appeals from orders under Cl. (c), S. 244, Civil P. C., Act 14 of 1882. That Notification would, under the provisions of S. 157, apply to orders under S. 47 (1) of the present Civil P. C. which corresponds to S. 244, Cl. (c), of the old Code. The question, therefore, is whether an order under S. 144 is an order which decides a question falling under S. 47 (1) of the present Code. Under S. 583 of the old Code an application for restitution was treated as an application for execution of the appellate decree and it was expressly provided that the Court shall proceed to execute the decree passed on appeal according to the rules for execution of decrees in suits. It was accordingly held in *Gangadhar Marwari* v. *Lachman Singh* (1) that an order under S. 583 fell within the provisions of S. 244 (c), and, therefore, Cl. (6) of the Notification applied. Under the old Code, there was divergence of judicial opinion on the point whether a separate suit for restitution was or was not barred. That question has now been set at rest by S. 144 (2) of the present Code. It is true S. 144 of the present Code omits the provisions that the Court is to proceed according to the rules prescribed for the execution of decrees in suits, but it expressly lays down that no suit shall be instituted for the purpose of claiming any restitution which can be obtained by application under the section. The Court in making restitution has to execute the decree of reversal (which necessarily carries with it the right to restitution even though the decree may be silent as to such restitution) in order to give effect to the reversal of the decree. That being so, an order under S. 144 comes under S. 47

1. (1910) 6 I C 125.

(1) and Cl. 6 of the Notification applies to such an order. I think, therefore, that the Taxing Officer is right in holding that a Court-fee of Rs. 2 is chargeable on appeals from orders under S. 144 of the Code.

V.B./R.K. *Answer accordingly.*

A. I. R. 1918 Calcutta 336

CHATTERJEA AND WALMSLEY, JJ.

Girijanath Roy Chowdhury and *others* —Plaintiffs—Appellants.

v.

Kanai Lal Mitra and *others*—Defendants—Respondents.

Appeal No. 601 of 1914, Decided on 29th August 1917, against original decree of Sub-Judge, Howrah, D/- 3rd September 1914.

(a) Civil P. C. (1908), Sch. 2, Para. 1 (1)—Reference by some parties is invalid—Even against parties referring.

It is essentially necessary that all the parties interested in a suit must agree before any reference to arbitration can be made under Cl. 1, para. 1, Sch. 2, Civil P. C. [P 336 C 2]

The agreement to refer to arbitration and the application to the Court founded upon it must have the concurrence of all the parties concerned, and if all the defendants, including those who have not appeared and contested the suit, do not join in the reference to arbitration, the award is wholly invalid not only against those who did not join in the reference but also against those who joined in it, and is liable to be set aside on the application of any of the parties: 9 *C. W. N.* 873 and 41 *I. C.* 295, *Foll.*; 11 *C. W. N.* 1152, *Diss. from.* [P 337 C 1]

(b) Practice—New plea — Objection to award on ground of its invalidity, all parties not having joined, can be taken, in appeal though not taken before—Arbitration.

An objection to the validity of a reference as well as of the award on the ground that all the parties concerned did not join in the reference although not taken in the Court of first instance or taken specifically in the grounds of appeal before the High Court, must be given effect to, as it relates to the jurisdiction of the Court to make the reference and such reference is altogether invalid. [P 337 C 2]

D. N. Chuckerbutty, *Anilendra Nath Roy Choudhury* and *Dhirendro Kumar Roy*—for Appellant.

Mohendro Nath Roy, *Manmotha Nath Roy* and *Sisir Kumar Ghosal*—for Respondents.

Chatterjea, J.—This appeal arises out of a suit for accounts brought by the plaintiffs against defendant 1, who was a gomasta of the plaintiffs, and the other defendants (defendants 2 to 7) who as sureties of defendant 1 had executed a security bond. The suit was originally filed in the Munsif's Court on 15th May 1912, being valued at Rs. 900. Subsequently, the valuation was raised to Rupees 6,488 and the plaint was taken back from that Court and filed in the Court of the Subordinate Judge on 16th June 1913. Only defendants 2 and 3 appeared and filed a written statement in the suit and on 30th June 1914 an application was made for referring the matter in dispute to the arbitration of one Amrita Lal Hazra. The Court accordingly referred the matter to the arbitrator, and the latter submitted his award on 17th August 1914, by which he held that the defendants were liable for Rs. 753-9-6 only. The plaintiffs took objections to the award on various grounds, the main ground, being that the arbitrator gave the plaintiff's man to understand that after making his own enquiries the latter would be given an opportunity of proving his case, but that he gave his award without giving the plaintiffs such opportunity. Defendant 1 however denied this in his affidavit, and the Court below overruled the objection holding that the plaintiffs were not misled by the arbitrator, and there being no ground for setting aside the award gave judgment in conformity with it, and the suit was accordingly decreed for Rs. 753-9-6 against the defendants.

Upon these facts there is no appeal against the decree based upon the award, but it is contended before us that all the defendants not having joined in the reference to arbitration, the arbitration is wholly invalid. It appears that some of the defendants viz., defendants 4 to 7, did not appear in the suit at all and the petition to the Court below to refer the case to arbitration was not signed by them or by any pleader on their behalf. Now Cl. 1, para. 1, Sch. 2, Civil P. C. provides, that

"where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgment is pronounced apply to the Court for an order of reference."

It is essentially necessary therefore that all the parties interested must agree before any reference can be made. It is true that defendants 4 to 7 did not appear in the suit, but issue 7 in the case was

"did the other defendants 2 to 7 at any time act as am-mukhtears or agents and as such were liable to the plaintiffs,"

and the decision of the arbitrator was that although they did not act as am-mukhtears and could not therefore be

held liable as such, they had executed the security bond and were liable as sureties. The arbitrator accordingly made an award against all the defendants for Rs. 753-9-6 and the Court below has made a decree for that sum against all the defendants. It cannot therefore be said that defendants 4 to 7 are not "persons interested" in the suit. There has been considerable divergence of opinion upon the question whether an award under such circumstances is invalid only as regards those who did not join in the reference, or is invalid even against those who joined in it. The former view was taken in the earlier decisions of this Court but in *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (1) it was held (without reference to the earlier cases) that the award was invalid in its entirety. In a later case, *Lal Mohan Pal* v. *Surya Kumar Das* (2), again the earlier view was taken, though one of the learned Judges was a party to the decision in *Parsidh Narain's* case (1). In the Allahabad High Court judicial opinion on the point has varied considerably from time to time. In the most recent case, however, in our Court, *Dooly Chand* v. *Mamuji Musaji* (3), the learned Judges were of opinion that the decision in the case of *Parsidh Narain Singh* v. *Ghanshyam Narain Singh* (1) was correct. The learned Chief Justice held that

"if all the parties interested do not agree, then the Court has no jurisdiction to take the order of reference, and the order of reference is invalid not only against those who have not agreed but also against those who have agreed."

Mookerjee, J., referred to the decisions on the point and held that

"the entire foundation of the jurisdiction is removed as soon as it is established that the parties had failed to comply with the fundamental requirement of the statute embodied in para. 1, Sch. 2, Civil P. C.

Having regard to the terms of the section, which lays down that "all the parties interested" must agree in the reference, and to what was said by the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan* (4), viz., that

"the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned,"

we agree with the view taken by the learned Chief Justice and Mookerjee, J. In the present case the objection is taken not by defendants 4 to 7 but by the plaintiffs. But had the objection been taken even by defendants 2 and 3, we would have had to give effect to it having regard to *Dooly Chand's* case (2), and we do not see how we can refuse to entertain the objection because it is raised by the plaintiffs. The objection was not taken in the Court below, nor taken specifically in the grounds of appeal to this Court, probably because the case of *Dooly Chand* v. *Mamuji Musaji* (3) had not then been decided, the only ground taken on the point being that the award was illegal and unenforceable. But an objection to the validity of an award made in contravention of the provisions of the last paragraph of S. 521, old Civil P. C., (Act 14, of 1882) was allowed, though raised for the first time before the Privy Council, Lord Morris observing:

"This objection was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the Statute is there and the Judges were bound to take judicial notice of it."

See *Raja Har Narain Singh* v. *Chaudarain Bhagwant Kuar* (5). Having regard to the fact that the objection relates to the jurisdiction of the Court to make the reference, and that the reference is altogether invalid, we are constrained to give effect to it. The decree of the Court below upon the award based upon the invalid reference is accordingly set aside, and the case sent back to that Court for trial. But the whole costs of the litigation subsequent to the submission of the award have been thrown away by reason of the omission of the plaintiffs to take the objection in the Court below. In these circumstances the plaintiffs-appellants must pay the costs of the respondents of this appeal and the costs in respect of pleader's fee incurred by them in the lower Court. All other costs in the Court below will abide the result. The records will be sent down without delay and we trust the Court below will take up the case as early as possible.

Walmsley, J.—I agree.

V.B./R.K. *Case remanded.*

1. (1905) 9 C W N 873.
2. (1907) 11 C W N 1152.
3. (1917) 41 I C 295.
4. (1902) 29 Cal 167=29 I A 51 (P C).
5. (1891) 13 All 390=18 I A 55 (P C).

* A.I.R. 1918 Calcutta 337

GREAVES, J.

G. H. Wittenbaker—Plaintiff.

v.

J. C. Galstaun and *others*—Defendants.

Original Civil Suit No. 1008 of 1916, Decided on 6th March 1917.

* (a) Master and servant—School master—One month's notice is not reasonable—Three month's or term's notice ought to be given.

In the absence of a special agreement a master in a college is entitled to "reasonable notice" on his service being dispensed with. One month's notice in an employment of this kind is not reasonable notice. [P 340 C 1]

A master at the Armenian College, Calcutta, was appointed for a period of three years. After the expiry of the period he continued to work as a master for some months, and his services were then dispensed with on one month's notice:

Held: that the master was entitled either to three months' or a term's notice. [P 340 C 2]

(b) Custom—Proof of— Evidence must be clear, convincing and consistent.

Usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation in the particular trade or business, and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove an usage in a particular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in and that every body acknowledged it in the trade and knew of it or might know of it if he took the pains to enquire. [P 340 C 1]

C. C. Ghose and *S. Hyam*— for Plaintiff.

Zorab and *A. K. Roy* — for Defendants.

Judgment.—The plaintiff in this case claims from the defendants, who are two of the managers of the Armenian College, a sum of Rs. 1,490 by way of damages under the circumstances to which I shall presently refer. On 28th February 1912, the plaintiff was appointed as Mathematical and English Master at the Armenian College for a period of three years from the 1st March 1912, at a salary of Rs. 150 a month with board and lodging. The agreement, which is contained in a resolution signed by three of the governors or managers of the College on 5th March 1912, contains one or two other matters to which I need not refer and it concludes with these words:

"The security to be paid him (that is, a certain sum to be retained from his salary) when the managers dispense with his services which they are entitled to do for insubordination, insobriety, neglect of duties, etc., on one month's notice."

In pursuance of that agreement, the plaintiff continued as a teacher at the Armenian College until the month of July of last year. On 22nd July of last year he received verbal notice to terminate his appointment, and on 26th July he received a written notice to terminate his appointment as from the 1st August. He was offered and paid one month's salary for the month of August, at the rate provided by the agreement, i. e., rupees 150. He continued to occupy his quarters and received board and lodging until the 24th August last, without performing any duties of the College and he was tendered and accepted a sum of Rs. 50 in lieu of the loss which he had sustained by losing the board and lodging during the period, one month from the 1st August. The plaintiff accepted the sums of Rs. 150 and Rs. 50 without prejudice to such rights as he had and which he claims in this suit. The plaintiff's claim of Rs. 1,490 is set forth in detail in para. 16 of the plaint. His claim is for 1690 i.e. Rs. 900 on account of salary in lieu of notice from the 1st August 1916 to the end of January 1917 at the rate of rupees 150 a month, and Rs. 790 for board and lodging, electric current and attendance from the 1st August 1916 to the end of January 1917 at the rate of Rs. 150 a month, and he gives the defendants credit for the sum of Rs. 290 received under the circumstances which I have already stated, making his total claim for Rs. 1,490 as already stated at the commencement of this judgment. The issues which have been agreed upon between the parties, are as follows: first, what notice is the plaintiff entitled to; secondly, to what damages if any, is he entitled?

The defendants' case shortly put is this, they say that they are not liable to the plaintiff for any sum at all, that they were entitled to give him a month's notice as they did, and pay him a sum of Rs. 150 in respect of salary, and that the sum of Rs. 50, which they have paid him for the loss of board and lodging, compensates him for any loss which he has incurred in that respect, and they sought to show before me that there was a custom or usage in the profession of school-masters, both in Calcutta and in India, establishing that, apart from any definite agreement, the school-master was entitled to give and receive and the school authority was entitled to give and receive one month's notice to terminate the agreement.

The evidence that was given before me was to this effect. On behalf of the plaintiff Mr. Heramba Chandra Maitra, the Principal of the City College since 1905, stated that according to the custom of the City College and of the schools which he knew, the teacher or the governing body were entitled to terminate an

engagement by giving notice to terminate it with the existing session. He said that in his own case he gave notice in April to terminate his employment and that the session ended in May and that that was good notice, and he said in cross-examination that the college must have accepted a month's notice from him and that if the college gave him notice in April to terminate in May, the notice would be sufficient as the session ended on the 31st of May. He also stated in cross-examination that he knew nothing of European schools. The plaintiff also gave evidence and, with regard to the question of the custom, he stated in cross-examination that he did not know of any custom in connexion with the Armenian College that teachers should receive a month's notice, and he said:

"I am prepard to say that one month's notice is not given except in cases of misconduct."

He also gave evidence upon the question of damages for loss of board, and he said that at the college he occupied a large room and had the use of the school dining room, the school servants, electric lights and fan, and received board and lodging and had the use of a godown for a private servant of his own, and he estimates that he could not have got accommodation similar to this or suitable accommodation for his position under a less sum than Rs. 150, including therein all those things which I have mentioned. Then on behalf of the defendant, Mr. Joseph Samuel Zemin gave evidence. He is Professor of English literature at St. Paul's College in this city, and is also a Professor at the Central College in Cornwallis Street. He was previously, he stated, at the Doveton College for 31 years, part of the time as a junior master and part of the time as Head of the College, and he stated that while he was there, the services of masters were dispensed with other than for misconduct, and that in those cases a month's notice was given and received when there was no special contract or agreement He gave one or two specific instances. He said:

"In Calcutta itself I have no personal knowledge of the length of notice that is usual in schools",

and in cross-examination he said that with regard to the cases in which notice had been given that it was perfectly understood, when the persons came to the college, that one month's notice should be given to terminate their appointments. He said this was one of the terms of their employment. Then Mr. Kirkpatrick gave evidence. He spoke from 33 years' experience in the Punjab, i. e., in Ludhiana, Amritsar, Delhi and Simla, and he said that so far as he was aware it was always the custom that one month's notice should be given and received. Then Mr. Moreno, the present Principal of the Armenian College, was called and he spoke from experience both of the Armenian College and as head of the C. M. S. School and as Principal of the Kidderpore Institution, and he stated that his understanding of the custom was that, in the absence of an agreement, a month's notice is usually given and accepted, and he stated that when he ceased to reside upon the college premises he accepted from the governors an allowance of Rs. 50 a month in lieu of board and lodging.

Then we had the evidence of Mr. Galstaun, who is one of the defendants, and of Mr. David, who is the other defendant, both of them being managers of the college at the present time, and they stated that in their experience it had been the custom among the masters of the Armenian College to take and receive one month's notice to terminate their engagements, and with regard to the sum of Rs. 50 which they tendered to the plaintiff in lieu of board and lodging, they stated that they arrived at this figure upon the basis of what it would cost to obtain suitable accommodation at the Young Men's Christian Association in Corporation Street. Mr. David stated that, for full board and lodging and the use of a separate room including electric light and fan and the general use of other rooms there the charge would be Rs. 35 a month, but that, of course, no profit was being made by the Society in respect of these charges.

Now it seems to me that there are three possible conclusions that one can arrive at in this case. First, you can say that the employment of the plaintiff having been continued after the expiration of his agreement, he must be treated as holding his post upon a yearly employment which could only be terminated with the end of the session, i. e., upon the 21st December 1916, or if you take the holidays into account then on the 21st January 1917; or, secondly, it is possible to say that he is entitled to a reasonable notice, i. e., either three

months' notice or a term's notice, the first of which would have the effect of terminating his employment at the end of October and the second on the 21st December 1916. So far as I can gather, the school year ends on the 21st December, and there are three terms in the year,—one from the 21st January to the 15th May, another from the 15th June to the 1st October and another from the 11th October to the 21st December. If he was entitled to three months' notice from the 1st August, his employment would come to an end at the end of October, and if he was entitled to a term's notice then his employment would come to an end either on the 21st December, as the plaintiff contends, on the 21st January when the school holidays end; or, thirdly, there is the contention of the defendants that according to the custom, which is generally in vogue in Calcutta and in India, an employment of this kind can be terminated by a month's notice. Now, first of all, so far as the custom is concerned, I am not satisfied upon the evidence that any custom of a month's notice in an employment of this kind has been established to my satisfaction.

The rule of proof of custom or usage can be stated shortly as follows:—Usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation in the particular trade or business, and evidence establishing custom or usage must be clear, convincing and consistent, and to prove an usage in a particular trade, it must be shown that the usage is consistent and reasonable and was universally acquiesced in and that everybody acknowledged it in the trade and knew of it, or might know of it if he took the pains to enquire. Now, of course, I have before me certain evidence as to the existence of this custom, but I am not satisfied that the evidence is sufficient to establish that this custom is so established as to be known to every one in the profession if he takes the pains to enquire, nor am I satisfied at all that one month's notice in the case of an employment of this kind is a reasonable notice, because as I pointed out in the course of the case, the school terms beginning as they do, it might press very harshly upon a person employed as a teacher if he were given one month's notice, say, at the beginning of a term, as then he might have to wait two months and probably another month during the school holidays before a new term began at another school, i.e., unless he were fortunate enough to get a temporary position or some other kind of employment, he might well find himself without any means of support during that period if a rule of a month's notice were established.

Therefore, I cannot say that in a profession of this kind this is a reasonable notice. Counsel for the plaintiff referred me to the case of *Todd* v. *Kerrich* (1). In that case a lady had been employed as a governess for a term of one year at a salary of £30 a year. She was given notice to terminate her engagement before her term had expired and her employer offered her a month's salary in lieu of notice. She declined to accept this and she sued for salary at the agreed rate for the balance of the year during which she had been engaged and she recovered the amount for which she sued. Against that there was an unsuccessful appeal and Chief Baron Pollock made this statement in his judgment:—

"The position which the lady holds, the station which she occupies in the family, and the manner in which such a person is usually treated in society, certainly place her in a very different situation from that which mere menial and domestic servants hold. So far, therefore, as the question is to be treated as a matter of law a governess does not fall within that rule,"

and I do not see why that principle should not be applicable here. Then I have got to consider the two other alternatives, i. e., whether having regard to the terms of the resolution of 5th March 1912, the employment must be deemed to have been continued as an yearly employment, which would terminate with the end of the year or of the school session. I am inclined to think that this is probably the true position in this case, and that after the plaintiff's agreement had expired, he stayed on with the Armenian College on an yearly agreement terminating when the school year terminated, i. e., on 21st December or thereabouts in any year, but if I am not right in this, then I think that apart from any provision in the agreement itself, the plaintiff is entitled to a reasonable notice, which I should put at either three months' or a term's notice. So, I think, for the purposes of this case, it will be

(1) (1852) 8 Ex. 151=22 L J Ex 1.

sufficient if I take it that the plaintiff was entitled to notice up to 21st December, whether under the agreement or as a reasonable notice. Before I come to deal with the actual sum to which the plaintiff is entitled, I think, I should say something with regard to the concluding words of his agreement.

I think that the fact that one month's notice applies to a case of insubordination, insobriety, neglect of duties, etc., (the etc., of course, being ejusdem generis) negatives the idea of one month's notice if his service is dispensed with on other grounds. I think that this is an additional reason why notice to terminate his services should terminate with the end of the session itself, or that he should receive the reasonable notice such as I have described. Therefore, I think, the plaintiff is entitled to recover from the defendants salary at the rate of Rs. 150 a month for the four months of August September, October and November and for a further period of 21 days, i. e., up to 21st December (I do not think he is entitled to include the school holidays from 21st December to 21st January), i. e., under these two heads he will be entitled to a sum of Rs. 705 calculated at the rate of Rs. 150 a month. Then so far as board and lodging are concerned, I feel some difficulty in this matter and apart from the case of Mr. Moreno himself, I should have certainly thought that the plaintiff was entitled to be recompensed for the loss, which he says he suffered, at a sum greater than Rs. 50 a month, and, of course, Mr. Moreno says that this was a mutual arrangement between himself and the managers. It may have been that other arrangements would have been arrived at if he had not been agreeable to the managers' proposal and had accepted the sum offered. I think a fair figure to allow is Rs. 75 a month calculated for the months of August, September, October and November and up to 21st December; this will roughly be Rs. 350, i. e., I think, the plaintiff is entitled to recover from the defendants the sum of Rs. 705 plus Rs. 350 less the sum of Rs. 200 already paid, that is to say, a total sum of Rs. 855. I give judgment for that sum to be paid to the plaintiff by the defendants, who do not as managers desire to dispute their liability if I am against them in the defence they raise, and the defendants must pay to the plaintiff his costs of the suit. As the suit has been brought in the High Court, I direct taxation under R. 58, Chap. 36 of the Rules of the Original Side of this Court.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 341

FLETCHER, GREAVES AND SHAMSUL HUDA, JJ.

Muzaffar Ali Khan—Appellant.

v.

Secy. of State and *another*—Respondents.

Letters Patent Appeal No. 3 of 1915, Decided on 4th January 1918, against the decree of Beachcroft, J., differing in opinion from Chatterjee, J., D/- 2nd August1915, in Appeal Suit No. 345 of 1913.

Land Acquisition Act (1894), S. 23—Per *Fletcher* and *Greaves, JJ.*—**Quarry—Measure of compensations is amount of workable stone likely to be gotten therefrom.** (*Shamsul Huda, J.* dissenting).

The basis of the compensation to be paid for acquiring a quarry is the amount of workable stone likely to be gotten therefrom taken at a rate to be determined from the evidence. [P 343 C 1]

Per *Shamsul Huda, J.*—In cases of this kind it is generally necessary to take two or all methods of valuation available in order to arrive at a fairly correct valuation, as exact valuation is practically impossible and approximate market value is all that can be aimed at. [P 343 C 1]

Sarat Chunder Basak and *Hamendra Coomar Das*—for Appellant.

Ram Charan Mitter — for Respondents.

Fletcher, J.—This appeal is preferred under Cl. 15 of the Letters Patent. The only question involved in the appeal is, what was the market value of certain land compulsorily acquired under the provisions of the Land Acquisition Act. The land acquired is a hill in the Sonthal Perganas which is called Bahadurpur and Belpahari. It was acquired in connection with the construction of the Lower Ganges Bridge. The value of the land as a quarry was the subject-matter of the enquiry in the proceedings out of which this appeal arises and also was the basis of the argument before us. The declaration is dated 9th August 1909. The Collector awarded Rs. 976-6-0 in respect of the land the subject of the present appeal. The District Judge increased this amount to Rs. 3,125. On appeal to this Court the appeal came to be heard by Digambar Chatterjee and Beachcroft, JJ. They were divided in their opinion, Digambar

Chatterjee, J. was of opinion that the amount awarded by the District Judge ought to be increased to Rs. 8,734-4-0 whilst Beachcroft, J., was of opinion that no ground has been shown for increasing the amount awarded by the District Judge. Before the District Judge as well as before Digambar Chatterjee and Beachcroft, JJ., there were two claimants. The present appellant who was the claimant 1 and is the proprietor of the land. The claimant 2, Mr. Atkinson, took a lease for 4 years of the property on 5th August 1908. The claimant 1 alleges that the lease to Atkinson covers only 6 bighas of the property, although the property acquired contains an area of 127 bighas.

Claimant No. 2 before the Collector claimed Rs. 31,00,000. Claimant No 1 did not make any claim before the Collector as he was not served with notice, but on his application for a reference to the Judge he claimed Rs. 1,60,000. The Collector valued the land in 3 villages at rupees 1,394-8-0. We are only concerned with the land in 2 villages, Banjikand and Shampur, and as already meltioned the amount awarded in respect of these 2 villages was Rs. 976-6-0. The Collector relied on a valuation made by Mr. Green, Superintending Engineer to the Government. Foolishly a copy of this valuation was not annexed to the award and for some time the parties were refused a copy of the same. A copy however was ultimately given and the claimants do not appear to have been prejudiced in any way by the refusal to supply a copy in first instance. Claimant No. 1 has preferred this appeal under Cl. 14, Letters Patent. No appeal has been preferred by claimant No. 2. In the first place I will deal with the suggestion that was made that the lease to Atkinson comprised only 6 or perhaps 20 bighas. The lease is of the Khaspatil Belpahari hill in Mouza Belpahari excepting lands settled with tenants. The northern boundary is given in the lease as Mauzda Banjikand and the southern boundary as Shampur. The lands according to the description in the lease bear the khasra No. 2 in Mauza Belpahari. The claimant No. 1 produced a khasra Ex. 2 of Mauza Shampur, which they say, is the khasra referred to in the lease.

The claimant No. 1 also called a witness Ketabuddin Sheikh who stated that Shampur is also called Belpahari. This witness perhaps by oversight was not cross-examined on this point. But if Shampur and Belpahari are one and the same, the southern boundary as given in the lease of Shampur is not explained. It may be that the khasra referred to in the lease is false demonstration. The evidence in my opinion does not show that all that Atkinson got under his lease was 6 or 20 bighas. The main point however argued on this appeal is as to the amount of compensation to be allowed. The present appeal is valued at Rs. 8,734-4-0, the amount that Digambar Chatterjee, J., thought should be allowed. The valuation of that learned Judge proceeded on this basis. He took the terms of a provisional agreement, dated 29th April 1909, as varied on 28th May 1909 between Mr. Atkinson and Mr. Gales, the Engineer-in-Chief in charge of the construction of the Lower Ganges Bridge. Under the terms of that agreement the Engineer-in-Chief was to get a lease from Mr. Atkinson of Belpahari up to October 1912, the date when Atkison's lease from the claimant No. 1 terminated. The terms of the proposed lease were a monthly rent of Rs. 42, royalty of 7 annas per 100 cubic feet of materal removed from the quarry, minimum amount to be removed being guaranteed at 40,000 cubic feet a month and that the agreement could be determined by the lessee on one month's notice.

On this basis Digambar Chatterjee, J., thought that the compensation should be based on the assumption that this agreement should run until October 1912 and calculating the minimum amount to be worked a month at the royalty of 7 annas per 100 cubic feet and adding the dead rent he arrived at the figure of rupees 8,734-4-0. I am wholly unable to agree with the view of the learned Judge. The evidence of Mr. Green, which in my opinion is not really challenged, shows that the amount of stone that could be conveniently and profitably worked was 4,81,032 cubic feet. Suggestions have been made that Mr. Green neglected to take into consideration stone when the overlay was more than 3 feet and also when the stone lay below 15 feet. The evidence does not show that with regard to the land in question Mr. Green's method was inaccurate and it is obvious that a prudent purchaser before he acquired an unopened quarry would consult an ex-

pert as to the amount of stone likely to be gotten.

There is nothing to suggest that an expert so consulted would have proceeded differently or come to a conclusion other than that arrived at by Mr. Green. Evidence of what may be the working conditions or the value of stone in other quarries seems to me to be of little or no value. I think the estimate of Mr. Green as to the quantity of stone capable of being worked should be accepted, and as to the rate that should be paid there is no difficulty. The parties agreed upon a rate of 7 annas per 100 cubic feet and this cannot be departed from on the ground that the Government paid in excess of this rate with regard to small quantities either to terminate disputes or to avoid litigation. In the result I think the proper basis of the compensation is the amount of workable stone as estimated by Mr. Green taken at the agreed rate of 7 annas per 100 cubic feet. On that basis the amount given to the claimants by the learned District Judge is in excess of the value. The present appeal I think, therefore, fails and must be dismissed with costs. Three hundred rupees.

Greaves, J.—I agree.

Shamsul Huda, J.—I regret I am unable to agree with the majority of the Court in the conclusions arrived at by them. As observed in the case of *Harish Chunder Neogy* v. *Secy. of State* (1), it is generally necessary in cases of this kind to take two or all the methods of valuation available in order to arrive at a fairly correct valuation. Exact valuation is practically impossible. The approximate market value is all that can be aimed at. In this case three methods of valuation have been discussed before us. The first is the valuation based on Mr. Green's report supported by his evidence in Court. Mr. Green, however, is not an expert in matters of quarrying. He made his valuation on the result of certain trial pits that he dug all over the land at regular intervals. He admitted that he had not before tried this method for the purpose of valuing quarries. Mr. Green's valuation, I may state, was the basis of the Collector's award. The District Judge, however, did not accept his valuation, as he considered the royalty of 4 annas per hundred cubic feet of stone was too low. In this Court D. Chatterjee, J., did not accept his valuation also and Beachcroft, J., was not wholly satisfied with it. "It may be," says Beachcroft, J.

"that in fact Mr. Green has under-estimated or over-estimated the quantity of workable stone. But that is not the point. The question is, would a prospective purchaser, apart from the question of low rates, have come to much the same conclusion."

I am unable to accept Mr. Green's estimate for two main reasons. In the first place, Mr. Green only valued stone that could be reached within 3 feet of the surface and he also did not take into account any stone below a depth of 15 feet. In this respect the other expert witnesses are not in accord with him. For instance, in regard to the overlay of more than 3 feet, Mr. Martin, the first witness for the Secretary of State, said that it would pay to remove about 5 or 6 feet of earth unless one struck solid stone; and regarding the depth up to which a quarry can be worked, Mr. Edward, Executive Engineer of State Railways of India, who had actual experience of quarrying at Belpahar, being in charge of the quarries for over a year, says that in his experience it does not pay to work down more than 15 or 20 feet on a slope such as Belpahar. I think, therefore, Mr. Green's estimate is an under-valuation and should not be accepted. The second method of valuation is based on the lease granted to Atkinson, the claimant 2, by the claimant 1, dated 5th August. 1908. It seems that Atkinson had taken a lease for some land in Belpahar for four years at a rental of Rs. 250 a year, the whole of which amount, namely, Rs. 1,000 was paid in advance. The difficulty in basing a conclusion on this lease has arisen from the uncertainty regarding the quantity of land covered by it. It has been contended on behalf of the appellant that this lease covered an area of 6 bighas only as it is expressly stated in the lease to belong to khasra No. 2. It appears from Ex. 2 that khasra No. 2 of Mouza Shampur has an area of 6 bighas and 5 cottas only. It has, however, been contended on behalf of the Secretary of State that Shampur is different from Belpahar, and that, therefore, Ex. 2, the khasra of Shampur, gives no indication of the quantity of land covered by the lease. As has been pointed out by D. Chatterjee, J., the witness 1 examined on behalf of the first

1. (1907) 11 C W N 875.

party stated in the very beginning of his examination-in-chief,

"I know the Bandi Khord and Shampur mahal. Shampur is also known as Belpahari",

and there was was no cross examination on the point. I cannot think that the statement like this would have gone unchallenged if it were untrue. Assuming, however, that the lease covered the whole of the waste land of the mauza, as pointed out by D. Chatterjee, J., it would cover an area of 20 bighas. It was, however, claimed by claimant 2 that the lease covered the entire area of the mauza, but it is clear that his lease was in respect of the Khaspalit hill excepting the settled land and lands cultivated by tenants. On the footing of the lease covering an area of 20 bighas, the rent for four years of 127 bighas would amount to Rs. 6,350. It is not, however, shown that four years' quarrying by Atkinson would have exhausted the entire quantity of stone and left the property wholly valueless. All that can be said on the basis of this lease is that the value should in no case be less than Rs. 6,350.

The third basis of valuation is the provisional agreement between claimant 2 and the Engineer-in-Chief of the Lower Ganges Bridge. By that lease the lessee agreed to pay to Atkinson for Belpahar a rental of Rs. 42 per annum for the period from April 1909 to October 1912. Three other mauzas were also included in this lease on similar terms with a difference in the rent. When the Secretary of State took possession in December 1909 the lease had 35 months yet to run. If that lease had been in force under its terms as subsequently varied, Atkinson would have received for Belpahari Rs. 42 into 35—Rs. 1,470 as rent and royalty calculated on a minimum quantity of 40,000 cubic feet of stone per month at the rate of 7 annas per hundred cubic feet, which would have amounted to Rs. 6,125, the whole amounting to Rs. 7,595. The only question as to the acceptance of this basis is that the lease was terminable on a month's notice. No doubt the lessee guarded himself against contingencies by this special provision, but there is nothing to show that such an option was at all likely to be exercised by the lessee. It is noticeable that in accordance with the terms of the provisional lease a formal lease was subsequently executed in respect of the three other mauzas. When the evidence in Court was being recorded, the term of the lease of the three mauzas had expired and yet there is not a word in the evidence to suggest that as regards those mauzas the option had to be exercised in any case and I have no reason to think that the term of the provisional lease, namely, the period from April 1909 to October 1912 did not represent an expectation on the part of the lessee to continue quarrying till the end of the lease. The reason why Belpahar had to be acquired, instead of being held in lease like the other three mauzas, was that there was a defect in the title of the lessor. That, however, does not affect the present question. The valuation on this basis is strongly supported by the valuation based on Atkinson's lease of 5th August 1908, the difference between Rs. 6,350 and Rs. 7,595 being accounted for by the chance of some value being still left in the quarries at the end of Atkinson's lease, which there is nothing to negative. I would, therefore, agree with the valuation arrived at by D. Chatterjee, J., and decree accordingly.

V.B./R K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 344

FLETCHER AND SHAMSUL HUDA, JJ.

Jogendra Nath Mitra—Plaintiff—Appellant.

v.

Apara Prosad Mukerjee—Defendant—Respondent.

Appeal No. 987 of 1916, Decided on 11th April 1918, from the appellate decree of Sub-J., 2nd Court, Burdwan, D/- 29th January 1916.

Landlord and Tenant—Landlord agreeing to bear cesses—Cesses cannot be recovered.

Where a landlord let out a tenure at Rs. 90 per annum including the cesses:

Held: that the landlord clearly undertook by contract, as between himself and the tenure-holder, that he would bear the cesses. [P 345 C 2]

Bepin Behari Ghose, I—for Appellant.

Sarat Chandra Bysack, Surendra Nath Guha, Narendra Nath Chowdhury for *Bepin Behari Ghose*, 2—for Respondant.

FACTS material to the report will appear from the following extract from the judgment of the lower appellate Court. The only question in controversy between the parties in this appeal is whether plaintiff is entitled to cesses. The judgment of the learned Munsif has been read over. The arguments of the pleaders of both parties were heard. It appears from

the patta granted by plaintiff's predecessor-in-interest to the defendant that the latter is to pay an annual jama of Rs. 90, including cesses. Apparently, therefore, plaintiff cannot get cesses under the contract. The learned pleader for the appellant, however, refers me to the decision in the case of *Mohanund Sahay* v. *Saidunnessa Bibi* (1). It appears that the learned Munsif considered the effect of this decision and I quite agree in the view expressed by him. The circumstances which led to the contract embodied in the patta are peculiar. It appears that the defendant's father held a mokurari jama of Rs. 128 under the plaintiff predecessor. Owing to the outbreak of malaria of a virulent type among the tenantry many of the tenants died while some deserted the village. Consequently there was a considerable falling off in the income of the defendant's father. He accordingly surrendered the jama. The plaintiff's predecessor then remained in khas possession for sometime and saw that the income from the tenants was only Rs. 60. He then persuaded the defendant to take fresh settlement at an annual rental Rs. 90 including cesses. The defendant would sustain a loss of Rs. 30 annually if he agreed to the terms proposed by the landlord, plaintiff's predecessor. If under these circumstences the defendant accepted the lease and the plaintiff's predecessor granted it, can it be reasonably supposed that the intention of the parties to the contract was that the defendant would be called upon to pay the cesses in excess if any imposed in future? In my opinion, having regard to the circumstances under which the lease was accepted by the defendant, the grantor of the lease had no idea of increasing the rent or cesses and that is why the term " there will be no increase or decrease of the jama thus fixed " was incorporated in the patta. It was stipulated that the jama would never be increased. As the jama included rent as well as cesses, it was tantamount to an admission of the grantor of the patta that neither the rent nor the cesses would be increased. In this view I dismiss the appeal with costs and affirm the decree of the first Court.

Judgment.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Burdwan affirming the decision of the Munsif of the same place. The plaintiff, who is the landlord sued for rent the defendant, who was a tenure-holder under him. The only question in the appeal as it was in the Courts below is:

"Is the defendant liable to pay the cesses or did the landlord plaintiff undertake by the contract to bear that liability?"

It is a perfectly clear case, because the property was let out at Rs. 90 per annum including the cesses. The landlord might wisely or unwisely have agreed to that contract and it may be a misfortune that the cesses have been so considerably increased. But notwithstanding that the landlord clearly undertook by contract as between himself and the tenure-holder that he would bear the cesses. That being so, the view adopted by the learned Judge of the lower appellate Court is correct. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. (1909) 8 C L J 525.

A. I. R. 1918 Calcutta 345

RICHARDSON AND BEACHCROFT, JJ.

Mahamad Jalis and *others*—Plaintiffs—Appellants.

v.

Secy. of State—Defendant—Respondent.

Appeals Nos. 1162, 1507 to 1516 of 1915, Decided on 4th February 1918, from appellate decrees of Dist. Judge, Noakali, D/- 27th January 1915.

Limitation Act (1908), Art. 142—Suit for declaration of title and confirmation of possession, plaintiff alleging that he was out of possession—Suit may be treated as one for recovery of possession for purposes of limitation.

Where a plaintiff in a suit for declaration of title and confirmation of possession alleges facts which show that he was out of possession, his suit, even though framed for confirmation of possession, may be treated as one for recovery of possession if his title to recover possession has not been barred by limitation; but where the plaintiff in such a suit makes a case that he is in possession, but fails to prove his possession, the Court will not give him recovery of possession, even though he proves his title and the suit has been instituted within the limitation period prescribed for suits for recovery of possession: 16 *W. R.* 27 and 4 *I. C.* 547, *Expl.*

[P 346 C 2]

Jadu Nath Kanjilal and *Girjia Prosanna Sanyal*—for Appellants.

Ram Charan Mitter—for Respondent.

Richardson, J.—Having read my learned brother's judgment I concur in the conclusion at which he has arrived. The question is merely on which side of the line of demarcation drawn by the

authorities the present case falls. That depends on the facts, and the facts as found bear out the view which the District Judge has taken on the point of law. The appeals are dismissed with costs. We assess the hearing fee in all the appeals at five gold mohurs to be paid in equal shares by the appellants in each case.

Beachcroft, J.—These appeals relate to a large area of riverside land in the Hudrakali Khas Mahal in the Noakhali District. The plaintiffs, who are the appellants, got settlement of some land, bounded on the north by the river, in 1893. Since then there has been a considerable accretion of land on the north side of the plaintiffs' holding and this land has been dealt with in three separate strips. The strip immediately to the north of the plaintiffs' holding was kept as gopat, the strip to the north of that was settled with the plaintiffs in 1905. and the northernmost strip, which is now the riverside land was settled, also in 1905, with some persons other than the plaintiffs. In the present suit the first Court gave the plaintiffs a decree in respect of all the accreted land, but on appeal the District Judge reversed the Munsif's decision in respect of the northernmost strip of land and the present appeals concern only that strip. The learned Judge found that though the plaintiffs had title to the land in dispute as being an accretion to their holding, their suits were barred by limitation as they were not for recovery of possession, but for declaration of title and confirmation of possession. The period of limitation for such a suit is six years and the learned Judge found that the persons with whom the strip in dispute was settled in 1905 had been in possession for over seven years when the suit was brought in 1912.

In appeal it is argued with reference to the question of limitation that though the suit was framed as one for confirmation of possession the Court may treat it as one for recovery of possession and give plaintiffs the appropriate relief, as admittedly the land had only been formed within 12 years of the date of filing the suit. We have been referred to a number of authorities ranging from the case of *Moulvie Abdoollah* v. *Saha Mujeesooddeen* (1) decided in 1871 to the case of *Bisseswari Koer* v. *Ram Protap Singh* (2) decided in 1909. These authorities establish this, that where a plaintiff alleges facts which show that he was out of possession, his suit, even though framed as one for confirmation of possession, may be treated as one for recovery of possession, but where he makes a case that he is in possession and fails to prove his possession, the Court will not give him recovery of possession even though he proves his title. There is no hardship in this rule. Apart from the fact that a plaintiff cannot complain of the Court's refusal to give him relief if he comes with a false story, it is clear that if he came after six years with an allegation that he was in possession and succeeded in proving that possession, his suit would be barred: *Shyamanand Das* v. *Raj Narain Das* (3). It is obvious that he ought not to be placed in a better position because part of his case turns out to be false. In the present case plaintiffs alleged that they were in possession and had brought the land under cultivation at great expense, and they brought their suits because the land had been settled with others. Their allegations have been found to be false. That being so, I am of opinion that the suits were rightly dismissed by the learned District Judge and that these appeals ought to be dismissed with costs.

V.B./R.K. *Appeals dismissed.*

1. (1871) 16 W R 27.
2. (1909) 4 I C 547.
3. (1906) 4 C L J 568.

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FLETCHER AND SHAMSUL HUDA, JJ.

A Vakil, In the matter of.

Civil Rule No. 138 of 1918, Decided on 7th March 1918.

(a) Criminal P. C. (5 of 1898), S. 476—Courts in presidency towns have no power to direct prosecution under S. 476.

Per *Curiam* (*Fletcher, J., dubitante*) S. 476, does not apply to an offence committed before a Court in presidency towns. Consequently, it is not competent to the High Court, acting under S. 476, to direct the prosecution of a person for the offence of forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a probate case. [P 347 C 2]

(b) Criminal P. C. (5 of 1898), Ss. 195 and 476—Scope.

The qualifications mentioned in S. 195, are to be treated as incorporated in the provisions of S. 476. [P 348 C 1]

N. Sarkar, Atulya Charan Bose, Sarat Chandra Chowdhury and *Satya Charan Sinhu*—for Vakil.

Judgment.—This is a Rule issued on a vakil calling on him to show cause why under the provisions of S. 476, Criminal P. C. proceedings should not be taken against him in respect of the evidence given by him in Appeal from Original Decree No. 248 of 1916, or why such other order should not be made with reference to the offences committed by the said vakil before this Court or brought to its notice in these proceedings, as to this Court may seem fit. The appeal was heard by myself and Shamsul Huda, J. It was a probate case, and agreeing with the decision of the learned District Judge, we found that the will was a forgery. Sanction to prosecute the appellant in the apeal had been granted by the lower Court and, on the will or the document said to be the will, the vakil's name appeared as one of the attesting witnesses. The vakil did not give evidence in the Court below, nor did he appear before the Commissioner under the commission issued by the lower Court for the purpose of taking his evidence. He stated that the parties had informed him that they did not require his evidence. We directed him to appear before us and with the consent of all parties his evidence was taken in this Court. He swore that the signature appearing on the alleged will, where his name appeared as one of the attesting witnesses, was not his signature. We did not agree with that view.

We had before us documents which had been filed in this Court by him—Vakalatnamas—for the purpose of comparison and we came to the conclusion that the signature apparently was his. Having regard to his evidence and the circumstances of the case, we thought that we should not allow the case to rest where it was, more especially so, as the person against whom this Rule was issued was a person practising in this Court as one of the qualified practitioners. We therefore issued the present Rule. On the hearing of the Rule, it has been objected, first of all, that S. 476, Criminal P. C., does not apply to an offence committed before a Court in the presidency town and, secondly, that even if it does, the qualification in S. 195, Criminal P. C., must be read into S. 476 and therefore except as regards the statements made in his evidence, it would not be competent to this Court acting under S. 476 to direct the prosecution of the vakil for the offence of forging or abetting the forging of the will. To deal with the first point first, reliance has been placed on the decision of this Court in the case of *Kedar Nath Kar* v. *Emperor* (1), where the learned Judge remarked:

"We have considered the course which we should take in the matter. S. 476, Criminal P. C. does not appear to provide for the case of an offence before a Court in a presidency town. It empowers a Court to send a case for inquiry or trial to the nearest Magistrate of the first class. But the nearest Magistrate, namely, the Presidency Magistrate, is not a Magistrate of the first Class."

Speaking for myself, I think that it may be open to question whether the nearest Magistrate of the first class is not a person who can be quite easily distinguished from the nearest Magistrate. The nearest Magistrate of the first class can be distinguished from all other Magistrates surrounding the High Court, whether they fall under the distinction of Presidency Magistrates salaried or not or Magistrates of a class inferior to the first. However the decision referred to is in favour of the vakil and, in my opinion, before we can differ from that decision, it would be necessary for us to send this case for the consideration of the Full Bench. While I follow this decision with besitation, I think in a case like the present, rather than to send the case for the decision of the Full Bench which would involve considerable time, it would be more convenient to adopt the procedure that was suggested in that case and to send the case to the legal remembrancer with the present judgment for such action as he may think proper.

The other point, namely, whether the qualification mentioned in S. 195 ought to be read into S. 476 is again a matter on which judicial decision is not all one way. There is the decision in *Akhil Chandra Sen* v. *Queen-Empress* (2). It seems to follow from the judgment that the qualification in S. 195 is not to be read into the provisions of S. 476. But again there is a decision the other way reported as *Jadunandan Singh* v. *Emperor* (3). There the learned Judges held, whilst recognizing that the course of decision was not all one way, that the

1. (1906) 3 C L J 357.
2. (1895) 22 Cal 1004.
3. (1910) 37 Cal 250=4 I C 710.

recent decision of this Court was in favour of the view that the qualification mentioned in the former section, that is, S. 195 was to be treated as incorporated in the latter provision, that is, S. 476. The same view was taken in the case of *Debilal* v. *Dhajadhari Goshame* (4). Again in that conflict of authority, I think it would not be right for us in this case, specially in a case of this nature, to depart from the more recent authorities and to hold that the qualification mentioned in S. 195 does not apply to S. 476. That is a matter which, I think, if it has got to be determined, ought not to be determined in a case of the present nature but in some other proceedings where both sides are properly represented.

In the result, we follow the course, adopted in the case of *Kedar Nath Kar* v. *Emperor* (1) and direct that the judgment and the papers in the case be laid before the legal remembrancer for inquiry and for such action as he thinks proper. In the event of the legal remembrancer desiring to take action in the matter, he should apply on notice to the party to be proceeded against and stating the result of such inquiry for sanction to prosecute. The Rule is discharged.

V.B./R.K. *Rule discharged.*

4. (1911) 9 I C 577.

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FLETCHER AND TEUNON, JJ.

Bepin Krishna Kumar and *others*—Defendants—Appellants,

v.

Hari Das Ghose and *others*—Plaintiffs—Respondents.

Appeal No. 710 of 1916, Decided on 23rd June 1916, from appellate decree of Sub-Judge., 3rd Court, Hooghly, D/- 17th December 1913.

Bengal Tenancy Act (1885), Ss. 105-A and 109—Settlement Officer can decide status of tenant—Decision by Settlement Officer—Suit for declaration of status does not lie in Civil Court.

Under S. 105-A, Ben. Ten. Act, a Settlement Officer hearing an application for the settlement of a fair rent is authorised to decide whether the tenant belongs to a class different from that to which he is shown in the Record of Rights as belonging. When a Settlement Officer has decided that question, it is not competent to a Civil Court, having regard to the terms of S. 109 of the Act, to entertain a suit for a declaration of the status of the tenant. [P 349 C 1]

Jyoti Prosad Sarbadhicary and *Jogendra Nath Dutt*—for Appellants.

Hemendra Nath Sen and *Jatindra Mohan Sen Gupta*—for Respondents.

Fletcher, J.—This is an appeal by the defendant against the judgment of the learned Subordinate Judge of Hooghly, dated 17th December 1913, affirming the decision of the Munsif at Howrah. The suit was brought by the plaintiffs, the tenants, against the defendants, the landlords, for a declaration that the entry in the Record of Rights was wrong and that they were permanent tenants at a fixed rate and not settled raiyats as entered in the record. The Record of Rights in this case was finally published on 29th October 1907; that is, after the date on which Act I (B. C.) of 1907 came into force, which amended the Bengal Tenancy Act by adding a new section (section 105 A). On 29th November 1907 an application was made by the landlords, the defendants, under the provisions of S. 105 for settlement of a fair rent. On 28th February 1908 an order was passed settling a fair rent under which the rent of the tenants was somewhat enhanced.

Then the tenants brought the present suit. The only question is whether the present suit is maintainable. Before S. 105-A came into force, the decisions of this Court show that, when the Settlement Officer was dealing with an application to settle a fair and equitable rent, he could not go behind the Record of Rights. He was bound to accept the entries that appeared there. That was the view which Teunon, J., and myself took in the case of *Shashi Bhusan Hazrah* v. *Sheikh Esabar Ali* (1). It appears that the record in that case was finally published in the year 1903. It was clearly a case to which Act I (B. C.) of 1907, which enacted for the first time S. 105-A, could not apply. But the present case must be dealt with with reference to the new section that has been added by Act I (B. C.) of 1907. Now, S. 105-A was expressly enacted to meet the objection that had been raised in the cases referred to, so as to enable the Settlement Officer who was hearing an application for settlement of rent to decide certain issues which the Court had held that he was not entitled to decide in an application under S. 105. Amongst those issues which the Settlement Officer was authorised to decide by

1. (1915) 29 I C 122.

S. 105-A was issue No. (e) of that section, namely, whether the tenant belonged to a class different from that to which he was shown in the Record of Rights as belonging. That being so, it is quite clear that the Settlement Officer had in this case jurisdiction to enquire as to whether the tenants belonged to the class to which they were shown in the Record of Rights. The question is, "did he so enquire"? It is quite clear that he did. The written statement set up a case that the rent was not liable to enhancement. The learned Settlement Officer by his decision decided that the rent was enhancible and ought to be enhanced.

Therefore, he must have come to a definite and clear conclusion that the status of the tenants was one of tenants whose rent was liable to be enhanced. That being so, under S. 109 of the Act, a Civil Court is prohibited from entertaining any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under Ss. 105 to 108 (both inclusive). That includes, of course, the new S. 105 A. It seems to me quite clear, on a reading of the new section along with S. 109, that, in this case, Settlement Officer having decided that the tenants were not tenants at fixed rates of rent but were liable to have their rents enhanced and their rents having been enhanced, it was not competent to the Civil Court, having regard to the terms of S. 109, to enter into and enquire what was the status of those tenants. That being so, the judgment of the lower appellate Court is, in my opinion, wrong. We should, therefore allow the appeal and dismiss the plaintiffs' suit. The plaintiffs respondents must pay to the defendants-appellants their costs in this Court as well as in the Courts below.

Teunon, J.—I agree.

V.B./R.K. *Appeal allowed.*

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CHATTERJEE AND WALMSLEY, JJ.

Mohammed Soleman—Appellant.

v.

Raghu Nath Dutta—Respondent.

Appeal No. 106 of 1915, Decided on 17th January 1917, from Original Decree of Offg., Sub Judge, Second Court, 24-Pergannas, D/- 22nd February 1915.

Bengal Municipal Act (1884), S. 361—Sale of unclaimed holding—Purchaser is not entitled to priority over existing mortgagee.

Where a sale is held under a Statute, the rights of the purchaser must be governed by that Statute.

The purchaser of an unclaimed holding for arrears of rates under S. 361 is not entitled to claim any priority over a mortgagee whose mortgage was in existence before the sale. [P 349 C 2]

Mohendra Nath Roy and *Wahid Hossain*—for Appellant.

Ram Chandra Mozumdar and *Nagendra Nath Ghose*—for Respondent.

Judgment. — In this case a certain holding in the Manictola Municipality belonged to one Chand Bibi. Chand Bibi in 1910 sold it to one Asutosh Dey, who in August 1911 sold it to defendant 1. On the same date defendant 1 mortgaged the holding to a certain person who again assigned his mortgage-rights to the plaintiff in 1912. In 1914 this holding was sold by the Manictola Municipality for arrears of rates due from September 1910 for ten quarters and the property was purchased by defendant 2 in 1915. Upon the present suit being brought on the mortgage in 1912 by the plaintiff, defendant 2 contends that he has purchased the holding devoid of all encumbrances and that the plaintiff is not entitled to sell the same. The title of defendant 2 is derived under a sale under S. 361, Mofussil Municipal Act. That section authorises the Municipal Commissioners to sell a holding in arrears under certain circumstances and provides that any person may pay the amount due at any time before the completion of the sale and may recover such amount by a suit in a Court of competent jurisdiction from any person beneficially interested in such property. There is, within the four corners of the Act, no provision for creating any charge on the property for arrears of rates and we do not think that any such charge can be presumed from the mere fact that the holding is directed to be sold. When the sale is under a Statute, the rights of the purchaser must be governed by the Statute and here the Statute does not create any charge or other preferential right in favour of the purchaser. Defendant 2, therefore, is not entitled to claim any priority over the plaintiff whose mortgage is clearly before his purchase. This appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 350

RICHARDSON AND BEACHCROFT, JJ.

Khetra Mohan Kundu and *others*—Judgment-debtors—Appellants.

v.

Jogendra Chandra Kundu — Decree-holder—Respondent.

Appeal No. 248 of 1917, Decided on 28th January 1918, from appellate order of Addl. Dist. Judge, Hooghly, D/- 22nd June 1917.

Civil P. C. (5 of 1908), O. 21, R. 35 (1)—Partition suit—Execution—Fresh execution for actual possession after dismissal of execution case on granting formal possession is maintainable.

A decree-holder in a partition suit, who has been given formal possession of the portion of the porperties allotted to him in an execution case which was dismissed after the delivery of the formal possession, can maintain a fresh application in execution for actual possession of the property under sub-R. 1, R. 35, O. 21. [P 350 C 2]

Bijan Kumar Mukherji—for Appellants.

Manmatha Nath Mukerji and *Satindra Nath Mukerji*—for Respondents.

FACTS material to the report will appear from the following judgments of the Subordinate Judge and the Additional District Judge respectively:—"In Partition Suit No. 109 of 1911 the decree-holder got a decree for possession of certain properties, which were allotted to his share. On 15th December 1914, the decree-holder applied for execution of the decree, and on 21st March 1915 he received formal possession of the properties and gave the usual acknowledgment. After that the execution case was dismissed on part satisfaction on 14th April 1915. After disposal of the execution case the decree-holder made an application in that case to be put into actual possession of the properties. On that application the following order was passed by my predecessor-in-office on 20th April 1916:—'As the execution case has been disposed of after delivery of possession no steps can be taken on decree-holder's application for delivery of possession in the manner as prayed for. Hence decree-holder's application is rejected.' The decree-holder has now made a fresh application to be put into actual possession of the properties under sub-R. 1, R. 35 of O. 21, Civil P. C., and his application has been registered as Execution Case No. 95 of 1915. On behalf of the judgment-debtors an application has been made under S. 47, Civil P. C., objecting to the decree-holder's application to be put into actual possession of the properties. It is contended on behalf of the judgment-debtors that the decree-holder having obtained delivery of possession in the previous execution proceedings and given an acknowledgment to that effect is precluded from making a fresh application for delivery of possession. It is also contended that the Court has no power to order delivery of actual possession to the decree-holder, that the present application is barred by reason of the decree-holder's previous application to be put into actual possession of the properties having been rejected on 20th April 1915, and that the decree-holder's only remedy is to bring a suit for recovery of khas possession of the properties.

It is not denied that under the decree in the partition suit the decree-holder is entitled to obtain actual possession of the properties under sub-R. 1, R. 35, O. 21, Civil P. C. Instead of actual possession formal possession was delivered to the decree holder in the previous execution proceedings. The previous execution proceedings were, therefore, incomplete. The decree-holder is entitled to realise the full benefit of his decree, and there is nothing, in my opinion, to preclude him from obtaining actual possession under sub-R. 1, R. 35, O. 21, to which he is entitled under the decree. The order of 20th April 1915 cannot be a bar to present application, as by that order it was only decided that after the disposal of the previous execution case no action could be taken in that case on the decree-holder's application to be put into actual possession of the properties. The judgment-debtor's objections are disallowed, and it is ordered that possession be delivered to the decree-holder under sub-R. 1, R. 35, O. 21, Civil P. C., by removing the judgment-debtors if they refuse to vacate the properties. In Misc. Case No. 74 of 1915 the decree-holder shall get his costs and R. 8 as pleader's fee."

"This is an appeal arising out of certain execution proceedings. There was a partition suit. The property was partitioned. The appellant applied for execution of the decree and was given formal possession of his portion and gave a receipt stating that he had been given possession by the affixing of a bamboo. The execution case was then dismissed on 14th

April 1915. A few days later on 19th April 1915 the appeliant applied to be put into actual possession of his portion. The Sub-Judge rejected the application on the ground that the execution case had been disposed of after delivery of possession and that accordingly no further steps would be taken. Later a fresh application was made for actual possession of the property under sub-R. 1, R. 35, O. 21, Civil P. C.

The Sub-Judge (the successor of the Sub-Judge who had passed the former order) granted the order prayed for. It is now argued on appeal that after the delivery of formal possession no further execution proceedings could be taken; that the only course then open to appellant was to bring a regular suit for possession. The Court having once delivered possession, it is said, exhausted its powers. So far as the Code goes, this would clearly appear not to be the case. It had only given possession by affixing a bamboo. R. 35 confers the further power of ousting people. It is however argued that it has been established by judicial decisions that after formal possession has been delivered nothing more can be done in execution of a decree. *Mohamed Elahee Buksh* v. *Kally Mohun Mookhopadhya* (1), *Lokessur Koer* v. *Purgun Roy* (2), *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (3), *Coventry* v. *Tulsi Prasad* (4) and *Hari Mohan Shaha* v. *Babarali* (5) are cited. In none of these cases were the circumstances identical with those obtaining here. Again these are all decisions of the time before the present Code of Civil Procedure came into existence. Under the circumstances of this case it seems to me it would be a distinct hardship for the appellant to have to bring a separate suit to get separate possession of the portion of the property allotted to him by the partition decree. The learned pleader for the respondent refers to the new S. 151 of the present Civil P. C., and I think it is a case when that section may well be invoked should it indeed be necessary, which I doubt. It is argued again on behalf of the appellant that the principle of res judicata applies in execution proceedings. *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (6) and *Murlidhar Supal* v. *Nursingh Das* (7) are referred to. These cases relate to entirely different circumstances. I do not think the Sub-Judge's order of 20th April 1915 raises the bar of res judicata here. On the whole I see no adequate reason to disagree with the order of the learned Subordinate Judge which is appealed against. The appeal is dismissed. Costs pleader's fee Rs. 8."

Judgment.—This appeal must be dismissed. We are satisfied that the judgment of the Court below is correct. The respondent is entitled to the costs of this appeal. We assess the hearing fee at one gold mohur.

V.B./R.K. *Appeal dismissed.*

1. (1880) 5 Cal 589.
2. (1881) 7 Cal 418.
3. (1885) 11 Cal 93.
4. (1904) 31 Cal 822.
5. (1897) 24 Cal 715.
6. (1882) 8 Cal 51=8 I A 123 (P C).
7. (1911) 10 I C 359.

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GREAVES, J.

Prem Lal Dhar, In re,

Original Insolvency Suit No. 24 of 1917, Decided on 23rd March 1917.

(a) Presidency Towns Insolvency Act (1909), Ss. 53, 108 and 109—S. 53 (1) does not apply to administration under Ss. 108 and 109.

The provisions of S. 53 (1) do not apply to an administration of the insolvent estate of a deceased person under the provisions of Ss. 108 and 109 of that Act. [P 353 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 108—Attachment before administration order does not confer any rights on attaching creditor and sale-proceeds are liable to be distributed rateably between him and other creditors.

An attachment in this country does not create any charge or lien upon the attached property such as attaches in England upon seizure under a writ of fi fa. In this country attachment only prevents alienation, it does not confer any title. An attachment therefore of a deceased judgment-debtor's property in execution of a decree before the date of an administration order under S. 108, Presidency Towns Insolvency Act, does not confer any rights on the attaching creditor, who is relegated to the same position as the other creditors, that is to say, the sale-proceeds are distributable rateably between him and the other creditors. [P 353 C 2]

A. N. Chaudhuri and *J. N. Mitter*—for Official Assignee.

C. C. Ghose—for Messrs. Blackwood, Blackwood & Co.

Judgment.—This is an application in insolvency to set aside an execution sale of an undivided one-fourth share of the

premises No. 58-A 1, Wellington Street, made in Suit No. 694 of 1916, or in the alternative, for an order directing the Sheriff to pay the sale-proceeds to the Official Assignee. The application in terms is to set aside the sale of the premises and no share is specified, but this is clearly wrong. On 24th July 1916 Messrs. Blackwood, Blackwood & Co obtained a decree for Rs. 5,541 8 6 in Suit No. 690 of 1916 against Sreemati Sukumari Dasee, the widow and administratrix of Prem Lal Dhar, deceased. Messrs. Blackwood, Blackwood & Co. on 31st August 1916, in execution of this decree attached, inter alia, an undivided one-fourth share of No. 58-1, Wellington Street, which formed part of the estate of Prem Lal Dhar, deceased. By an order of this Court, dated 8th December 1916, and made in Suit No. 694 of 1916, the Sheriff was directed to sell, inter alia, these premises in execution of the decree and to pay the money arising from such sale, less his poundage and charges, to the Comptroller General of Accounts with the privity of the Accountant General, to be placed by them to the credit of this suit subject to further order. By an order dated 23rd February 1917, made in insolvency, on the petition No. 24 of 1917 of one Upendra Mohan Chowdhury, a creditor of the estate of Prem Lal Dhar deceased, it was ordered that the estate of Prem Lal Dhar deceased should be administered in insolvency.

Notice of this order was given to Messrs. Blackwood, Blackwood & Co.'s attorneys on the same day by the attorney for Upendra Mohan Chowdhury, and the attorney requested them not to proceed further with the execution proceedings. The sale of the premises was ultimately fixed by the Sheriff for the 16th March, this was brought to the notice of the Official Assignee on the 15th March and he thereupon wrote to the Sheriff informing him of the order of the 23rd February and requesting him to stay the sale, and a copy of the letter was sent to Messrs. Blackwood, Blackwood & Co.'s attorneys. The sale ultimately proceeded and the premises were sold. Messrs Blackwood, Blackwood & Co. contended that the order of the 23rd February did not affect their right to proceed with the sale and to be paid the amount of their decree and costs out of the sale-proceeds; the Official Assignee, however, contends that, inasmuch as the premises had not been brought to sale prior to the order of the 23rd February, Messrs. Blackwood, Blackwood & Co. are not entitled to the benefit of the execution against him. S. 109, Presidency Towns Insolvency Act provides (1):

"Upon an order being made for the administration of a deceased debtor's estate under S. 108, the property of the debtor shall vest in the Official Assignee of the Court, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act. (2) With the modification hereinafter mentioned all the provisions of Part 3 relating to the administration of the property of an insolvent shall, so far as the same are applicable, apply to the case of such administration order in like manner as to an order of adjudication under this Act."

The corresponding section of the English Bankruptcy Act, 1914, is S. 130 (4) and (5), this section and these sub-sections corresponding to S. 125 (5) and (6) English Bankruptcy Act, 1883. Part 3, Presidency Towns Insolvency Act, includes S. 53 (1), which is as follows:—

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Official Assignee, except in respect of assets realised in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of any insolvency petition by or against the debtor."

The corresponding section of the Englsh Act of 1914 is S. 40 and of the Act of 1883, S. 45. The English Courts have held that an order for adminstration of the estate of a deceased debtor under S. 125, Bankruptcy Act, 1883, is not equivalent to a receiving order for the purposes of S. 45 of that Act, so as to disentitle an execution creditor of the deceased debtor to retain the benefit of his execution against the trustee of the debtor's estate in cases in which he has not completed the execution before the date of the administration order: see *Hasluck* v. *Clark* (1) The learned Judges point out that S. 125 (S. 108 of our Act) applies to the mode of administration and not to the subject-matter to be administered, and that it dealt with the deceased debtor's estate and nothing else, and Chitty, L. J., points out that the question is not whether the property in the goods passed to the trustee under the administration order, but whether they passed free from the right of the execution creditor. *Hasluck* v. *Clark* (1) is

1. (1898) 2 Q B 26=67 L J Q B 627.

considered in *Johnson* v. *Pickering* (2), and Fletcher Moulton, L. J., states:

"I am satisfied that the effect of the decision in *Hasluck* v. *Clark* (1) is that the property which vests under the administration order in the trustee and is to be administered for the benefit of the creditors of the deceased, is the property of the deceased, subject to any liabilities and rights which attached to it in his hands."

In that case the decision was against the execution creditor because under the circumsances the Court held there had been no seizure, and that, therefore, no charge or lien had attached. In *Hasluck* v. *Clark* (1) the goods had been seized under a writ of fi fa., and although under such seizure the property in the goods remains in the execution debtor under sale, yet after seizure and before sale the execution creditor is, as regards these goods, in the position of a secured creditor and has a legal right as against the execution debtor, the owner of the goods to have the goods sold and to be paid out of the proceeds of sale: *Clarke, In re* (3)· *Williams, Ex parte Davies, In re* (4), *Slater* v. *Pinder* (5) and accordingly under an administration order made under S. 130 (formerly S. 125) English Bankruptcy Act, 1914, the goods pass to the trustee subject to these rights of the execution creditor. The question I have got to decide is whether an attachment in this country has the effect of giving any similar rights to the attaching creditor. If it has then *Hasluck* v. *Clark* (1) is an authority in favour of Messrs. Blackwood Blackwood & Co., and the rights of the Official Assignee are subject to their rights in the sale-proceeds. If however an attachment in this country gives no right to the attaching creditor prior to sale, then *Hasluck* v. *Clark* (1) has no application. My decision is based upon the non-applicability of the provisions of S. 53 (1), Presidency Towns Insolvency Act, to an administration of the insolvent estate of a deceased person under the provisions of Ss. 108 and 109 of that Act, and to this extent I agree with the arguments addressed to me on behalf of Messrs. Blackwood Blackwood & Co., but I am not prepared to assent to their arguments to the full extent, as I do not think that an attachment in this country creates any charge or lien upon the attached property such as attaches in England upon seizure under a writ of fi fa.

Attachment in this country only prevents alienation, it does not conferany title: *Frederick Peacock* v. *Madan Gopal* (6), *Raghunath Das* v. *Sundar Das Khetri* (7). The result is that the principles upon which *Hasluck* v. *Clark* (1) was decided, have no application here and upon the making of the administration order of the property vested in the Official Assignee, and Messrs Blackwood Blackwood & Co. have no rights therein and are relegated to the same position as the other creditors, that is to say, the sale-proceeds are distributable rateably between them and theother creditors. I declare that the Official Assignee is entitled to the sale proceeds of the 1/4th undivided share of the premises No. 58-1. Wellington Street, sold in Suit No. 694 of 1916, in the hands of the Sheriff, in priority to Messrs. Blackwood Blackwood & Co. Suit No. 694 of 1916. is not before me and I can therefore, in view of the order in that suit make no order upon this application for payment by the Sheriff to the Official Assignee of the sale proceeds of the 1/4th undivided share.

V.B./R K. *Order accordingly.*

2. (1908) 1 K B 1=77 L J K B 13
3. (1898) 1 Ch 336=67 L J Ch 234.
4. (1872) 7 Ch A 314.
5. (1871) 6 Ex 228.=41 L J Ex. 66.
6. (1902) 29 Cal 423.
7. A I R 1914 P C 129=42 Cal 72=24 I C 304=41 I A 251 (P C)

A. I. R. 1918 Calcutta 353

MOOKERJEE AND BEACHCROFT, JJ.

Moni Lal Seat—Appellant.

v.

Nepal Chandra Pal and *others*—Respondents.

Appeal No. 242 of 1917, Decided on 22nd August 1917, against the order of Dist. Judge, Hooghly, D/- 16th June 1917.

(a) Lunacy Act, (1912), Ss. 3 (11) and 62 —Wife's brother is "relative".

The brother of the wife is related by marriage to the husband of his sister and is, therefore, a "relative" within the meaning of S. 3 (11), and is competent to make an application for inquisition under S. 62 of the Act. [P 345 C 1]

A narrow construction should not be placed upon the term "relative" as defined in S. 3, Cl. (11). [P 354 C 2]

(b) Lunacy Act (1912), S. 61.—S. 61 and rules thereunder are inapplicable to cases outside Presidency Towns.

S. 61 and the rules framed thereunder are applicable only to cases in Presidency Towns, and in the absence of rules applicable to cases outside the Presidency Towns those rules cannot be made applicable to such cases. [P 355 C 1]

(c) Civil P. C. (1908), S. 141—District Judge can take proceedings on application under Lunacy Act (1912), S. 62.

Under S. 141, the provisions of the Code are applicable to proceedings under the Lunacy Act, and consequently, a District Judge is competent to take proceedings on the basis of an application under S. 62, Lunacy Act, if such application is duly verified in the manner provided for in the Civil Procedure Code. [P 355 C 1]

Dwarka Nath Mitter and *Debendra Nath Mondal*—for Appellant.

Sasi Shekhar Bose—for Respondents.

Judgment.—This appeal is directed against an order for inquisition made under the Lunacy Act, 1912. The proceedings were initiated on an application on 27th March 1917 by one Nepal Chandra Pal, who stated that the husband of his sister, Moni Lal Seal, was a lunatic and that it was necessary to take proceedings under the Lunacy Act for the care of his person and for the management of his estate. The petition was only verified by Nepal Chandra Pal, who affirmed the truth of the statements material for the institution of the proceedings. The District Judge, notwithstanding the opposition of the lunatic and his brother, has directed an inquisition. That order has been assailed before us on the ground that the application should not have been at all entertained. Two questions consequently require consideration; namely, first whether the petitioner was competent to present the application, and, secondly, whether the District Judge could take action on the verified petition presented to him.

As regards the first question, we observe that under S. 63, Lunacy Act, 1912, an application for inquisition under S 62, may be made by any relative of the alleged lunatic, or by any public curator appointed under the Succession Property Protection Act, 1841, or by the Government Pleader, as defined in the Civil P. C. 1908, or, if the porperty of the alleged lunatic consists in whole or in part of land or any interest in land, by the Collector of the district in which it is situate. The term "relative," as defined in Cl. (11), S. 3, includes any person related by blood, marriage or adoption. The brother of the wife must, we think, be deemed a "relative" within the meaning of this clause; he is plainly related by marriage to the husband of his sister, and it would not be right to restrict the term only to the husband or the wife. A question may hereafter possibly arise, what limitation, if any, should be placed on the term in a case of this description; it is not necessary for our present purpose to consider, whether every blood relation of the wife is a relative of the husband within the meaning of S. 3 (11). But we may observe that the cases in England seem to show that a narrow construction should not be placed upon the expression. Eldon, L. C., *Ex. parte Ojle* (1), held that even a stranger may be permitted, in a proper case, without regard to his motive, to move the Lord Chancellor for the institution of a proceeding and the issue of an inquisition. A similar view was taken by Cottenham, L. C., in *In re Neslitt* (2), where he laid down the qualification that even amongst people who are connected by blood, although the carriage of the proceedings should ordinarily be given to the nearest of kins, yet the carriage, in the case of a contest, might be given to the party who was most likely to bring out the whole truth. If the Indian Legislature had intended to put a restricted meaning upon the term "relative", the interpretation clause in S. 341, English Lunacy Act, 1890, might well have been adopted, and it might have been stated that

"the term 'relative' means lineal ancestors or lineal descendants or lineal descendants of ancestors not more remote than great-grandfather and great-grandmother.

In our opinion, the brother-in-law was unquestionably a relative within the meaning of S. 63, Lunacy Act, 1912. As regards the second question, we have been pressed to hold that the application should not have been entertained by the District Judge, as it was not accompanied by two medical certificates, such as are required in similar cases on the original side of this Court. It has been urged in substance that in the abssnce of rules applicable to cases outside the Presidency towns, the same procedure should be followed as has been prescribed by this Court for cases in Calcutta. We are unable to accept this contention as sound and reasonable. The Legislature deliberately made S. 60 applicable only to cases in the Presidency towns. That section provides that the Court may, from time to time, make rules for the purpose of carrying into effect the provisions of Ch. 4, in matters of lunacy. Under that sec-

1. (1808) 15 Ves. (Jun.) 112=33 E R 697.
2. (1847) 2 P L 245.

tion, this Court has framed a rule to the effect that every application on the original side should set out certain particulars and should be supported by duly verified certificates of at least two medical practitioners and by an application of the proposed guardian or manager. We are of opinion that this rule is not only not applicable to cases outside the Presidency towns, but that it should not be made applicable to such cases. It is conceivable that, in cases outside the Presidency towns, the production of two medical certificates of the kind mentioned may be impracticable in many instances. This is precisely a matter in which the conditions in the presidency towns and in places outside are so widely different that it would be most unreasonable to hold that rules intended for the Presidency towns should be extended to places outside.

It may be pointed out that under S. 141, Civil P. C., 1908, the provisions of that Code are applicable to proceedings of this character; for that section lays down that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. That this is a proceeding in a Court of civil jurisdiction is clear from the fact that the term "District Court" is defined in section 3 (3) as the principal civil Court of orginal jurisdiction in any ares outside the local limits, for the time being, of the presidency towns. This view was first taken by Sir Barnes Peacock, C. J., in the case of *Maharajah Jagunnath Sahee Deo* v. *Burra Lal Upendronath Sahee Deo* (3) and was followed in *Busrut Ali Chowdhry* v. *Eshan Chunder Roy* (4). Consequently, all applications for the initiation of proceedings under the Lunacy Act 1912, must be verfied in the same manner as is provided in the Code of Civil Procedure. This clearly furnishes a sufficient safeguard against the institution of vexatious or unfounded proceedings of the kind contemplated by Sir Richard Couch, C. J., in the case of *Baboo Gunga Pershad Sahoo* v. *Mt. Wooma Koower* (5). If a proceeding is sought to be instituted upon a verified application which contains statements untrue to the knowledge of the petitioner, criminal proceedings of a deterrent character may easily be adopted against him. In the present case, the application was duly verified, and the District Judge was competent to take proceedings on its basis. The result is that the order of the Court below is affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold mohur.

V.B /R.K. *Appeal dismissed.*

3. (1866) 5 W R Mis 54.
4. (1867) 7 W R 267.
5. (1872) 18 W R 326.

A. I. R. 1918 Calcutta 355

FLETCHER AND NEWBOULD, JJ.

Dhuki Ram Dhok— Defendant — Appellant.

v.

Matabi Bibi—Plaintiff—Respondent.

Appeal No. 683 of 1915, Decided on 18th April 1917, from appellate decree of Sub-Judge, 2nd Court, 24-Pargannahs, D/- 8th March 1915.

Landlord and Tenant—Ejectment—Tenancy-at-will—To determine tenancy only reasonable notice is necessary—Notice whether reasonable is question of fact—Civil P.C., S. 100.

To determine a tenancy-at-will the notice to quit necessary to be given to the tenant need not be anything more than a reasonable notice. What is a reasonable notice is largely a question of fact. A tenant-at-will can never be entitled to a notice of anything like the length of six months.

[P 356 C 1]

Harendra Kumar Sarbadhikary —for Appellant.

Fletcher, J.—This is an appeal by the defendant against a judgment of the learned Subordinate Judge of the Second Court of the 24 Pargannahs affirming the decision of the Munsif of the Second Court of Alipore. The plaintiff brought the suit for ejectment after service of a notice to quit. The only point urged in this appeal is about the sufficiency of the notice. The learned Judge of the lower appellate Court has found that the notice was a six months notice expiring at the end of the Bengali year. But the notice was not served six clear months before because apparently it was served about the 1st Kartik and, to give six clear months, it ought to have been served not later than the last day of Aswin. But the finding is that the defendant is a tenant-at-will of the plaintiff. Both the lower Courts have found that the tenancy is of that nature, and as it is a tenancy-at-will, it is manifest that the Court could find that this notice served about the 1st Kartik expiring at the end of the Bengali year was

a reasonable notice. The question what is a reasonable notice is largely a question of fact, although as regards tenancies of certain nature, the Court has laid down definitely as a rule of law that the notice must be of a particular length of time. But in the case of a tenancy-at-will, it was never laid down as to what was the length required. The learned Judge had manifestly evidence before him in finding that this notice was a good and valid notice. I cannot imagine that any tenant-at-will is entitled to a notice of anything like the length of six months as given in the present case. The present appeal fails and must be dismissed. No one appearing for the respondent, we make no order as to costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 356

FLETCHER AND RICHARDSON, JJ.

Khalil Rahman and *others* — Defendants—Appellants.

v.

Kafiluddin Dalal—Plaintiff—Respondent.

Appeal No. 1542 of 1912, Decided on 15th February 1917, from appellate decree of Dist. Judge, Noakhali, D/- 26th January 1912.

(a) Bengal Tenancy Act (1885), Sch. 3, Art. 3—Limitation—Kaimi raiyat dispossessed before passing of Amendment Act (E. B. and Assam)—Limitation for suit for recovery of possession is 12 years and not two as under amended Act.

Where a kaimi raiyat (a raiyat holding at fixed rates was dispossesssed by his landlord shortly before the paesing of the Bengal Tenancy Amendment Act (E. B. and Assam):

Held: that the limitation applicable to his suit for recovery of possession was 12 years under the law as it stood before the passing of the Amendment Act, and not two years under Art. 3, Sch. 3, Ben. Ten. Act, as amended. [P 356 C 2]

(b) Practice—Full Bench—Division Bench can follow decision of Court with which it is not in full approval and is not bound to refer case to Full Bench—Precedent.

Obiter dictum.—A Divison Bench of the High Court is not bound to refer any particular case to a Full Bench but can decide it by following a decision of the Court with which it is not in full approval: 20 *I C* 821; *Foll. though not Appr.*

[P 357 C 1]

Brojendra Nath Chatterjee—for Appellants.

Dhirandra Lai Kastgir—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned District Judge of Noakhali, dated 26th January 1912, reversing the decision of the Munsif at Hatiya. The plaintiff, who was the purchaser of a raiyati holding from which he had been dispossessed by the defendant, sued to recover possession. The suit was dismissed by the Court of first instance. On appeal, the learned District Judge has reversed that decision. The suit was instituted as long ago as July 1910 and was valued at the sum of Rs. 25. The dispossession, according to the first Court, took place in April 1908. The amendment of the Bengal Tenancy Act by Art 3, Sch. 3, came into force in May 1908. If the first Court's finding, remains unaffected, it has been argued that the dispossession took place more than two years before the institution of the suit and the suit was therefore barred by Art. 3, Sch. 3. In the judgment of the learned District Judge, no finding has been made on what date the dispossession took place; but it has been found that it took place rscently. Although the learned Judge has given us no idea as to what he means by recently, it cannot be much less than two years, because the plaintiff alleges in his plaint that the dispossession took place in Sravan 1315, which would be July or August 1908. In that view of the case two points are open. First of all, if the two years' rule of limitation is to apply under Art. 3, Sch. 3, it would be essential to have a finding of fact as to on what date the actual dispossession took place; because in any case the dispossession took place, according to the plaintiff and according to the finding made by the first Court, not much on one side or the other of the period of two years. But if the view is that the suit is not governed by the period laid down in Art. 3, Sch 3, Ben. Ten. Act, but the period of limitation is 12 years then, having regard to the finding of the learned Judge that the dispossession has been recent, the suit was amply within time. This point is covered by judicial decisions. The decision of this Court in the case of *Budhu Kumar* v. *Hafiz Hussain* (1) has expressly stated that notwithstanding the judgment of the Judicial Committee of the Privy Council in the case of *Soni Ram* v. *Kanhaiya Lal* (2), the rule laid down in the case of *Manjuri Bibi* v. *Akkel Mahmud* (3) is good law and re-

1. (1913) 20 I C 821.
2. (1913) 35 All 227=40 I A 74 (P C).
3. (1913) 19 I C 793.

mains unaffected. It may be said that the Special Bench in the case of *Gopeshwar Pal* v. *Jiban Chandra Chandra* (4) has cast a considerable amount of doubt on the second proposition said to be established by *Manjnri Bibi's* case (3). But the judgment of the Special Bench did not consider the decision in *Budhu Kumar* v. *Hafiz Hussain* (1) and as at present matters stand, the decision in *Budhu Kumar* v. *Hafiz Hussain* (1) must be taken as a binding decision in this Court. In that view unless we are prepared to refer this case to a Full Bench for consideration as to whether the case of *Budhu Kumar* v. *Hafiz Hussain* (1) was correctly decided, we are bound by it. We are not bound to refer any particular case to a Full Bench ; we may follow a decision of this Court with which we are not in full approval. I think we ought not to refer a case of this nature where the litigation is going on practically for seven years for a property valued at Rs. 25 only for consideration on the point. It will be sufficient for us to say that we follow without expressing any approval the decision in the case of *Budhu Kumar* v. *Hafiz Hussain* (1). That being so the present appeal fails and must be dismissed with costs.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

4. A I R 1914 Cal 806=41 Cal 1125=24 I C 37.

A. I. R. 1918 Calcutta 357

FLETCHER AND RICHARDSON, JJ.

Manindra Chandra Nandi—Plaintiff—Appellant.

v.

Srinibash Kasya and *another*—Defendants—Respondents.

Appeal No. 2001 of 1915, Decided on 8th February 1917, from appellate decree of Dist. Judge, Rajshahye.

Bengal Tenancy Act (1885), Ss. 29 and 42—Stipulation in kabuliyat—Certain sum payable as cash rent and rest not to become payable until property comes to be settled again—True rent if smaller sum larger sum cannot be recovered if put as attempt to override S. 29.

In a case where under the terms of a kabuliyat by an occupancy raiyat a certain sum is given as cash rent payable, and the rest of the rent is stated as not becoming payable until the property comes to be settled again, before it can be decided whether the higher rent is recoverable, having regard to the provisions of S. 29 it must be found and judicially determined which of the two sums mentioned in the kabuliyat is the true rent.

[P 357 C 2]

If the bigger sum is the true rent, the mere fact that the landlord has given a temporary remission would not deprive him from claiming the true rent at a subsequent period. But if the true rent is the smaller sum, then the larger sum cannot be recovered if it has been put in the kabuliyat as an attempt to override the provisions of S. 29. *A I R* 1914 *Cal* 64, *Ref.*

[P 357 C 2]

Rash Behari Ghose, *Ram Charan Mitter*, *Jogesh Chandra De*, *Hemendra Nath Sen* and *Sarat Coomar Mitter*—for Appellant.

Fletcher, J—This appeal is preferred against a decision of the learned District Judge of Rajshahye, dated 13th May 1915, affirming the decision of the Munsif at Naogaon. The suit was brought to recover rent under the terms of a kabuliyat for lands that had been let out to the defendants. The suit was undefended. The case turns on a kabuliyat in a form which my experience for the last few weeks in this Bench shows is a form which is very largely adopted by the zemindars in Bengal that is, that a certain sum is given as the cash rent, if one may use the expression, the rest of the rent, owing to the tender-heartedness of the landlord, not becoming payable until the property comes to be settled again. It may be suggested of course, in a proper case when the proper facts have been found that that is merely a means or attempt by the landlord to override the statutory provisions laid down in S. 29, Ben. Ten. Act and to enhance the rent of the tenants beyond the statutory limit. But of course, before that can be decided, it has got to be found out and judicially determined which of the two sums mentioned in the kabuliyat is the true rent. If the bigger sum is the true rent, of course the mere fact that the landlord has given a temporary remission would not deprive him from claiming the true rent at a subsequent period. But if it is found, as in the case of *Mahamaya Kar* v. *Kishore Chang* (1), that the true rent is the smalfer sum, then the larger sum cannot be recovered because it was merely put in the kabuliyat as an attempt to override the provisions of S. 29, Ben. Ten. Act. The decree of the lower appellate Court must accordingly be set aside and the case must go back to the learned Judge of that Court to make a finding on the evidence on the record which of these two sums, namely, Rs. 12 and

1. A I R 1914 Cal 64=21 I C 948.

Rs. 17-14-8 mentioned in the kabuliyat is, in fact, the true rent agreed to be paid by the tenants, and then to dispose of the case according to law. We make no order as to costs.

Richardson, J.—I agree. The question is what was the real or true rent of the holding at the time the contract was entered into.

V.B./R.K. *Case sent back.*

A. I. R. 1918 Calcutta 358

MOOKERJEE AND WALMSLEY, JJ.

Nagendra Bala Dassi—Decree-holder—Appellant.

v.

Debendra Nath Mahis and *others*—Judgment-debtors—Respondents.

Appeal No. 87 of 1916, Decided on 29th August 1917, from order of Sub-Judge, Midnapore, D/- 11th March 1916.

(a) Civil P. C. (1908), S. 47—Assignment of decree in favour of *N*—*N* applying for substitution of name—Judgment-debtors contending that *N's* husband was real assignee—*N's* husband not being party to execution no question could be decided as between him and his wife as to who was beneficial owner of decree

N took an assignment of a mortgage-decree and applied to the execution Court to have her name substituted in the place of the decree-holder. The judgment-debtors lodged an objection to the effect that *N* was not the real assignee of the decree, but that her husband, who was the pleader for the judgment-debtors in the execution case, was the real purchaser of the decree, and that the effect of the purchase of the decree by the pleader for the judgment-debtors was to satisfy the decree and to discharge the judgment-debtors:

Held: that the pleader was not and could not be a party to the execution case and no question could consequently be decided as between him and his wife as to who was the beneficial owner of the decree. [P 359 C 1]

(b) Trusts Act (1882), S. 88—Purchase of decree by pleader for judgment-debtor—Effect is not to satisfy decree and release judgment-debtor although pleader holds decree in trust for client—Re-conveyance will be decreed only on equitable terms.

That the effect of the purchase of a decree by the pleader for the judgment-debtors is not to satisfy the decree and to release the judgment-debtors from their liability, although the pleader holds the decree assigned to him in trust for his clients, and if called upon by his client to do so, is bound to assign the decree to him. No Court will however decree such a re-conveyance except upon equitable terms. [P 359 C 2]

C. R. Dass, *Biraj Mohun Majumdar* and *Mohini Mohun Chatterjee*—for Appellant.

Brojalal Chakravartty and *Santimoy Majumdar*—for Respondents.

Judgment.—This is an appeal against an order in an execution case to the effect that the decree must be considered as satisfied and the judgment debtors fully discharged. The events which have led up to this order are not in controversy at this stage. On 19th February 1907, Rani Mrinalini, wife of Raja Narendra Lal Khan of Narajole, obtained a consent decree in a mortgage suit against the respondents. There were various proceedings in execution, which need not be recited for our present purpose. On 15th February 1915, the present appellant, Nagendra Bala Dassi, applied to the execution Court to have her name substituted in the place of the decree-holder, on the allegation that she had taken an assignment of the decree on 7th February 1915. On 20th February 1915, the original decree-holder intimated to the Court that she had transferred the decree and had no objection to the grant of the application. The judgment-debtors took time to put in objections, but as they did not enter appearance on the day fixed, the name of the appellant was duly substituted and execution was directed to proceed at her instance. Four of the judgment-debtors subsequently applied to the Court to re-consider the matter and their application was granted. Thereupon, they lodged an objection to the effect that the appellant had not really taken an assignment of the decree, but that her husband Babu Nabakumar Hazra, who was the pleader for the judgment-debtors in the execution case, was the purchaser of the decree and had put forward his wife as the ostensible transferee. The Subordinate Judge then proceeded to determine the question, whether Nagendra Bala Dasi or Babu Nabakumar Hazra had taken an assignment of the decree and came to the conclusion that the pleader had purchased the decree with his own money. The Subordinate Judge also found that the assignment had been taken for Rs. 11,500, while a much larger sum was due under the decree.

The Subordinate Judge next proceeded to consider what he calls the legal and equitable aspect of this transaction and held that the effect of the purchase of the decree by the pleader for the judgment-debtors was to satisfy the decree and to discharge the judgment-debtors. Nagendra Bala Dassi has now appealed to this Court, and on her behalf the decision of

Subordinate Judge has been assailed substantially on two grounds, namely, first, that the evidence does not establish that she was not the real purchaser of the decree, assuming that the question can be raised in execution proceedings, and secondly, that the decree cannot be treated as extinguished even if it be found that her husband had made the purchase with his own money. We are of opinion that the order of the Subordinate Judge cannot possibly be supported. In the first place, the Subordinate Judge has decided the question of the reality of the assignment of the decree to the appellant, as if her husband were a party to the present proceedings. The pleader, however, is not and could not be a party to the execution proceedings, and no question could consequently be decided as between him and his wife as to who was the beneficial owner of the decree.

In the second place, even if it were assumed that the pleader had taken an assignment of the decree (which we do not decide upon the evidence) it is plain that the decree could not be deemed as extinguished and the judgment-debtor treated as fully discharged. The Subordinate Judge has not correctly appreciated the law applicable to cases of this character. It is well settled that while the relation of pleader and client continues, the pleader cannot as against his client acquire absolutely a beneficial interest in or title to the subject-matter of the litigation antagonistic to that of his client; in the language of the framers of S 88, Trusts Act, 1882, a legal adviser, who under such circumstances gains a pecuniary advantage, must hold for the benefit of his client the advantage so gained. The reason for this rule is obvious; no person in position of a pleader, who rightly enjoys the confidence of his client, can be allowed to derive any benefit to the detriment of his client by reason of information acquired during the course of his employment. In *Hobday* v. *Peters* (1) a mortgagor consulted a solicitor who turned her over to his clerk to assist her gratuitously. The clerk, by reason of information derived during such consultation, bought up the mortgage for less than half the amount. It was ruled by Romilly, M. R., that he was a trustee for the benefit of the mortgagor. In *Macleod* v. *Jones* (2) a solicitor who had purchased securities given by his client for smaller sums than the amount secured, was not allowed to hold the purchased securities as a security to himself for a larger sum than the amount which he had expended in making the purchase. But as the Court had a discretion with regard to the allowance of interest in such cases, the solicitor was allowed five per cent on the sum he had expended in making the purchase. *Macleod* v. *Jones* (3), *Unsworth's Trust, Re* (4) and *Douglas* v. *Culverwell* (5).

The leading decision on the subject is that of *Carter* v. *Palmer* (6), where the House of Lords ruled that employment of counsel as legal adviser disqualified him from purchasing for his own benefit charges on his client's estates without provision, and that even though the confidential employment ceases, the disability continues as long as the reason on which it is founded continues to operate. *Broun* v. *Kennedy* (7). *Pisani* v. *Attorney-General (Gibraltar)* (8), *MacPherson* v. *Watt* (9) *Luddy's Trustee* v. *Peard* (10), *Rhodes* v. *Bate* (11) and *Austin* v. *Chambers* (12). These principles have been recognized and applied in a variety of cases in Indian Courts: *Fuzeelun Beebee* v. *Omdah Beebee* (13), *Nundeeput Matha* v. *Mr. Alexander Shaw Urguhart* (14), *Subbarayudu* v. *Kotayya* (15), *Aghore Nath Chuckerbutty* v. *Ram Churn Chuckerbutty* (16) and *Goshain Jug Roop Geer* v. *Chingun Lal* (17). These cases however do not support the view taken by the Subordinate Judge. Assume that a decree for Rs. 10,000 has been purchased, by the pleader for the judgment debtor, from the decree-holder for Rs. 5,000. On principle and on the authorities, the pleader holds the decree assigned to him in trust for his client, and, if called upon by his client to do so, is bound to assign the decree to him. But no Court will de-

1. (1860) 28 Beav 349=29 L J Ch 780.
2. (1883) 24 Ch D 289=53 L J Ch 145.
3. (1884) 32 W R 660=53 L J Ch 534.
4. (1865) 2 Dr & Sm 337=13 W R 448.
5. (1862) 4 De G F & J 20=3 Giff 251.
6. (1842) 8 Cl & Fin 657=11 Bligh (n s) 397.
7. (1864) 4 De G J & S 217=33 L J Ch 71 & 842.
8. (1874) 5 P C 516=30 L T 729.
9. (1878) 3 A C 254.
10. (1886) 33 Ch D 500=55 L J Ch 884.
11. (1866) 1 Ch 252=35 L J Ch 287.
12. (1838) 6 Cl & Fin 1=7 E R 598.
13. (1868) 10 W R 469=11 B L R 60*n*.
14. (1870) 13 W R 209=4 B L R A C 181.
15. (1892) 15 Mad 389.
16. (1896) 23 Cal 805
17. (1870) 2 N W P H C R 46.

cree such re-conveyance except upon equitable terms. It is impossible on any conceivable principle to justify the position that the effect of the assignment to the pleader is forthwith to extinguish the judgment-debt and to release the judgment-debtor from liability. In the case, before us, such of the judgment-debtors as have entered appearance have not offered to bring into Court the sum which according to their own case, the pleader had paid for the purchase of the decree. An additional difficulty has been created by the fact that there are several sets of judgment-debtors, whose liabilities are apparently distinct under the decree and who have from time to time paid different sums in reduction of their respective liabilities. Under these circumstances, it is not practicable in these proceedings to go behind the decree and to alter the liabilities of the parties, after investigation of the sum which would be equitably payable by the judgment-debtors to the assignee of the decree before they can obtain a reconveyance thereof. We hold accordingly that this appeal must be allowed and the order of the Subordinate Judge set aside. The assignee (the appellant before us) will be entitled to proceed with the execution of the decree and the execution proceeding will stand revived for that purpose. No steps however will be taken in execution till 1st January 1918, so that the judgment-debtors may have ample time to institute, if they are so advised, a suit against the assignee of the decree and her husband to obtain a transfer of the decree in their own favour, on proof of the allegations they have made and upon payment of such sum as the Court may determine. The appellant is entitled to her costs both here and in the Court below. We assess the hearing fee at five gold mohurs in this Court.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 360

SANDERSON, C. J., TEUNON AND WALMSLEY, JJ.

Saraj Ranjan Chowdhury—Principal Defendant—Appellant.

v.

Prem Chand Chowdhury and *others*—Plaintiffs and pro forma Defendants—Respondents.

Letters Patent Appeal No. 4 of 1916, Decided on 21st August 1917.

Limitation Act (1877), Arts. 109 and 120—Purchaser at sale under Patni Regulation—Sale set aside—Suit for mesne profits is governed by Art. 109 and not Art. 120.

Article 109 and not Art. 120, would apply to a suit for the recovery of mesne profits from a purchaser at a sale held under the Patni Regn. 8 of 1819, which is afterwards set aside by the civil Court. The plaintiff in such a suit can recover mesne profits for a period of three years only prior to the institution of the suit, [P 362 C 1]

Profits received or which might have been received without wilful default by such a purchaser, who obtained possession under the sale so set aside, may be said to have been wrongfully received. [P 362 C 1]

Even if possession were obtained under a decree of the civil Court which is subsequently set aside on appeal, the profits may be said to have been wrongfully received, and Art. 109, Limitation Act of 1877, would apply : 35 *Cal.* 996, *Foll.* ; 3 *C. L. J.* 182, *Dist.* [P 362 C 1]

Mohendra Nath Roy and *Mohini Mohan Chatterji*—for Appellant.

D. N. Mitter, *Satcowri Pati Roy*, *Baidyanath Dutt* and *Mohini Nath Bose*—for Respondents.

Sanderson, C. J.—This is an appeal under the Letters Patent in respect of an appeal in which Doss, J., and my learned brother Richardson, J. differed in opinion. The judgments were delivered so long ago as June 1909. Both the judgments were read by Richardson, J, because, as we have been informed, on that date Doss was away on leave; and apparently some doubt arose as to whether the judgment of Doss, J., was a valid judgment, having regard to the fact that that was read by my learned brother Richardson, J., when Doss, J., was away from Court on leave, and apparently this matter was left in abeyance for many years. It was brought before my learned brother Mookerjee, J., and me last year, and it was argued on the one hand that Doss, J's., judgment was a valid judgment, and on the other that it was not a valid judgment. We came to the conclusion that it was a valid judgment and consequently the appellant would have had a right of appeal under the Letters Patent if he had appealed within the proper time, and having regard to the special facts that were stated to us at that time, that the time for appealing should be extended and we did extend it. The result was that this appeal was presented to Court and it has now been heard by us. I think it was necessary to state those facts and to show how

this very considerable delay in this case has arisen.

Now, the suit in which this appeal arises was a suit brought by the plaintiffs for mesne profits in respect of the Amli years 1309, 1310, 1311 and 1312. I might say at this stage that the claim in respect of the earlier half of the year 1309 was given up by the plaintiffs at some stage of the proceedings. The learned Subordinate Judge decreed the suit, and declared that the plaintiffs were entitled to get mesne profits from the last six months of 1309 to 1312, and that a Commissioner should be appointed to take accounts from the papers filed by the plaintiffs and from other necessary papers and that the amount paid by the auction-purchaser on account of the 1311 rent and the costs of realisation should be set off against the money due to the plaintiffs and that the case should be brought up again before him after the Commissioner's report had been received. From that decision defendant 1 appealed. That was the appeal which was heard by Doss, J., and my learned brother Richardson, J. The point which arose upon the appeal was as to the Limitation Act. The defendants contended that the plaintiffs were not entitled to recover any mesne profits, except those which were received or which ought to have been received without wilful default, within three years prior to the institution of the suit.

The facts which are material to be stated in this matter are as follows : It appears that in October 1901, the property in question was bought by defendant 1 at an auction sale held under Patni Regn. 8 of 1819. He was put into possession in September (the auction sale took place, I understand, in October but the possession was taken as from September 1901). On 17th May 1902, the plaintiffs sued the defendants to set aside the sale. In that suit they made no claim for mesne profits which had accrued either before the suit or which accrued during the pendency of the suit.

On 18th August 1902, the suit was decreed in the first Court, with the result that the sale was set aside. Then there was an appeal which was heard by the District Judge, and on 13th February 1903 the District Judge reversed the decree of the Subordinate Judge, with the result that the sale was affirmed. Then there was an appeal to the High Court and on 11th May 1905 the High Court remanded the case for further consideration and decision to the District Judge. On 11th September 1905, the District Judge affirmed the decision of the Subordinate Judge with the result that the sale was set aside. Then there was a further appeal to the High Court, which was heard on 30th May 1907, and the appeal was dismissed, the result, of course, being that the decree setting aside the sale was upheld. This suit was brought on 16th September 1907 : and the learned vakil for defendant 1 has urged that the plaintiffs are not entitled to recover any mesne profits which accrued and which were received or which might have been received prior to 16th September 1904. I might point out that inasmuch as the claim was made with reference to the Amli years, September 1902 might be taken to be the beginning of 1309, September 1903 to be the beginning of 1310, September 1904 to be the beginning of 1311, September 1905 to be the beginning of 1312.

The first point that arises in respect of this matter is whether Art. 109, Lim. Act which is applicable to this case, namely, Act 15 of 1877, applies to this case.

The learned vakil for the plaintiffs has argued that Art. 109 is not applicable and his ground was that Art. 109 applies to profits of immovable property belonging to the plaintiffs which have been wrongfully received by the defendant, and his point was that inasmuch as the defendant was put in possession in consequence of the sale which was held under the Patni Regulation, the defendant's possession could not be held to be wrongful; in other words, the defendant could not be held to be a trespasser, and that consequently the mesne profits which the defendant received prior to 11th September 1905 was not wrongfully received. He further urged that the matter ought to be looked upon as if the defendant had obtained possession in pursuance of a proceeding under the Regulation which was of a semi-judicial nature. With that I cannot agree. As I have already said possession was obtained by the defendant under the sale which was held under the Patni Regulation. Our attention was drawn to that Regulation this morning and, it is clear that in this case there

P. N. Das
Advocate High Court
Jammu & Kashmir

was an order of the Court for the sale: the sale was held by the appointed officer, and possession was given, as I assume by the zamindar in accordance with the provisions of Cl. 15 of the Regulation. But there still remains the question whether the point is right which the learned vakil has argued, namely, that Art. 109 does not apply, because it cannot be said that the profits were wrongfully received. In my judgment Art. 109 does apply. I think that it is clear that when we look at Col. 3 of the schedule, we find that even if the possession had been obtained under a decree of the Court which was afterwards set aside on appeal this Article would have applied; and the profits would have been said to have been wrongfully received. A fortiori when possession was obtained by the defendant under the sale held under Regulation to which I have referred, Art. 109 would apply. I am confirmed in that opinion by a judgment of this Court in the case of *Peary Mohun Roy* v. *Khelaram Sarkar* (1), where the facts are very similar to the fact of this case. In that case:

"a patni mahal was sold under Regn. 8 of 1819 for arrears of rent on 18th May 1900, when the defendant purchaser came into possession. The plaintiff owner of the patni instituted a suit for setting aside the sale and obtained a decree and took possession on 11th September 1901. The plaintiff then instituted the present suit on 6th April 1904 for mesne profits for the period the defendant was in possession, viz., from 18th May 1900 to 11th September 1901: It was held that the defendants wrongfully received profits, which were receivable by the plaintiff. Art. 109 and not Art. 120 governed the case and the claim for the period (18th May 1900 to 5th April 1901) preceding the three years next before the institution of the suit was barred by limitation."

I think that is a case directly in point, and I agree with the decision that was arrived at in that case. Further, there is another case [*Kishnanand* v. *Kunwar Partab Narain Singh* (2)], to which we have been referred. Although in that case the property was not sold under the Regulation which was used in this case and also in the case reported in *Peary Mohun Roy* v. *Khelaram Sarkar* (1), and the defendant there was put in possesssion by the Settlement Officer at the instigation of the manager under the Talukdars' Relief Act, 24 of 1870, the principle of the decision applies to this case. It was there held that the mesne profits which were recoverable were those which had been received within three years prior to the suit. Our attention was drawn to a case *Holloway* v. *Guneshwar Singh* (3), and that was relied upon by the learned vakil for the respondent. I do not think that we are bound by that decision because the learned Judges who decided that case were of opinion that although the sale had been set aside, the order by reason of which the sale had been held and the order for possession had not in fact been set aside, and consequently they came to the conclusion that the profits which had been received while the defendant was in possession were not wrongfully received. It is not necessary for me to say whether I agree with that or not. All that I wish to draw attention to is that inasmuch as that was one of the grounds of the decision it is really not a decision which is binding on this Court: and I may further point out that this case was decided by Henderson, J , and Mitra. J., and Mitra J., himself was a party to the judgment in *Peary Mohun Roy* v. *Khelaram Sarkar* (1) to which I have referred, and that decision was given three years after the decision in *Holloway* v. *Guneshwar Singh* (3) and that decision, as I have already said, is directly in point, in this case, and with it I agree.

For these reasons I am of opinion that Art. 109 applies to this case and that subject to two other points which the plaintiffs have raised, the plaintiffs would not be entitled to recover any mesne profits except those which had in fact been received, or which ought to have been received without wilful default, within three years before the institution of the suit. The second point raised by the learned vakil was that the District Judge on 13th February 1903 by his judgment affirmed the sale and that that judgment was not finally disposed of until 11th September 1905 and that, therefore, during the poriod from 13th February 1903 to 11th September 1905 the defendant was rightfully in possession and that the plaintiffs, although they might have brought a suit on 12th February 1903 to recover mesne profits, after 13th February they could not have so brought their suit until 11th September 1905, because the sale had been upheld by the Court and the learned vakil asked us, to use his own expression, to deduct from the period of limitation that period

1. (1908) 35 Cal 996=1 I C 157.
2. (1884) 10 Cal 785=11 I A 88 (P C).
3. (1906) 3 C L J 182.

of time from 13th February 1903 to 11th September 1905. In my judgment we cannot do that. We have to apply the Limitation Act as it stands, and the limitation provided by Art. 109 is to the effect that the period of limitation begins to run from the time when the profits are received, and for that reason I think the second point which was raised by the learned vakil is not a good point.

The third point which the learned vakil raised was that usually the mesne profits could not be ascertained until the end of the Amli year and that consequently the liability for such mesne profits would not begin until the end of the Amli year. The result of that argument, if it was upheld, would be that the plaintiffs would be entitled to mesne profits not only for the year 1312, which was admitted by the learned vakil for the appellant, but also for the year 1311. In my judgment we have nothing to do with that on this occasion, and as I have said we have to apply Art. 109: All we can say is that the plaintiffs are only entitled to recover rents and profits which the defendant had received and which without wilful default he might have received between 16th September 1904 and the date of the suit (16th September 1907). Consequently the judgment of the learned Subordinate Judge ought to be varied in the way I have indicated in my judgment, and the enquiry by the Commissioner directed by the learned Subordinate Judge's judgment ought to take place upon that basis forthwith. The appeal is allowed with costs both of the hearing before Doss, J., and Richardson J., as well as before us. The appellant must pay the pro forma defendants three gold mohurs as their costs in this Court.

Teunon, J.—I agree.

Walmsley, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 363
Special Bench

SANDERSON, C. J., WOODROFFE AND MOOKERJEE, JJ.

Mariam Bibee - Plaintiff—Appellant.

v.

Muhammad Ibrahim and *others*—Defendants—Respondents.

Appeal No. 55 of 1915, Decided on 14th June 1916, from original decision of Greaves, J., D/- 3rd May 1915.

(a) Practice — Evidence — Appreciation — Case decided on oral and documentary evidence—Documentary evidence conflicting—Opinion of trial Judge who has seen and heard witnesses should be given great weight.

Per *Sanderson, C. J.*—Where a case has been decided on documentary as well as oral evidence, if the documentary evidence is conflicting, great weight should be given by the appellate Court to the opinion of the trial Judge who has seen and heard the witnesses. [P 368 C 1,2]

(b) Practice — Appeal — Appellate Court should not allow appeal unless trial Judge found to be wrong—Burden of proving that trial Judge is wrong is on appellant.

Per *Sanderson, C. J.*—The Court of Appeal should not allow an appeal unless they are satisfied that the Judge who tried the case was wrong. If they are in doubt at the end of the argument whether the Judge was right or wrong, since the burden of proof is on the appellant and he has not satisfied them that the Judge was wrong, the appeal should be dismissed. The Judge in the Court below may have heard witnesses and if so, the Court of Appeal should be more unwilling to set aside his judgment especially if there was a conflict of evidence, than in a case tried on written evidence, where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. [P 368 C 2]

Per *Mookerjee, J.*—The burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record. [P 386 C 2]

(c) Mahomedan Law — Gift—Musha—Doctrine of should be confined within strictest limits—It cannot be ignored or repudiated.

Per *Sanderson, C. J.*—The doctrine relating to the invalidity of gifts of musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest limits. [P 369 C 1]

Per *Mookerjee, J.*—The doctrine relating to the invalidity of gifts of musha, though not favoured, cannot be altogether ignored or repudiated. [P 389 C 2]

(d) Mahomedan Law — Gift — Gift to an adult and minor—Minor not under donor's guardianship at time of gift—Adult accepting gift on behalf of himself and minor—Gift is not invalid—If minor under donor's guardianship, gift is void.

When a person makes a gift to two donees, one of whom is an adult and the other a minor but the latter is not in the guardianship of the donor at the time of the gift, and the adult accepts the gift on behalf of himself and the minor, the gift is not invalid. But when the gift is made to an adult and an infant who is in the donor's care or guardianship, the gift may be void because the donor is assumed to take seisin at once of the minor's share, whereas the gift in favour of the adult requires acceptance and thus confusion is occasioned. [P 369 C 2]

If a Mahomedan owner makes a gift of a house to two of his sons, one of whom is adult and the other is a minor and the adult son takes possession of the property, the gift is absolutely void. [P 369 C 1, 2]

(e) Mahomedan Law — Gift—Possession—Actual possession by donee is not necessary —Relationship of parties must be kept in view in considering question—Donee must be placed in position to take possession or invested with authority for that purpose.

According to Mahomedan law seisin or actual possession by the donee is not necessary to complete the gift, but the donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee by placing the latter in a position to enjoy it beneficially or to make use of it consistently with its purpose, and in considering this question the relationship of the parties must be kept in view. In other words, to be in a position to take possession is tantamount to taking possession: and to place the donee in a position to take possession, is equivalent to delivery of possession, similarly investing with authority for that purpose is equally sufficient.

[P 369 C 2; P 370 C 1]

(f) Custom—Proof—Special usages modifying ordinary law must be ancient and invariable and should be established by clear and unambiguous evidence — Long established usages existing in particular districts and families must be given effect to.

Per *Curiam*.—Long established usages existing in particular districts and families in India should be given effect to, but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. [P 370 C 2; P 384 C 1]

A custom must be ancient, certain and reasonable and being in derogation of the general rules of law, must be construed strictly. [P 370 C 2]

(g) Pardanashin lady—Deeds by—When can be avoided.

Circumstances under which deeds executed by pardanashin ladies can be avoided discussed.

[P 371 C 2; P 372 C 2; P 390 C 1, 2]

(h) Civil P. C. (1908), O. 26, R. 16—Demeanour of witnesses—Commissioner can note his observation as to demeanour of witness —Civil P. C., O. 18, R. 12.

Per *Woodroffe, J.*—A Commissioner for the examination of witnesses is entitled by law to note his observations as to the demeanour of the witnesses examined by him. [P 379 C 1]

(i) Custom—Proof — Eraki Mahomedan—Crooke's work on Castes and Tribes of N. W. F. Province and Oudh may be referred as authority of custom

Per *Mookerjee, J.*—Reference may legitimately be made to the Work on Castes and Tribes of the North-Western Provinces and Oudh by Mr. Crookes as an authoritative statement of customs prevalent among the Eraki sect of Mahomedans. [P 383 C 2]

(j) Custom—Proof—Custom not pleaded in litigation between members of community, where it might have been pleaded—Fact is relevant to show non-existence of custom.

The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded, is relevant evidence for the purpose of showing the non-existence of the custom. [P 384 C 1]

(k) Benami—Test—Test to ascertain whether ostensible purchaser is also real purchaser is to find out source of purchase-money.

Where the question arises, whether the ostensible purchaser is also the real purchaser, the familiar test to apply is what is the source of the purchase-money. In a case of gift, however, when it is alleged that the transaction was fictitious, this test fails, and the Court must rely upon other aspects of the matter, namely, the surrounding circumstance contemporaneous with the gift and the subsequent conduct of the parties concerned. [P 384 C 2]

(l) Mahomedan Law—Gift — Gift of incorporeal property may be completed by such transfer of control as appropriate and possible in circumstances.

Under the Mahomedan law as administered by British Indian Courts, where the subject of gift is incorporeal property not susceptible of physical possession the gift thereof may be completed by such transfer of control as may be appropriate and possible in the circumstances.

[P 386 C 2]

(m) Evidence Act (1872), S 115—Settlement of disputed claim is valid and binding.

A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or repudiate. [P 391 C 1]

A. P. Sen, A. Suhrawardy, and *P. K. Chakravarty*—for Appellant.

Jackson, Rasul, N. Ghatan, Majumdar, J. N. Sinha for *Mahomed Siddik*—for Respondents.

Sanderson, C. J.—This is an appeal by the plaintiff from the judgment of Greaves, J., dismissing her suit. The nature of the claim and the defence are fully set out at the beginning of the learned Judge's judgment as follows:

"The plaintiff in this case is the daughter of one Haji Kader Bux, deceased, a Mahomedan of the Eraki sect or community who died on 28th August 1907, leaving him surviving three sons, defendants Shaik Mahomed Ibrahim, Shaik Mahomed Solaiman and Abdus Samad, five daughters, namely, the plaintiff and the defendants Hakima Bibi, Khadija Bibi, Ayesha Bibi and Khairunnessa Bibi, and two widows, Waziran Bibi and Mohatabo Bibi, the last named being the mother of the three sons and five daughters. The plaintiff claims to be entitled to 7/38 of her father's estate and amongst other reliefs asks for an enquiry of what the estate consists, and for partition thereof. The defendants other than those above mentioned are two sons of a brother of Haji Kader Bux named Hazir Bux, with whom he used to carry on business in Calcutta and elsewhere, and who succeeded to their father's share in business, and one Mahomed Siddick who was and is entitled to a share in the profits of the Calcutta business. The plaintiff's claim is resisted upon three grounds which appear in the written statement of Shaik Mahomed Ibrahim and which are as follows: (1) that Haji Kader Bux left no property, having during his lifetime disposed of it by two Hebas, the first of which was made on 22nd April 1897 in favour of the defendant Shaik Mahomed Ibrahim and of the share of Haji Kader Bux in the Calcutta business, and the

second of which was made on 19th July 1907 in favour of his three sons and of the rest of his property; (2) that the Eraki community, although governed in all other respects by Sunni School of Mahomedan law, is governed in matters of succession and inheritance by Hindu law, and that by the law and custom governing the parties the plaintiff is not entitled to any share in the estate of Haji Kader Bux if he in fact left any estate; (3) that by a deed of release, dated 10th January 1908 the plaintiff for valuable consideration released any right and interest she had in her father's estate."

It will be convenient to set out the material dates: 22nd April 1897 was the date on which 1st Heba relating to the Calcutta business is alleged to have been made by Kader Bux. 13th October 1904 —The purchase of the house 47, Taltolla Lane. 7th February 1907—The dissolution of partnership so far as Abdul Gunny was concerned. 19th July 1907—The alleged 2nd Heba by Kader Bux. 28th August 1907—The death of Kader Bux. 31st October 1907—The Hebannama of Hadjee Bux. 5th November 1907—Hadjee Bux died. 9th January 1908—The deed of release. 9th June 1908—Petition of Mahomed Ibrahim for guardianship.

The learned Judge found that the two Hebas were in fact made and that they were valid and operative under Mahomedan law. This decision really disposed of the case, and it is this question which was first argued by the learned counsel for the appellant. The verbal evidence as to the first Heba has been summarised by the learned Judge in his judgment, and I need not refer in detail to that with which he had already dealt: the principal evidence relating there to is to be found at pp. 24, 46, 47, 63, 64, 128, 135, 136, 139, 369 to 377, 403 to 414, 424, 425, 432 of the paper-book. As regards the constitution of the Calcutta firm at the date of the first Heba, viz., April 1897, it appears that the partners entitled to share in the profits were Kader Bux, Hazir Bux, Abdul Gunny and Mahomed Siddik (see p. 345 of paper-book), that Kader Bux's account was entered in the books of the Calcutta firm under the name of Haji Kader Bux Mahomed Ibrahim (see p. 127 and the accounts), Kader Bux resided generally at Kotwari, but sometimes at Calcutta: Mahammad Siddick and Hazir Bux were the managers of the Calcutta firm. The defendant Ibrahim had at the time of the alleged Heba been about 2 years in the firm and had been working chiefly as cashier, but going about with his uncle Hazir Bux and looking after the business of the firm generally: see p. 135 There were other businesses at various places in which Kader Bux and Hazir Bux were interested, and it was under these circumstances that Kader Bux is alleged to have made over his share in the Calcutta business to Ibrahim, who at that time was his only son, or, in the words supposed to have been used by his father, "to have made him owner just like myself and made him seated on my guddi."

With regard to the first Heba, I am satisfied on the evidence that there is no ground for interfering with the learned Judge's finding that a transaction purporting to transfer Kader Bux's share in the Calcutta business to Ibrahim was in fact made. But it is said that the transaction was a benami one. The verbal evidence of those connected with the business is against this allegation, and, in addition to the other matters relied on, the evidence goes to show that Kader Bux took no part in the working of the Calcutta firm after the first Heba. Before the date of the first Heba there were three accounts—1st, an account in the name of Kader Bux Mohamed Ibrahim, which was called during the hearing the partnership account—2nd, an account in the name of Kader Bux which was drawn upon by Kader Bux for his expenses—3rd, an account in the name of Mahomed Ibrahim which was an interest account.

After the alleged Heba, the first account was put into the name of Mahomed Ibrahim, and the other two accounts remained in the same names. The 2nd account remained in the name of Kader Bux, but Ibrahim drew upon it for his expenses. It seems curious if Kader Bux had ceased to have any connexion with the firm, that this account should have remained in the name of Kader Bux, but it was pointed out that this was not exceptional in the case of this firm, for there was a similar account in the name of Hazir Bux, and after his death the account was kept in his name, his sons drawing upon it for expenses. At the time of the alleged Heba the balance standing to the credit of Kader Bux was debited to him and credited to Mahomed Ibrahim, and the accounts were thereafter dealt with as if Ibrahim was a partner. Further more in the deed of dissolution of February 1907 Ibrahim is treated as a partner, he

and Hazir Bux taking over the share of the outgoing partner, and no reference is made to Kader Bux. But certain matters were relied upon by the appellant as showing that the verbal evidence, confirmed as it is by the deed of dissolution and the accounts, could not be relied upon —and that the transaction was really a benami one.

First, it is said that the application for guardianship made on 9th June 1908 admitted the title of the minor brothers to a share in the house No. 47, Taltolla Lane, which, according to the defendant's case, had become the property of the firm after Kader Bux ceased to be a member, and also to a share in the Calcutta business. The learned Judge having seen and heard the witness has accepted the evidence of the defendant Mahomed Ibrahim, who appeared to him a reliable witness, as to how the application came to be made and the details inserted, and I am not prepared to interfere with his finding of fact thereon. Ibrahim said he could not write or read Urdu: it is to be noted that if he did know what was in the details contained in the application for guardianship, he was deliberately creating evidence contrary to the case which he set up in the Court below. It is urged, however, that it was after he made this application that he changed his mind, and decided to defraud his two brothers; this seems to me improbable and is inconsistent with the learned Judge's finding that in his opinion Ibrahim was a witness of truth.

Secondly—that the house No. 47, Taltolla Lane was conveyed to Kader Bux and Hazir Bux on 13th October 1904, seven years after the first alleged Heba. It is true that the conveyence is to Kader Bux and Hazir Bux. But the consideration for the sale was money advanced by the Calcutta business and the Exs. 12B, 13B, 14A and 15A confirm the verbal evidence that this house belonged in reality to the firm; repairs were charged to the firm and the rent was included in the profits which were divided among the partners. To make the matter more clear we had the pages represented by Exs. 12B and 15A translated by one of the Court interpreters and translators, and these show conclusively that the entries were made under the heading of the firm, and in particular that the sum of Rs. 434 11-6, which was the balance on the house account, was included in the amount credited to the profit account of the firm. Reliance, however, was placed on the Hebanama of Hazir Bux of 31st October 1907 (which document and the deed of dissolution of partnership were admitted by consent of learned counsel for the plaintiff and Mahomed Ibrahim during the course of the argument) as showing that this house did in fact belong to Kader Bux and Hazir Bux, and not to the firm. I am not prepared to disturb the learned Judge's finding, having regard to the verbal evidence, corroborated as it is by the firm's books, that this house was the property of the firm and that Kader Bux and Hazir Bux must be taken to have held it in trust for the partnership.

Thirdly, reliance was placed on the statement in Hazir Bux's Hebanama that Kader Bux had "owing to its being considered advisable", or according to another translation for "politic reasons," substituted the name of Mahomed Ibrahim in the place of his own in the books of the shop and had also declared his son to be owner of his share and had got the credit and debit entries made in the name of Mahomed Ibrahim: I agree with the learned Judge that this is not conclusive against the Heba, and indeed the reference to the declaration by Kader Bux that his son was owner of his share may be said to be consistent with the Heba having been made.

Fourthly—it was urged that Mahomed Ibrahim was only 16 or 17 years old at the date of the Heba and that it was improbable that his father would entrust him at so early an age with his share in the business. This is a matter for consideration undoubtedly, but upon such consideration it must be remembered that the evidence was that Mahomed Ibrahim's uncle was the manager together with Siddik and that apparently his father had not taken a very active part in the working of this part of the joint business.

Fifthly—it was urged that the father would not have given the one son so large a portion of his property. In this connexion it must be remembered that at the time Mahomed Ibrahim was the only son; it is said that Kader Bux's wife was in the family way, but the child was not born until eight months afterwards, and there is no evidence to show that Kader Bux was aware of his wife's condition at the time of the alleged Heba: apparently at that time the Calcutta business was

not so valuable and did not bear such a large proportion to the rest of the father's property as it did afterwards. There is, however, another matter upon which much reliance has been placed by the learned counsel for the appellant, viz., that in the deed of release of 9th January 1908, Mohomed Ibrahim submitted a statement that the Calcutta business belonged not to him only, but to him and his two brothers. The beginning of the declaration in this deed is not inconsistent with the case of the defendant Ibrahim, but on the contrary to some extent it confirms it, inasmuch as it recites that it was the intention of Kader Bux:

"to give away the whole of his properties to his three sons Mohamed Ibrahim, Mahomed Solaiman, and Abdus Samad, and with this object he made his eldest son Mohamed Ibrahim the proprietor of the shop in Calcutta,"

which may be taken as a reference to the first Heba in 1897; but it then proceeds to say that prior to his death:

"he made a gift and gave away all his moveable and immovable properties situate in District Balia, Calcutta, and Muzafferpore to his sons aforesaid and made them proprietors and put them in possession of the same, etc."

In the schedule the Calcutta shop is specifically mentioned as part of the property which was held and possessed by the three sons as proprietors in accordance with the oral gift and grant aforesaid. On the face of the deed, therefore, there appears to be an inconsistency; for in the one place it is declared that for the purpose of carrying out his intention of giving away all his property to his three sons he made Ibrahim the proprietor of the Calcutta shop: in another place it is declared that the shop was held and possessed by the three sons as proprietors. By reference to one of the Court interpreters it appeared that the words in the original which have been translated "the oral gift and grant," are more accurately translated thus: "the heba and oral gift." Such words are, in my judgment, consistent with either case, viz., that there was a heba and subsequent oral grant, or that there was only the heba which is further described as an oral grant. It is urged that the above mentioned statements are not inconsistent if the first Heba of 22nd April 1897 is regarded as a benami transaction; it should, however, be noted that so far as the deed itself is concerned it makes it clear at any rate that the intention of Kader Bux was to give all his property to his three sons, and even if the first heba was in the nature of a benami transaction, the second was not, and if that was a good and valid heba, transferring all Kader Bux's property to the three sons, the plaintiff's claim would be defeated.

We are asked to conclude that the above-mentioned description of the property in the deed is so inconsistent with the evidence of Mohamed Ibrahim that his evidence should not be accepted. The learned Judge in the course of a very careful and exhaustive judgment does not deal with this particular point, and I am not surprised, for I cannot find that a single question was put in cross-examination of the defendant Ibrahim as to how the Calcutta business came to be described in the schedule to the deed as belonging to the three sons and not to him only. This leads me to think that not much reliance, if any, was placed on this point at the trial. In the course of its preparation the deed went through several hands, and instructions apparently were given by various people to three individuals at least at different times, and it may be that in consequence confusion may have arisen. What happened was this. Shukrulla got the draft prepared, apparently on verbal instructions, at Allahabad by Nawab Abdul Majid, a Barrister-at-law. This draft was read to him by the Barrister's clerk and he says that he noticed that in the draft no amount of money was mentioned and no list of property was included, while in the deed, which subsequently he heard the Sub-Registrar read and explain to the ladies, these matters were mentioned.

Next, the draft was taken by Abdul Hamid and Haji Ahmed to Moulvi Abdulla a pleader at Ghazipur, who was called a witness and who identified the draft. In this draft there is no list of properties: and by reference to the original the draft finishes at the end of Cl. 3 (or para. 1, on p. 147 of the paper-book) and by the interpreter's translation, the words "verbal gift" in Cl. 3 should be "heba and verbal gift." The draft then shown by Ibrahim to a pleader at Rashra, Lala Ramkrishna Lall. The draft and stamp were then taken by Ibrahim, Haji Anmed and Abdul Ahmed to Hadi Hossain, a scribe, for the purpose of his making a fair copy, and to him was given a 'list of the properties:" see p. 84 of the paper-book. As far as I know, there is no evidence as to who

made up the list of properties or how the properties came to be described in the manner set out in the deed. I understand the deed is written in Urdu, a language which, as already mentioned, Ibrahim has sworn he cannot read or write. The comment made as to the schedule in the application for guardianship is applicable to the schedule of this deed, viz., that if Ibrahim did not know how the property was described in the schedule, he was deliberately creating evidence which would be contrary to the case he was about to set up.

I am not surprised that a deed passing through so many hands and prepared in such a manner as that above mentioned should present some inconsistencies, and though this deed is an important factor in the case, I do not think, having regard to the above mentioned matters, so much importance should be attached to it as if the whole of it (including the schedules) had been settled by a competent conveyancer. This deed unexplained, added to the other matters already referred to, does raise some doubt in my mind, as to whether the first heba was a benami transaction, and it is very unfortunate that this particular matter was not drawn to the attention of the defendant, so that the Court should have been in possession of any explanation he might have been able to give. On the other hand the learned Judge has seen the witness Ibrahim in the witness-box and subjected to a long cross-examination, and he has come to the conclusion that he was a truthful and reliable witness, and in my judgment it would not be just or fair to the defendant for this Court, sitting as a Court of Appeal, to come to the conclusion that his evidence must be unreliable because of the contents of the schedule of this deed and the criticisms of learned counsel upon it, when the point was never put to the defendant in the Court of first instance. He has sworn that this was not a benami transaction: this evidence is corroborated by other witnesses and by Mahomed Siddik (who was also described by the learned Judge as a reliable witness), the entries in the books, and the deed of dissolution of partnership; and in a case like this where the documentary evidence is conflicting, in my judgment great weight should be given to the opinion of the learned Judge who has seen and heard the witness and this is a case in which very important witnesses were seen and heard by the learned Judge. The principle on which a question such as this should be dealt with by a Court of Appeal is laid down in *Colonial Securities Trust Co.* v. *Massey* (1), where Lord Esher said:

"We must see first of all what is the rule of conduct of the Court of Appeal when hearing an appeal on a question of fact from the judgment of a Judge trying a case without a jury. It cannot be shaped according to the rule of conduct of the Court of Common law before the Judicature Acts, but must follow that adopted by the Courts of Appeal in Chancery, because before that Court only could an appeal from a Judge sitting without a jury have then come. In the Courts of equity the matter appealed against was the decision of a Judge and for that reason such an appeal was called a re-hearing, since the Court could set aside the decree or judgment of the Judge who had tried the case, and pronounce another decree or judgment. The Court of Appeal in Chancery acted upon this rule, that they would not allow an appeal unless they were satisfied that the Judge was wrong. If they were in doubt, at the end of the argument, whether the Judge was right or wrong, since the burden of proof was on the appellant and he had not satisfied them that the Judge was wrong, they dismissed the appeal. That is the rule of conduct which we ought now to apply in this Court. The Judge in the Court below may have heard witnesses; and if so, the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit."

The burden of proof is now on the appellant and I am not satisfied that the learned Judge was wrong on this point, and I, therefore, think that his judgment on this point should not be disturbed. With regard to the second Heba of 19th July 1907, the learned Judge has found that the existence and validity of the second Heba was established. As regards the question whether a gift was in fact then made by Kader Bux to his three sons, in my judgment, there was ample evidence to support the learned Judge's finding. As regards the extent and the effect of the gift, I am satisfied on the evidence that Kader Bux intended, as stated in the deed of release dated 9th January 1908, to give the whole of his property to his three sons to the exclusion of the rest of his family. If the first Heba was not of a benami nature, then the defendant's case is proved in its entirety; but even if it was benami, the object and intention of the second Heba was to vest all Kader

1. (1896) 1 Q B 38=65 L J Q B 100.

Bux's property in his three sons, which would be sufficient to bar the plaintiff's claim, provided that the gift was a valid Heba. In this connection I may point out that much reliance was placed by the plaintiff on the Hebanama of Hazir Bux as showing that the first gift of Kader Bux was benami. This document was executed on 31st October 1907, two months after Kadar Bux's death and about two months before the deed of release. If this document is to be accepted as showing the true state of affairs as the plaintiff urged, it is strongly against the plaintiff on this part of the case; after reference to Kader Bux's death the words of the document are:

"Now his sons, S. M. Ibrahim, Mohamed Solaiman and Abdus Samad, are in his place holding and possessing the property left by him as owners,"

a clear indication that the plaintiff was not entitled to any share in her father's estate. The validity of the second Heba is disputed first on the ground that it was a gift by Kader Bux to Mahomed Ibrahim, an adult, and to his other two sons who were minors at the time, and was consequently void, reliance being placed upon the rule of Mahomedan law as to confusion. Certain texts in support of this proposition were relied upon, and the text of Al Hakim may be taken as an example. Al Hakim states:

"A man makes a gift of a house to two of his sons, one of whom is adult and the other is a minor and the adult son takes possession (of it). The gift is absolutely void, and this is the correct view. For the gift in favour of the minor is complete at the very moment of the declaration of the gift because the seisin or possession of the father is equivalent to his (minor's) seisin or possession. (Qabz): Whereas the gift in favour of the adult son stands in need of acceptance. Thus the gift in favour of the minor precedes (that in favour of the adult), and thus confusion (shuyu) is occasioned. And the device is that he (father) should deliver possession of the house to the adult son and then make a gift of it to both of them. Thus it is laid down in the Wajiz of Al Kardari."

Fatawa Alamgiri. Vol. IV, p. 549, Ed. Cal, and the case of *Nizam-ud-din* v. *Zabeda Bibi* (2) was also referred to. If the rule above stated applies to this case, it must be given effect to: but it is to be noted that it has been laid down by the Judicial Committee of the Privy Council in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3) that the doctrine relating to the invalidity of gifts of musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules. The principle of the rule in question seems to be that when a person makes a gift to an adult, and an infant, who is in the donor's care or guardianship, the donor is assumed to take seisin at once of the minor's share, whereas the gift in favour of the adult requires acceptance, and thus confusion is occasioned. According to the evidence in this case, the gift of the property was made to Ibrahim and his two younger brothers, and Kader Bux asked Ibrahim to accept the property on behalf of himself and his two brothers —see for instance pp. 128, 137, 379 of the paper-book; and that he then handed over all the documents to Ibrahim requesting him to take charge of them for himself and his two younger brothers. If this evidence is accepted as to the manner in which the gift was made, it seems to me that it does not come within the above rule, for Ibrahim must be taken to have accepted the property for himself and his brothers at one and the same time and thereby plaeed himself in the position of trustee or guardian for his brothers, and consequently the donor would not take seisin of the property for his younger sons and no "confusion" would arise.

There appears to be no dispute as to the validity of a gift to two donees, one of whom is an adult and the other a minor, but who is not in the guardianship of the donor at the time of the gift. No case has been produced to show that the doctrine relied on has been applied to such a case as the present, and keeping in view the opinion of the Privy Council that it should be kept within the strictest rules, I am not prepared to extend it and apply it to this case. Next it was urged that possession had not been given in such a way as to make the gift valid. According to Mahomedan law, seisin or actual possession does not seem to be necessary to complete the Heba—and the correct view seems to be that the donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee by placing the latter in a position to enjoy it beneficially, or to make use of it consistently with its purpose, and in considering this question the relationship of the parties must be kept in view. In other words, to be in a position to take posses-

2. (1874) 6 N. W. P. H. C. R. 338.
3. (1889) 11 All 460=16 I. A. 205 (PC).

sion is tantamount to taking possession: and to place the donee in a position to take possession is equival ent to delivery of possession—similarly investing with authority for that purpose is equally sufficient—see the authorities cited at pp. 90 and 122 of Ameer Ali's Mahomedan law, Vol. 1, Edn 4. In this case as regards the share in the Calcutta business and the Taltollah house, Ibrahim was in fact in possession at the time and as regards the rest of the property, the second Heba seems to have been made with much publicity, and by handing over all the documents, keys, rokars, books, etc., which Kader Bux possessed in respect of all his properties to Mahomed Ibrahim, and by asking him to take charge thereof, Kader Bux intimated his intention of giving him possession, and thereby put him in a position to take possession. In addition there is some evidence that from that date the donees did take possession: see for instance pp. 128 and 137 of the paper-book.

For these reasons, in my judgment, the Heba of 19th July 1907 which the learned Judge has found was in fact made was valid according to Mahomedan law. That being so the whole of Kadar Bux's property passed by reason of the two Hebas to his sons, and the plaintiff has no claim thereto. This conclusion is sufficient to justify the dismissal of the appeal. Other points however, were argued before us and it is necessary therefore to express my opinion thereon. The defendant Ibrahim attempted to establish by evidence a custom to the effect that in the Eraki community, to which the plaintiff and Ibrahim belonged females do not under any circumstances inherit any property. With regard to this in the first place, it is to be noticed that this was not the custom pleaded. The pleadings alleged that the members of the Eraki community were governed in the matter of succession and inheritance by the Hindu law. Under that law, as is well known under certain circumstances females do inherit. In the second place, it was admitted that such a custom as the defendant attempted to establish had never yet been recognised in any Court of law in India. Thirdly, there was evidence brought forward by the plaintiff showing some instances where the alleged custom had not been followed, and there was general evidence produced by the plaintiff against the existence of such a custom. Fourthly, the defendant's witnesses were not agreed as to the incidents of the custom, as for instance, Ibrahim himself at p. 393 said:

"I am not fully aware of the provisions of Hindu law, but if under certain circumstances females inherit under that form of law the same thing applies to us under certain circumstances as well."

Such a statement is inconsistent with the custom attempted to be established, viz., that under no circumstances do females inherit and it was contrary to the evidence of his witnesses taken on commission. Again some of the witnesses asserted that it was part of the custom to maintain mother and sister (e. g, Abdul Mian's evidence at p. 78), whereas others declared that the sister and mother have no right to maintenance (see Abdul Latif, p. 65, Abdur Salam, p. 57, Wahbullah, p. 52, and Mt. Khadija, at p. 106 who declared that her position was no better than that of a charity girl or a slave girl.) Now a custom must be ancient, certain and reasonable and being in derogation of the general rules of law must be construed strictly: *Hurpershad* v. *Sheo Dyal* (4), and Sir Montague Smith in giving the judgment of the Privy Council in *Ramalakshmi Ammal* v. *Sivanatha Permal* (5) said:

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

In my judgment the evidence in this case does not comply with the above-mentioned essentials. I do not think the evidence is clear or unambiguous: it does not show with certainty what the custom was: and the custom sought to be proved varies from that relied upon in the pleadings: and for these reasons I agree with the learned Judge that the evidence failed to establish the custom relied on. The last question which I need to consider is that relating to the release of 9th January 1908. The learned Judge has found on the evidence as a fact that the deed was explained to the plaintiff and that she did receive the con-

4. (1875-76) 3 I A 259=26 W R 55 (P C).
5. (1870-72) 14 M I A 570=17 W R 552 (P C).

sideration of Rs. 4,500 and that the deed was not executed by her through misrepresentation and fraud. In my judgment there was ample evidence on which the learned Judge was entitled to arrive at this conclusion and I am not prepared to interfere with his finding of fact in this matter. The fraudulent representation relied upon was that the defendant Ibrahim had represented to her that the document was merely a power-of-attorney necessary for the preservation of the estate. The deed was executed on her behalf by her husband but when the plaintiff came to Court making the claim in this case his evidence was that he himself was a party to a fraudulent conspiracy to deceive her.

This witness was examined before the learned Judge who disbelieved him and it is to be noted that during the course of the argument in this Court the learned counsel for the appellant stated that he could not support the contention as to the fraudulent representation and that he must also throw over the evidence of the plaintiff's husband. This is material for it amounts to an almission that the plaintiff, in order to avoid being bound by the release set up a case at the trial which the learned Judge has found to be a false one and which it is now admitted cannot be supported. It is not necessary for me to go through the evidence as to the explanation of the deed to the plaintiff or the receipt of the money by her: I think, however, it is desirable to draw attention to the endorsement on the deed by the Sub-Registrar. This gentleman could not be called as a witness as he is dead but the memorandum endorsed by him in the course of his duty as Sub-Registrar contains material corroboration of the evidence on the questions of explanation and receipt of the money. Further it is to be noted that the deed was executed in an open manner, the maternal uncle and husband of the plaintiff amongst others, being present and signing the deed.

I think it must be taken from the evidence that the plaintiff and her husband knew perfectly well what she was doing by executing the release, and that the plaintiff received the money. This is in accordance with the learned Judge's finding of fact: it may, however, well be that her husband, who was in need of money, disposed of it. It cannot be said that she had not independent advice: for she was living with her husband, and his story, no doubt made up for the purpose of this claim, that he was a party to a deception upon her having been discarded, it must be taken that he, knowing well the facts of the case and what was in the deed, was in a position to advise her. But it is urged that this was a case in which the plaintiff, being a pardanshin lady, should have had independent legal advice, and that she was labouring under a mistake as to her rights both as regards custom and the Hebas or gifts referred to in the release. The law with regard to this question has been laid down by the Judicial Committee of the Privy Council in *Mahomed Bukhsh Khan* v. *Hosseini Bibi* (6) and *Kali Bakhsh Singh* v. *Ram Gopal Singh* (7). In the latter case it is stated at (*P. 91 of 36 All*) that there is no absolute rule of law that a pardanshin lady must have independent advice:

"The possession of indeendent advice or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld, but if upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor as well as the proximate circumstances affecting the execution:—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result then the dead ought to stand."

As regards the custom, the learned Judge finds that it may well be that there has been a practice among certain families of this community to exclude women from succession, though there was not a custom in the true legal sense of the word: and I doubt very much, if the plaintiff had obtained independent legal advice on this point, it would have made any difference or prevented her from executing the release. But even if she had been advised that there was no such custom binding on her as that alleged in the release, there was the fact of the two Hebas, the second of which was made in her presence and of the first of which, according to the evidence, she must have been fully aware: As by one or both of these Kader Bux, in my judgment, made a valid and effective disposal of all his property to his sons, it cannot be said that when she executed

6. (1888) 15 Cal 684=15 I A 81 (P C)
7. (1914) 36 All 81=21 I C 985=41 I A 23 =16 O C 378 (P C).

the deed she was labouring under any mistake as to her rights in this respect or that the parties in this respect were labouring under a mutual mistake or misapprehension as to their respective rights. For these reasons, in my judgment, the deed of the 9th January 1908 was a good and valid deed whereby the plaintiff for good consideration relinquished all claim and right to her father's properties.

With reference to this dead of release, the learned counsel for the plaintiff relied upon it as showing that there was only one Heba, that by such Heba all the property passed to three sons, and consequently the defendant's case as to the first Heba could not be sustained. With this I have already dealt in the course of my judgment: and I only refer to it again to point out that even if this contention be accepted in its entirety, there still remains the second Heba in the plaintiff's way, and I am satisfied on the evidence that, whether by reason of the two Hebas or, (if, contrary to the view expressed by the learned Judge, the first was merely a benami transaction) then by reason of the second Heba, Kader Bux intended to dispose and did dispose of all his properties to his three sons to the exclusion of the other members of the family, and whatever the rights of the sons might be "inter se" this would dispose of the plaintiff's claim for as far as she is concerned it would be immaterial whether the property passed by one or both of the Hebas. Speaking generally of this case, the learned Judge tried the case at great length and examined the evidence with much care. I do not find any errors of apprehension such as could justify this Court in reversing his decision, nor do I find any misconception of law. That being so, as was pointed out by their Lordships in a recent case in the Privy Council, *Rivers Steam Navigation Co.* v. *Hathor Steamship Co.* (8), it would be wrong for this Court to interfere with the Judge's decision. For the above reasons, in my judgment, this appeal should be dismissed with costs.

Woodroffe, J.– The plaintiff is the daughter of Haji Kader Bux deceased and she claims according to the Mahomedan law 7/88th part of his estate. To this she would be, it is not disputed, entitled if the defence is not made out. That defence is three-fold: (1) that the parties belong to a community called Erakis whose custom as to inheritance excludes the plaintiff, (2) that if this be not so, at any rate there was nothing for the plaintiff to inherit as her father had during his lifetime made over all his estate by two Hebas to his sons, (3) lastly, that if there was no custom and no gift, the plaintiff for a sum of Rs. 4,500 surrendered all and any rights she might have possessed in her father's estate. I will deal with these defences in this order. A large body of evidence was adduced upon the question of custom and I was first somewhat impressed by it, supported in part as it is by the Government publication on the Castes and Tribes of the North-Western Provinces and Oudh, but a closer analysis of the evidence and the pleadings and the fact elicited by my brother Mookerjee that the bulk of the evidence on custom was given with reference to the custom set up in the pleadings and not that in the issue, and that the defendant Ibrahim even now takes his stand on the pleadings, have satisfied me that the custom has not been made out in such a way as to justify a reversal of Greaves, J's. judgment that it has not been proved. I think there is no doubt that there is a community called Eraki, and I should say that it is possible on the evidence that they were Hindus converted to Mahomedanism. The point, however, is not of importance and I do not decide it, but I decide that if this community has a custom which is in derogation of Mahomedan law, this has not been made out. It is very important in this connection to see what the pleadings say. The written statement was as follows :

> That this defendant denies the allegations contained in para. 3 of the plaint and states that even if the said Haji Kadar Bux had left an estate which he did not, the plaintiff being a daughter would not have been entitled to 7/88th or any share in the said estate, inasmuch as the community, which is known as the Eraki community and to which the plaintiff and the defendant belongs, though governed in all other respects by the Sunni school of Mahomedan law, is like the Khojas and Memons governed in matters of succession and inheritance by the Hindu law. and the plaintiff is not entitled by the law and custom governing the parties to any share in the estate, if any, of the said Haji Kader Bux."

The learned Judge was quite right in deciding that the evidence does not establish the custom pleaded, that is to say, that the community is governed in mat-

(8) A I R 1916 P C 73=35 I C 193 (P C).

ters of succession by Hindu law, for the evidence rather seeks to establish that in no circumstances do females take by inheritance in this community. No doubt the issue as framed was "Is there a custom among the Eraki community excluding females from inheritance," but the evidence on commission was taken upon the case as stated in the pleadings and before the framing of this issue and even at the trial Mahomed Ibrahim adhered to the case as set out in his written statement. Without looking at the matter technically it must be admitted that the form in which the written statement puts the case goes against the existence of the custom. For if females are excluded under all circumstances, how came it that the written statement alleged that the succession was governed by Hindu law according to which females do in some circumstances suceed? Mahomed Ibrahim qualifies this in his evidence by saying that he is not fully aware of the provisions of Hindu law, but if in certain circumstances females inherit under that form of law, "then the same thing applies to us under certain circumstances as well." This is contrary to other evidence given on his behalf. This evidence in itself is not altogether the same in the mouths of the various witnesses. The Government publication edited by Mr. Crookes, to which I think we may refer, whilst it supports the exclusion of daughters, unless provision be made during their father's lifetime, shows that there are cases in which women do succeed, thus contradicting those witnesses who allege that the custom excludes females altogether. It is admitted that the alleged custom has not been recognized by any Court and the documents before us go against it.

For the judgments to which the learned Judge refers show at least this, when read with the evidence, that the parties to these litigations were Erakis, and yet though the custom might have been pleaded in defence, it was not. This is not necessarily conclusive, but it is some evidence against the existence of the custom. I think also the pleadings in pending suits excluded by the learned Judge were also evidence on the same ground. Thus Mahomed Amin, though alleging that Mahomed Jan and Mahomed Husain knew of the alleged custom, yet says they must have forgotten to plead it in the written statement in their suit. It is also to be remembered that most of the witnesses who speak to the alleged custom were personally interested to establish it. Nor must we overlook the alleged fact of the Hebas and the release. As regards the first alleged Heba, if it was, as the plaintiff alleges, benami, there would be some reason for its execution at the date alleged, whatever might be the custom. Next, if the Heba was a real transaction, it is possible, though I think on the facts not made out, that Kader Bux wished to immediately advance his eldest son to property which, under the alleged custom, he could only inherit at his father's death. But as regards the second Heba, no such explanation is possible. This was, it is said, executed only a month before his death. The reason assigned for it by Mahomed Ibrahim, namely, that his father intended to go on pilgrimage, is not supported by the other evidence, and I doubt its truth. If further he was ill, the possibility of his death may have been present to his mind. But why should the Heba be executed in favour of sons who according to the alleged custom inherited the property covered thereby a month or so later? Doubtless a person may make a disposition in conformity with the laws of inheritance, but the fact that it is alleged that a Heba was executed, has some bearing on the question of the existence of a custom which rendered any Heba unnecessary. It is not irrelevant also to consider that it was further thought necessary to get a release from the plaintiff acknowledging a custom which, according to the evidence, is well known to every one. I conclude, therefore, that the alleged custom has not been proved.

I pass then to the question of the Hebas. The first is dated 22nd April 1897 and is said to have been in favour of Kader Bux's eldest son Mahomed Ibrahim. The property said to have been covered by it is the Calcutta business. The plaintiff alleges that if there was any such transaction, it was benami and not real. There is no document. The alleged Heba was oral. Its existence depends on two bases: (1) some oral evidence of which two witnesses were alone heard by the learned Judge, and the rest on commission and (2) some entries in the books made at the time. Some exception has been taken to the mention of benami, and it has been said that the matter was

not argued before the learned Judge or mentioned in the evidence. This is not so, for the learned Judge mentions the matter of benami, and it was put specifically in cross examination during the commission to Abdus Sattar. The plaintiff says that there were no Hebas in fact or law and that if there was a transaction in 1897 it was benami and not real and that there was in fact no Heba. It is true it is argued that the evidence is that some entries were made at the time but if so, these were a mere paper affair, not affecting the real ownership or possession. Now it is to be observed that at the time of the first Heba Mahomed Ibrahim was then a minor of 15, 16 or 17 years of age. The father was then in good health and no reason is assigned why the father ten years before his death should assign to his son what was perhaps his chief property and business, even if there were any other properties at the time, which is not clear.

The evidence is that the value of the property of the alleged second gift in 1907 was of somewhat equal value. There is nothing however which clearly shows what, if any thing, was left to Kader Bux after the alleged gift. Moreover the son was a minor. There was no stated urgency for making a minor son a partner. The only reason assigned for the alleged gift is that given by Mahatabo Bibee, who says that she inquired of her husband why he made that Heba—she said:

"I inquired from him why did he make that Heba and he replied that Ibrahim was his son and I made him owner just like myself and made him seated on my gaddi (*Jaisa ham waisa woh*)."

This is no explanation at all. Others can give no explanation. If Kader Bux wanted him to take up his place in the business, there was no need to retire. He could have kept him with him. The defendant is so anxious to disassociate Kader Bux from the business after the date of the Heba, that it is denied that he was ever afterwards even consulted on any occasion: a manifestly improbable statement. There was no apparent reason for his retiring from this business and making it over to a minor. Why, it is asked, was there any anxiety to put him in his place and at any rate a boy of 16 years old or less. Further such a gift would exclude any possible issue, and and it is noteworthy that the second son was born on 30th December 1897 and was, at the time of the alleged Heba, en ventre sa mere. This was said to be the less necessary that according to the alleged custom the sons would have taken without any Heba. According to Mahomed Amin the defendant Ibrahim was a partner in the firm before the date of the first Heba. This contradicts other evidence that he was not a partner, but employed in the firm. At this time there were, it is said, three sets of accounts, account No. 1 which was the partnership account in the name of Kader Bux Mahomed Ibrahim, account No. 2 in the name of the first in which personal drawings are said to be debited, account No. 3 in the name of the latter, being, it is said, deposits made by Ibrahim of money given him by his father.

It is suggested that the account that stood in the name of Ibrahim before the alleged first Heba was really the account of the father. These sums are supposed to represent gifts of large amounts extending from Rs. 2,000 to 5,000 by the father to the son. We find from Ex. 5d that the account standing to the credit of this young boy in 1897 was Rs. 14,386-1-0. This to me is a very improbable story. What is more likely is that the father opened an interest account of moneys of his own in the son's name. The source of the money being the father, the presumption is that the account was his. This so-called private account of Ibrahim is said to have been started when he was 14 or 15. I do not believe that the father gave this young boy these large sums amounting to Rs. 2,000 at a time. It will be observed that Mahomed Ibrahim's name was used before he was a partner. After 22nd April 1897 it is said that the first account was changed into the name of Mahomed Ibrahim alone and the other accounts continued as before. But Ibrahim says that the name of the second account indicated nothing for that though the account stood in the name of Kader Bux, he Ibrahim, was the malik of that account. So that according to the defendant's case both before and after the Heba names were used in the accounts which did not indicate ownership. That there was some change in the account in the year 1897 there is, I think, no doubt. The defendant's evidence is on this point supported by a document on which the plaintiff relies (Ex. H, the

Heba of Hazir Bux the brother of Kader Bux), in which it is stated that credit and debit entries in respect of capital, profit and loss were made in the name of Mahomed Ibrahim.

It may be admitted that this change of entry was done with some purpose. But whether that purpose was a benami or a real gift, cannot be inferred from the transfer entries alone. For it is admitted that whether the transaction was of the one nature or the other, there would have been the change in the entries which were made. That a transfer might take place in the name of Ibrahim when there was admittedly no gift is shown by the Motihari account, where the whole amount is transferred to the name of Mahomed Ibrahim though there had been no gift of the Motihari business. That there was a gift really depends on the credit given to the oral evidence, for there is not, in my opinion any document tendered by the defendant which is inconsistent with the benami. I am not unmindful of Ex. 3, which is a deed of dissolution of partnership dated 7th February 1907 between Abdul Gunny and others and Mahomed Siddik. This document was tendered by the defendants but was excluded by the learned Judge. It is, in my opinion, evidence and that document states that the share of Mahomed Ibrahim was seven annas and three pies and the name of Kadar Bux does not occur. This however is not inconsistent with the case that there was no real Heba: for, of course, whenever a benami transaction is effected, everything is done which is necessary to give it the appearance of reality. If Mahomed Ibrahim's name stood for his father in 1897, it would stand for him in the deed of dissolution in 1907.

There is no document, in my opinion, which supports the defendant's case. It is admitted that so far as the public were concerned, the old name of the firm was retained notwithstanding the change of name in the books. No notice was given to the public that Kadar Bux had ceased to be a partner, though little stress can be laid on this circumstance in the case of a firm of this kind. The gift is said to be oral. There is no mention in the transfer entry of the transfer being made on account of a gift. There is no contemporary document which supports the defendant's case. It does not appear that there were any drawings on the partnership account, but as this occurred also as regards Hazir Bux's account all that can be said is that as this account was not drawn on, it does not help the defendant. No reason is assigned why the Heba was not made in writing, as for instance the Heba of Hazir Bux was. According however to Ibrahim his father Kadar Bux was anxious about the matter before his death and wished to state in writing that this and the other Heba had been made. He is unable to explain if everything was in order why his father should wish to do this. There are however three documents besides the alleged release which directly put in doubt both this and the second Heba. On 13th October 1904, two persons named Abdul Bari and Abdul Majid made a conveyance of the permises No. 47, Taltolla Lane (Ex. 1). This document purports to be between these persons of the first part and Hazir Bux and Kadar Bux the purchasers of the other part. It recites that the vendors were indebted to the purchasers in respect of Rs. 7,000 and by this conveyance conveyed the property to them for that sum.

It is quite clear that the conveyance is to the two individual persons named and not to the firm as alleged by the defendant. The suggestion is that the name of the firm was inserted by mistake. This was after the date of the alleged Heba. Now the defendant's case is that this purchase was made with moneys of the firm of which Ibrahim was, and Kadar Bux was not, a partner. Whether the debt was to the whole firm or to the two partners mentioned in the conveyance is disputed. If the money was that of the firm, then the conveyance would not have been to Kadar Bux who, according to the defendant's case, had long ceased to be a member of the firm. I do not agree with the learned Judge that the conveyance was to the firm and the alternative suggestion that if it was in fact conveyed to these two individuals they held it in trust for the partnership, is not founded on the evidence which suggests that the conveyance, notwithstanding its terms was to the firm. Further the Heba (Ex. H) made by Hazir Bux in November 1907 refers to the house in 47, Taltolla Lane, as belonging to him and his deceased brother Kader Bux, a statement which the former's son, a supporter of Ibrahim, attributes also to mistake. Further in

the schedule of the alleged release dated 9th January 1908, a document drawn up in consultation with several pleaders on behalf of the defendant Ibrahim and on which he relies to defeat the plaintiff's claim, it is re-affirmed that the house at 47, Taltolla Lane, belonged as to half (not to the firm) but to Haji Kadar Bux, the ancestor deceased. It further contains the statement that this property is

"held and possessed as proprietors by Mahomed Ibrahim, Mahomed Sulaiman and Abdus Samad, sons of the Haji Saheb aforesaid."

But how is this in the defendant's case? If it was bought with the money of a firm of which Kader Bux had ceased to be a partner, the latter could not have a half or other share in it. Nextly if the property as alleged belonged to the firm and Muhammad Ibrahim had alone a share therein to the exclusion of his brothers, how is it that in the schedule Ibrahim's sharers are declared to be co-sharers in it? I am not overlooking the fact that the release itself speaks of Ibrahim having been made proprietor of the Calcutta shop. Nextly, there is the Hebanama (Ex. H) a registered document by Kader Bux's brother Hazir Bux in favour of his sons, dated in November 1907, after the death of Kader Bux—as regards this document as well as Ex. 3, the learned Judge in his judgment says they are not evidence though they were admitted and marked as exhibits. I have already expressed my opinion that the defendant's evidence (Ex. 3) is evidence, and in my opinion the plaintiff's document (Ex. H) is so. It was asserted in the evidence that Hazir Bux as partner was aware of and had assented to the alleged Heba, an allegation this document refutes. Now this document contains a recital of great importance in this case. This document runs as follows:

"I am Shiekh Hazir Bux son of Sheikh Rahat Ali deceased, sect Shaikh, occupation zemindari, money-lending and trade, inhabitant of Mouza Kotwari, Parganah Lakhneswar, District Balia. Whereas I and Haji Kader Bux, deceased, were full brothers, I and the said deceased brother jointly started hide and money-lending business at different places wherein our shares were half and half, which are by the grace of God going on up to this time. So that (we) established a firm for Hide Commission Agency business in the town of Calcutta, wherein the business of Hide Commission Agency is carried on and which is at present situate at No. 3, Damzen's Lane, Chinapara, in the town of Calcutta, and the name of the firm is Haji Kader Bux Hazir Bux. In the capital thereof, out of the sixteen annas of the whole capital a share of seven and-a-half annas belongs to me and a share of seven and a-half annas to Haji Kader Bux (my) deceased brother aforesaid, and a share of half an anna to Shaikh Muhammad Amin of Kotwari. and a share of half an anna to Shaikh Abdul Latif of Kotwari. It is a period of about ten or twelve years since my deceased brother Shaikh Kader Bux owing to its being considered advisable (literally by reason of some advisability) substituted the name of his son Shaikh Muhammad Ibrahim in the place of his own name in the papers of the said shop, such as books, accounts, etc., and having also declared his son Shaikh Muhammad Ibrahim to be the owner of his share of capital, got the credit and debit entries in respect of capital, profit, loss, etc., made in the name of Shaikh Muhammad Ibrahim aforesaid in the papers of the shop, so that the credit and debit entries in respect of captial and profit, loss, etc., of the Commission Agency firm in Calcutta are up to this time made in the name of Shaikh Muhammad Ibrahim aforesaid in the papers of the shop but the name of the firm continues to be Haji Kader Bux Hazir Bux as before."

After some further matter not relevant, it says:

"There is also a house in Calcutta purchased by a bill of sale which belonges to me and my deceased brother Haji Kader Bux and is situate at No. 47, Taltolla Lane, in the town of Calcutta. I and my deceased brother Haji Kader Bux are half and half owners and cosharers thereof. The partners of the Calcutta firm have no connection with the said house."

The words "by reason of some advisability" have been at the request of the parties translated by Imam J., as "for some politic reasons." To my mind the first passage very clearly indicates that there was no real Heba. It states that he was a sharer with his brother "up to this time," which means all along, i. e., with Kader Bux and his representatives, for Kader Bux was then dead. This could not be so, if there was the first Heba, for he would have shared with Ibrahim, not with Kader Bux, in that case. It very carefully avoids all mention of a Heba and states the fact that "for some politic reasons" he (Kader) substituted the name of his son in the books of the firm which appears to be a fact, and declared his son to be owner and that the entries are in the name of Ibrahim, though the name of the firm was the same as before. If there was a gift, why not mention it? What is mentioned is a declaration for "some politic reasons" and transfer entries; and the share of Kader Bux, who is supposed to have transferred it to his son, is stated "to be going on up to this time." This evidence very clearly in my opinion negatives the Heba. It is unexplained how a person like Hazir Bux, who was in a position to

know the real facts and, so far as it appears, had no interest to misrepresent them, should thus either impugn or ignore the first Heba. The explanation that all these statements were due to his illness seems to be absurd. The statement is obviously a carefully considered one. I have already referred to the statement in this document regarding the Taltolla house which also negatives the Heba. Then we find that an application was made on 9th June 1908 by Muhammad Ibrahim for a certificate of guardianship of the person and property of his minor brothers, and in this document no mention is made of either of the first or second Heba and in the schedule of properties, 2/3rd of which is declared to belong to the minors, is included, both the house No. 47, Taltolla Lane, and the outstandings of the Calcutta business in which, if the first Heba were a reality, the minors had no interest whatever. The explanation given as regards this is that his servant Budhraj wrote saying that the business was suffering for want of a certificate. An application was sent to Ibrahim and he says he signed it without looking at it—thinking it was the usual thing. Now so far as regards an absence of mention of the second Heba, it does seem unlikely that Ibrahim would knowingly have done anything which would negative a Heba, which had already been set up in the alleged release by the daughter of the deceased in the January previous. This however, only applies to the absence of mention of the second Heba for the interest of the brothers is admitted in the release as in the application for certificate. It is quite possible that Ibrahim might have been satisfied with the document as substantially affirming the rights of the parties as set out in the release without reference to the title by which they were acquired.

But assuming that he did not know at all what was in the document, how is it that this document is in the form which it is, seeing that it was drawn up by Budhraj who had been two years in service and is admitted to have been aware of both the Hebas? Assuming again that Ibrahim was not aware of what was in the document, how did it come to be drawn up in the way in which it is drawn up, which, whilst being in conformity with the release, is to that extent, as explained later, not in conformity with the case set up as regards the first Heba? I now therefore pass to the alleged release which was drawn up by pleaders under the instructions of the defendant Ibrahim In that document the widows and daughters of the deceased are alleged to have said as follows:

"We declare that the late Haji Kader Bux, the predecessor of the declarants, was the proprietor of the moveable and immovable properties detailed below and his intention was to give away the whole of his properties to his three sons, Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, and with this object he made his eldest son Mahomed Ibrahim the proprietor of the shop in Calcutta, and prior to his demise, the late Haji Saheb, in the presence of us the declarants and of Mahommed Ibrahim, Mahomed Sulaiman and Abdus Samad and other relatives and kinsmen of his, made a gift of and gave away all his moveable and immovable properties situate in District Balia, Calcutta and Muzaffarpore to his sons aforesaid, made (them) proprietors and put (them) in possession of the same and in accordance with the oral gift and grant aforesaid all the three sons of the Haji Saheb aforesaid are holding and possessing all the properties as proprietors and it is their names which have been registered in the Sarkari papers ... our brothers aforesaid are in every way proprietors of all the same. Cl. 3: We the declarants do in every way confirm and admit the oral gift and grant which has been made by our husband and (our) father in favour of our brothers, and (our) sons Mahomed Ibrahim, Mahomed Solaiman, and Abdus Samad, and Mahomed Solaiman, Mahomed Ibrahim and Abdus Samad have in every manner become proprietors (in place of) Haji Kader Bux deceased. Therefore we do execute this declaration of relinquishment so that it may come to use in time and remain as a document."

After giving the names of the declarants and the amount of consideration money, it sets out the schedule as follows:

"Schedule of the estate and property of Haji Kader Bux, the ancestor deceased, which in accordance with the oral gift and grant aforesaid are held and possessed as proprietors by Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, sons of the Haji Saheb aforesaid. Schedule of Trading and Banking firms (1) A firm of Arath (Commission Agency) for hide, the name of which firm is Haji Kader Bux Hazir Bux situate in the town of Calcutta, Chinapara, Damzens Lane, No. 3, together with the funds and capital, the trading and Arath business and articles of merchandise and household furniture, etc., lying in the firm together with all the things and rights, etc., appertaining thereto, wherein out of the sixteen annas the right and share to the extent of seven annas and half belonged to Haji Kader Bux the ancestor deceased and which are held and possessed by Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, sons of the Haji Saheb aforesaid, as proprietors."

Then omitting some further particulars we have:

"(1) A brick built house situate in the town of Calcutta, Taltolla Lane No. 47, which is let out on hire, wherein right and share to the

extent of half belong to Haji Kader Bux, the ancestor deceased, and which are held and possessed as proprietors by Mahomed Ibrahim, Mahomed Solaiman and Abdus Samad, sons of the Haji Saheb aforesaid."

This document is in my opinion very strong evidence against the first Heba and as it is a document prepared on behalf of the defendant Ibrahim, it is of exceptional importance. Before dealing with this document it is necessary to recall that the case of the latter now is that there was in 1897 a valid Heba legally effective which transferred to him the Calcutta business, which from that date formed no part of the estate of the deceased. This document impugns each of these points. It was drawn up at the instance of Ibrahim in consultation with several lawyers who were well aware what a Heba or gift is and its effect. Now it starts by saying that Kader Bux made Mahomed Ibrahim "the proprietor" of the Calcutta shop just as the Heba of Hazir Bux says that Kader Bux for "some politic reasons" declared his son to be its "owner." Something may have taken place in 1897. But was the transaction meant to be and was it in fact a valid Heba? If it was, it is curious that the lawyers did not use the word gift or Heba, the more particularly that they do so immediately afterwards in connection with the second Heba—why not say that Kader Bux gave his son the Calcutta business, if such be the fact? If the matter rested there, this criticism might be said to be refining on words.

It does not, however, rest there, for we find throughout only one gift (not two) mentioned, under which all Kader Bux's properties (not excluding the Calcutta business) were given to the three sons (and not to Ibrahim alone). How could Kader Bux have given all his properties to his three sons if the most valuable property of all, the Calcutta business, had already been given to Mahomed Ibrahim? He could only do so if there were no legal valid first Heba. It is possible that there was no valid first Heba, but that for "some politic reasons" Ibrahim was declared proprietor or owner of the property now alleged to be covered by it and that the release refers to this fact: but that it was not a valid gift and that, therefore, objection was taken on behalf of the minors to its being so described in the release or given effect to as such. This is, it is true, only a matter of speculation put forward as a possible explanation of how in this document two transactions are referred to, only one of which is called a gift. But the document itself and its schedule leaves me in no doubt as to its meaning. For after the body of the document had stated that all the properties had been given to the three sons, the schedule clinches the matter by showing what those properties were. It in the most express terms affirms that half of the Calcutta business belonged to Kader Bux (not to Ibrahim as now alleged), though according to the present case Ibrahim had been holding the property from ten years before this document and his father had nothing to do with it, it, secondly, affirms that this business was the property of the three sons, and thirdly, that it was their property by virtue of the oral gift, that is, the one gift referred to in the body of the document under which all three sons took.

It further goes on to make a similar affirmation as regards the Taltolla house, half of which is said to have belonged to Kader Bux though this is now said not to be so and which, if it were purchased out of the moneys of the Calcutta business as alleged by the defendant Ibrahim, would in the event of there being a valid first gift have belonged to him alone. Mr. Jackson has not given any explanation of this except that this only occurs in the schedule. But this is no answer. The schedule merely affirms the body of the document for we must read the body and schedule consistently if we can; and moreover the schedule is no trifling thing and the whole document was drafted by lawyers on the instruction of Ibrahim. In my opinion this release disposes of the case as to the first Heba. It merely alleges that, as is possible, there was some transaction in 1897 which did not amount to a valid gift but that what was the subject of that transaction was subsequently transferred with other properties to all the three sons. It seems to me impossible that this document could have been framed as it is, had there been a a valid Heba in 1897. In that case all that it was necessary to say was that the Calcutta business had been given to Mahomed Ibrahim and the rest of the properties to him and his brothers. As the matter stands if the second Heba is an effective document, then all the sons

of Kader Bux are interested in the Calcutta business.

I have no doubt that there was no valid first Heba in 1897. I may here point out that of the evidence by which the two Hebas are sought to be supported all except two witnesses gave their evidence on commission, and we are, therefore, in no worse position than the learned Judge who heard the trial. Of these witnesses the Commissioner, who was entitled by law to do so, noted his observations as to the demeanour of some of the witnesses. Of Abdus Sattar, on whom great reliance is placed and whose evidence I distrust—the Commissioner says he was evasive. Of Mahatabo Bibi, Hakima Bibi, and Hadi Hasan he records the observation that they appeared to him to have been tutored. If they were tutored they must have been tutored by or on behalf of Mahomed Ibrahim, for he is the person most interested and for whose advantage only it would be done. That he is not altogether scrupulous is shown by Exhibit F, in which he shows himself a party to bribery. A suggestion was put forward that the Commissioner had dishonestly made these adverse comments because of a dispute as to his fee. This charge against the Commissioner who is a Munsif is based on the fact that the observation on the demeanour of one witness was made sometime after he had given his evidence and after the date on which the dispute is supposed to have arisen. But the other observations were made before that date. The allegation is without substance and evidence only of the length to which the defence is prepared to go in support of the case which it sets up. It is then said that the Commissioner was not in a position to observe the witnesses because they were pardanashin. The observation cannot apply to the two men witnesses and it is feasible, as I have often done, to judge of the character of a witness's testimony without seeing her face by the manner of and delay and so forth in answering questions, the character of the answers and so forth.

The learned Judge says that Ibrahim and Siddik appeared to him to be truthful and reliable witnesses and that he preferred them to the evidence of Abdul Hamid, the plaintiff's husband. That may well be so for the latter, in my opinion, is an unreliable and unscrupulous person and the last to have represented his wife's interests in the matter of the release. I am not prepared myself to place such trust on these two witnesses or to put aside all the probabilities and inferences arising from the documentary evidence because they do not fit in with Mahomed Ibrahim's story. That story must, in my opinion, fit in with them or it is not entitled to acceptance. The learned Judge does not in his judgment deal with a large number of the considerations which were dealt with and had they been present to his mind, he might not improbably have taken a different view of the value of Ibrahim's evidence which is directly contradicted by the documents. It is further to be remembered that he is a very interested party who is claiming the bulk of the property for himself, for the value of the Calcutta business is said by him to be about 3 lakhs. A question was argued as to whether if the Heba was made, legal effect was given to it by transfer of possession. If the evidence is accepted and it is held that there was a real Heba, then that same evidence would seem to establish that possession was given. But as I am not satisfied that there was a Heba of 1897, I need not further discuss this matter. I will only add that the contention that if there was any transaction in 1897, it was a benami and not a Heba, was raised in the lower Court as appears both from the judgment and evidence. The submission that this is not so is without foundation.

The question of the second Heba is one of greater difficulty. For there are not against it the same improbabilities. It is said to have been made shortly before Kader Bux's death in favour of all his three sons, and if there were ground for impugning the alleged first Heba that might in itself be a reason for executing a second. There is, however, no mention of the second Heba in the Heba of Hazir Bux, who, as having an interest in the other properties, might reasonably have been expected to refer to it, as he did to the transfer of entries made at the date of the alleged first Heba. It is not mentioned in the application for a certificate of guardianship. Though there were zamindaries, no evidence is adduced to show by revenue records that there was such a transfer, and the effect given to it. It is true that there is a reference to

registration in the Sarkari papers in the release, and in so far as this release is brought home to the plaintiff this is some evidence. But we have not these papers and do not know their contents. There are different provisions for transfers inter vivos, and by inheritance. If these papers do not show a transfer inter vivos, they would be evidence against the existence of the second Heba. The presumption on this point is against the defendant Ibrahim who has not produced these papers. For all that we know they may show a mutation effected in accordance with inheritance and the alleged custom excluding females. Then as I have above pointed out, the release does refer to the second Heba but speaks only of one gift, and if the facts are correctly recorded there, the second gift operated over property other than that which is said to be its subject in the evidence. For if the first Heba be not established, the defendants could not claim as against the plaintiff in this suit the Calcutta business, for that would be to give them relief upon a new case. The present case made on the evidence is that the Calcutta business is not covered by the second Heba.

The evidence and the release have suggested the argument which is not without foundation that Mahomed Ibrahim, who admitted the title of his brothers to the Calcutta business in 1908, is now trying to take it from them. There is also to be considered the fact that by this Heba, which would seem to be unnecessary if there was the custom alleged (for the story of Kader going on pilgrimage is spoken to by Ibrahim alone, who at first said there was no necessity for it). Kader Bux is said to have made over his property to his sons without making any provision whatever for the female members of the family. This Heba again is unsupported by any document and has the application for guardianship against it, for whatever that circumstance may be worth. It might have been supported by revenue papers showing that the properties were claimed by transfer, but such are not produced. There is nothing but the word of some of the witnesses to it, some of whom the Commissioner thought gave their evidence in tutored fashion. Moreover in the absence of corroborative evidence, the view one takes as to the oral evidence given in support of the first Heba must necessarily re-act upon the evidence of the witnesses to the second Heba where these are the same. I hold, therefore, that the existence of the second Heba has not been established. I need not then go into the question whether if it took place in fact, it was valid in law, at any great length. It has been said to be based on the doctrine of musha. Amongst other authorities a passage is cited from Fatawa Alamgiri, Vol. 4, p. 549, Ed. Cal., in which Al Hakim states:

"A man makes a gift of a house to two of his sons one of whom is adult and the other is a minor and the adult son takes possession (of it). The gift is absolutely void and this is the correct view. For the gift in favour of the minor is complete at the very moment of the declaration of the gift because the seisin or possession of the father is equivalent to his (minor's) seisin or possession (qabz); Whereas the gift in favour of the adult son stands in need of acceptance. Thus the gift in favour of the minor precedes (that in favour of the adult) and thus confusion (shuyn) is occasioned, And the device is that he (father) should deliver possession of the house to the adult son and then make a gift of it to both of them. Thus it is laid down in the Wajiz of Al Kardari."

There is no evidence of such a device being resorted to here and one may reasonably question whether Kader Bux was aware of such technicalities. I am not prepared to say that the fact, if it be a fact (which I cannot hold), that Kader asked Ibrahim to accept the gift for himself and his brothers, whilst it would interpose some one who does not appear to be the legal guardian between the alleged donor and the infant donees, whose share is not expressly stated, brought the case strictly within the device according to which Kader should first have transferred possession to Ibrahim and then made a joint gift to Ibrahim and his minor brothers. It is, however, unnecessary for me to give a formal decision on this point. I should have been sorry to decide the case upon so technical a ground and am relieved from doing so by my finding that the existence of the second Heba has not been made out. I now pass to the concluding point, the alleged release of her rights by the plaintiff. Abdul Latif, when asked what was the necessity for the execution of the deed of release by the ladies, answered "to confirm the two verbal Hebas by Kader Bux." I have already pointed out that it was not a confirmation of the alleged first Heba. If the Hebas were real, it is noteworthy that it was thought necessary according

to the evidence to mention and thus confirm the first at the date of the second and to confirm the last by a release, the deceased Kader Bux having, it is said meanwhile expressed a wish to confirm them in writing, which was not done.

Shortly after the death of Kader Bux on 28th August 1907 steps were taken to secure Ibrahim from any claim by the ladies and it was he who suggested that they should give him a release of their claims, if any. The idea of the release originated, he says, with him. These ladies are illiterate pardanashin, who from the evidence I should say are entirely in the hands of the male members of the family. Indeed as appears from the evidence as to the alleged custom women are not of much account in this community for fear, according to one of the witnesses, that they might be spoiled. Now it is not suggested that the plaintiff had any direct knowledge of the alleged first Heba, at the time it was made. If she was told anything it does not seem that she was told that there was a Heba in 1897 giving the Calcutta business solely to Ibrahim and that his brothers had no share in it, for we do not find any such statement in the document which she is said to have executed and which was drawn up by Ibrahim's lawyers.

Ibrahim gives some vague evidence to the effect that he told his mother "that his father wanted to execute a document like that" and he wanted a document in which his father's intention should be stated and that if the ladies desired payment for this, he would do so. The second Heba is alleged to have been made in a loud voice in the presence of many persons including the ladies. According to the evidence the second gift was of property other than that disposed of by the first, a fact which is, as I have shown, contrary to what is stated in the release and its schedules. We must take it then either that the evidence is not true or that the document which the plaintiff is said to have signed is an incorrect statement of the facts. The release also states that under the alleged custom the females get nothing. This the plaintiff denies and it is a different custom from that pleaded. We thus find, that this release affirms facts which I find on the evidence not proved, namely, the two Hebas and the custom and without doubt (even on the defendants' own showing) contains statements not consistent with the evidence and case now made.

Ibrahim got this document prepared by his lawyers. Maulvi Abdul Barkut, the defendant's witness, says that the draft was taken to him by Haji Ahmed and Abdul Hamid who "were in a hurry" and they were sent over to a pleader. The document received a great deal of legal attention in the interest of Ibrahim but it never occurred to him that the ladies might properly require legal advice as to their rights. He cannot say whether they were aware of their rights under the general Mahomedan law, nor does it appear that they knew what the law requires in the case of custom in derogation of the law and what is necessary to the legal perfection of a heba. There were matters as to which legal assistance was clearly necessary. The facts again as regards the alleged first Heba were not in their direct knowledge. The document is then said to have been explained no less than five times to the different ladies by Mahomed Amin, Hadi Hossain and the Registrar and, it is said, executed for the plaintiff by her husband, who on his own evidence was a person willing for a consideration to cheat her. This same person Hamid is also said to have had the handling of the money Rs. 4,500, which is said to have gone into the hands of the plaintiff as the consideration for the release. It is admitted that the plaintiff had no legal advice though this is, in my opinion, a case where it was necessary that she should be rightly advised of her rights before signing them away. I am not satisfied that she had any proper advice or protection. Certainly her husband was not the sort of person from whom it might have been expected, and the other ladies of the family were no better situated than herself. Learned counsel admits that he cannot support altogether the case made by his clients that the release was never read to her or that it was represented to be a Muktearnamah. That particular case must be held to fail. How little is the value to be attached to the so-called explanation of the document of release is shown by the facts mentioned and in particular by the following.

An argument as to its meaning, which it may be argued is capable of various possible interpretations, has occupied us for several days. I do not refer to some

alleged slips in translation which do not appear to me to affect the case, even if established. If the release was explained to the plaintiff as if it acknowledged two valid Hebas, was the alleged mistake in the schedule which is contrary to such acknowledgment brought to her notice? If the release was explained as a document which recited only one valid legal disposition of the property, which is the interpretation which makes the body of the document and its schedules consistent, then the document was explained in a sense contrary to that in which the respondent has now used it. The reading of documents to illiterate pardanashins is sometimes a meaningless formality of which the present case is a conspicuous illustration. Whatever be the deficiencies in the plaintiff's case on this point, it will however still remain on the defendant, who sets up the release, to show that it is an operative bar to the plaintiff getting that share of the inheritance to which she is entitled under Mahomedan law. If she is entitled to share in the Calcutta business, she has not had anything like her rights, even assuming she received the whole or any portion of the Rs. 4,500, of which I have considerable doubt.

It is to be noted that it is not possible to trace the sum of Rs. 13,500, for it is said to have been paid in rupees. It is usual to make payment of consideration in notes capable of identification. It is said that rupees were given because the ladies specially asked for it, Rs. 13,500 was brought, it is said, in 9 bags and counted out and, according to witness 1, all this hard coin was paid into the outstretched hands of the ladies behind the pardah. The story has a physiognomy common to this class of cases, but is not on that account the more convincing. The Registrar's note is evidence of payment, and it may be, and probably is the case, that money was produced and counted out in his presence, but whether it or the whole of it remained with the ladies, is another matter.

It is significant in this connexion to refer to the evidence of Hakima Bibee, who appears to have had Rs. 1,200 or so only. She says "the sum of Rs. 2,800 has been spent up in our hide business at home." When this witness was asked whether her male relatives — who were supposed to have been giving her Rs. 4,500—nevertheless looked to her for pecuniary assistance, she says she was told to give them the money to be used for the business — "so I gave." I have no confidence that Rs. 4,500 found its way into the hands of the plaintiff even though it may have been produced before the Registrar. As however the onus on this point is on the plaintiff and her counsel did not press her statement on this matter for our acceptance, I am obliged to hold that she has not established that she did not receive the money. Her rights however are in excess of this, if there be no custom against inheritance and if her father did not divest himself of everything he possessed in favour of his sons and left his daughters and other female defendants with nothing. On my finding as to the alleged custom and the Hebas, the release was executed in misconception of the true facts and of the plaintiff's rights and is in consequence not binding upon her.

On these findings it is not necessary to inquire into the question of jurisdiction, but even if the first Heba had been established, the Court would, in my opinion, have jurisdiction. The plaintiff's cause of action is the release which purported to operate over property within and without Calcutta. The mere fact that the defendant might make a case as regards the Calcutta properties would not deprive the Court of the right to deal with the rest of the properties covered by the same document. The result therefore is that, in my opinion, the suit should, subject to the remarks about to be made, be decreed with costs in terms of the plaint other than Cls. (g) and (h). Any relief, the subject of these clauses, may however be made the subject of independent application. On the account the plaintiff will have to be debited with the sum of Rs. 4,500 which I have found, she must on the evidence be taken to have already had. As I have no doubt that the judgment is erroneous I would therefore reverse the decree under appeal and decree the suit and appeal with costs in both Courts.

Mookerjee, J.—The litigation, which has culminated in this appeal, was commenced by the appellant on 3rd January 1911, for declaration of her title to a 7/88ths share of the estate left by her father, Haji Kader Buksh, who died on 28th August 1907 and left two widows,

three sons and five daughters. Kader Buksh had a brother, Hazir Buksh, who died on 5th November 1907 and left two sons. The relationship of the parties to this suit will be apparent from the annexed genealogical table. The case for the plaintiff is that her father left an estate of considerable value, which has been unlawfully seized by her brother Ibrahim, defendant 1. She further alleges that on 9th January 1908 she was induced to execute a registered instrument in Urdu language and character on the representation that it was a general power-of-attorney, but which she has subsequently ascertained was a release of her rights in the estate of her deceased father in favour of her three brothers. She consequently prays that the deed of release may be declared void and inoperative, that she may be held entitled to the share mentioned in the estate left by her father, and that she may be awarded possession upon partition as also incidental reliefs.

Defendant 1 who contested the claim of the plaintiff, filed his written statement on 14th June 1912, which disclosed a threefold defence, namely, first, that the parties belonged to a community called Erakis, which, though governed in all other respects by the Sunni School of Mahomedan law, is, like the Khojas and Memons, governed in matters of succession and inheritance by the Hindu law, so that the plaintiff is not entitled by the custom prevalent in the community to any share of the estate of Haji Kader Baksh; secondly, that Haji Kader Baksh did not, at the time of his death, leave any estate, as whatever properties he had were validly transferred by him by way of two gifts on 22nd April 1897 and 19th July 1907; and thirdly, that if the alleged custom and the gifts are not established, the plaintiff has relinqished her right in the estate of her father for a consideration of Rs. 4,500 and executed a release on 9th January 1908. Greaves, J., found upon the first question against the defendant and upon the second and third questions against the plaintiff. In this view, he dismissed the suit with costs. On the present appeal, the three questions stated have been elaborately argued by counsel on both sides, and I shall examine them in the order I have mentioned.

As regards the question of custom, reliance has been placed by counsel for the appellant upon a statement in the work on Castes and Tribes of the North Western Provinces and Oudh by Mr. Crookes, prepared at the instance and published by the authority of the Government of that Province. Reference, I think, may legitimately be made to the work of Mr. Crookes as an authoritative statement of customs prevalent among the Eraki sect of Mohomedans, but it is of no real assistance to the plaintiff. The issues were not framed till 8th April 1915, and issue 5 was expressed in the following terms:

"Is there a custom amongst the Eraki community, to which the parties to this suit belong, excluding females from inheritance."

It will be observed that the issue framed is not in conformity with the custom alleged in para. 3 of the written statement; the custom set out there was, not the absolute exclusion of females from inheritance, but a limited exclusion as prevails amongst the Khojas and Memons. [*Khojas and Memons case*, *Hirbea* v. *Sonabae* and *Rahimatbae* v. *Hadji Jussap* (9)]. Before this issue was framed, however, a large number of witnesses had already been examined on commission on behalf of the plaintiff from 14th September 1913 to 6th November 1913. These witnesses, as may be anticipated, were examined and cross-examined with reference to the custom pleaded in the written statement, and not with reference to the custom subsequently set up in the issue. The evidece taken in Court later on, it may be generally stated, seeks to establish that in no circumstances do females take by inheritance in the Eraki community, while the evidence on commission seeks to support the case that females are excluded only to a limited extent as amongst the Khojas and Memons. The evidence of Muhammad Ibrahim on this part of the case is not consistent with the evidence of his witnesses, who, as I have already stated, are not agreed amongst themselves as to whether the exclusion is absolute or qualified. The statement in the work of Mr. Crookes tends to show that in certain contingencies, women do take by inheritance, and consequently discredits the witnesses who support a case of complete exclusion. The custom alleged has not met with acceptance in any Court of Justice, and such documents as we have do not support the

9. Perry's Oriental Cases 110.

defendant. It is also plain that the custom does not possess two at least of the essential attributes for its validity, viz., uniformity and certainty: *Hurpershad* v. *Sheo Dayal* (4), *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (10) and *Mahamaya Debi* v. *Haridas Haldar* (11).

The fact that the custom was not pleaded in litigations between members of the community where it might have been pleaded, is, I think, also relevant evidence and the question of its relevancy is not affected by the circumstance that some of these suits were still pending at the time of the trial in the Court below. I do not think reliance can be implicitly placed upon the oral evidence adduced by Muhammad Ibrahim in support of the custom, because most of the witnesses who came forward to testify to the custom had excluded their female relations and were deeply interested to establish that the exclusion was justifiable. Some weight must also be attached to the circumstances that Kadar Buksh deemed it necessary to make gifts in favour of his sons and that the defendant I thought it prudent to take a release from his sister; neither the gifts nor the release would have been necessary if the custom of exclusion of female heirs, either entirely or to a limited extent, had been as well known to members of the community as we are now asked to believe. I feel no doubt, on the first question, that defendant 1 has failed to establish the custom of exclusion of female heirs, whether we look to the qualified custom pleaded in the written statement or the more comprehensive custom raised in the issue.

As regards the second question, it is alleged by defendant 1 that his father had divested himself of all that he possessed by means of two oral gifts, the first made in his favour on 22nd April 1897 in respect of what has been described in this proceeding as the Calcutta Hide Business, and the second made in favour of himself and his two infant brothers on 19th July 1907 in respect of all the other properties mentioned in the schedule to the plaint. It may bestated here parenthetically that one of these properties is a house in 47, Taltola Lane Calcutta, which, it is said, was acquired out of the funds of the Calcutta business and must consequently be regarded as the property of the owners of that business. We have thus to consider the factum and validity of the two gifts separately.

By the first gift, it is alleged that Kader Buksh gave away his share of the Calcutta business to Muhammad Ibrahim at that time his only son. There is no documentary evidence in support of the gift, but we have the statements of witnesses, of whom two were examined in Court and the others on commission. We have further entries in the books of account of the firm. The plaintiff asserts that there was no gift at all and that if the parties went through the form of a gift, it was never intended to be a real and operative transaction. She further contends that the gift, if it did really take place, did not satisfy the requirements of the Mahomedan law. I am not prepared to reject entirely the evidence that in 1897, spme transaction apparently in the nature of a gift did take place: but I am of opinion that what Kader Buksh did was never intended by him to take effect as a real gift. In the case of a transfer for consideration, where the question arises whether the ostensible purchaser is also the real purchaser it is possible to apply the familiar test, usually conclusive in this class of cases, namely, what is the source of the purchase money. In a case of gift however when it is alleged that the transaction was fictitious, this test naturally fails, and we have to rely upon other aspects of the matter, namely, the surrounding circumstances contemporaneous with the gift and the subsequent conduct of the parties concerned.

Now, in the case before us, Kader Buksh was, in 1897, a man in business and in good health. His only son Ibrahim was a lad 15 16, or 17 years old. His property, so far as we can gather, consisted of the hide business. What was the motive which could possibly have moved a man in that position to transfer to his boy, by way of gift, all that he had, namely, a flourishing business in Calcutta ? No plausible explanation has been offered. If Kader Buksh was anxious to advance his son in life, he might possibly have taken him as a partner, but no theory has even been so much as suggested why he should retire from business completely and leave it in the hands of a youth, even though his brother was a partner. No reason has been

10. (1876-78) 1 Mad 235=4 I A 76.
11. (1915) 42 Cal 455=27 I C 400.

put forward why Kader Buksh should deprive his possible issue of their share in the patrimony. As a matter of fact, at the time of the alleged gift, one of his wives was in the family way, and his second son was born, within eight months of the gift, on 30th December 1897. Reliance however has been placed on what is called positive testimony. That testimony may point to the conclusion that some transaction in the way of an apparent transfer did take place at the time, but it does not establish with certainty that the transaction was intended to be real. The sheet anchor of the case for the defendant is the account books, extracts from which have been explained before us with great care and lucidity by Mr. Rasul.

These accounts may be classified under three heads, namely, first, partnership accounts in the name of Kader Buksh Muhammad Ibrahim; secondly, the personal drawing account of Kader Buksh ; and, thirdly, the deposit account of Ibrahim in respect of money given to him by Kader Buksh. These accounts, in my opinion, are by no means of a conclusive character, for it is well known that when parties have decided to enter upon a fictitious transaction, the accounts are made carefully to correspond to the apparent state of things; but apart from this, there are inheret improbabilities in this case, which cannot be overlooked. Thus, the deposit account of Ibrahim shows that in 1897 the sum of Rupees 14,386-1-0 stood to his credit. No explanation has been offered why such a large sum as this should be placed at the disposal of a boy of 15. His father was the source of this money and was presumably the owner. On 22nd April 1897, the partnership account was altered and the name of Muhammad Ibrahim was introduced. This, in my opinion, does not necessarily indicate that Muhammad Ibrahim thereby replaced his father as a partner of the firm. The change of name may be consistent with the theory of gift, but does not necessarily indicate that there was a gift, for it is significant that no trace of a mention of gift is to be found in the account books. If there had been a real gift, it would have been only natural to recite it in the account books, when the substitution of name was made. In this connection, it may be observed that while one of the witnesses, Amin, says that Ibrahim was a partner from before, other witnesses maintain that he was only employed in the business. The mere entry of the name of Ibrahim accordingly does not show that there was a gift in his favour. To take one illustration, the Motihari business account was also transferred to the name of Ibrahim. But it has not been suggested that there was a gift of that business to Ibrahim. Much stress was laid by the defendant on the deed of dissolution of partnership, dated 7th February 1907, between Abdul Gani and others and Muhammad Siddique. This, in my opinion, was admissible to establish the factum of dissolution of a firm recited therein as

"carried on by Muhammad Ibrahim, Hazir Buksh, Muhammad Amin, Abdul Latif and Muhammad Siddique in co-partnership between them."

This enumeration of partners is, however, really of little assistance, because if there was a benami in 1897, the parties would adhere to the benami when the partnership was dissolved in 1907. We have, on the other hand, the significane fact that in 1897 when, it is alleged, the interest of Kader Buksh was transferredt by way of gift to his son, Muhammad Ibrahim, no notice was given to the public, and though the name was changed in the books of account, the original firm name was retained and used in transactions with the public. We have further the important fact that the gift was not recited in the account books, nor was there a written instrument, though the subject-matter of the transaction was property of considerable value. We have, besides all this, the incident of the purchase of the Taltola house on 13th October 1904, when Abdul Bari, Abdul Majid and others sold the house to Hazir Buksh and Kader Buksh. The consideration for this transfer was money advanced to the vendors from the Calcutta business. The transfer, however, was not to Muhammad Ibrahim as a partner of the firm, but to Hazir Buksh and Kader Baksh. A desperate effort was made to establish that this was in reality a transfer to the firm. In my opinion, that attempt has entirely failed. Besides Hazir Buksh, in his registered deed of gift, which, I think, was admissible in evidence, stated on 1st November 1907 that the Taltola House belonged to himself and his deceased brother Kader Buksh, half and half.

Indeed, in the schedule to the release, dated 9th January 1908, the house is treated as the property of Kader Buksh. This could only be so if the consideration paid therefor belonged to Kader Buksh; and, as the purchase money came from the Calcutta business, it is plain that in 1904, notwithstanding what might have happened in 1897, Kader Buksh was still treated as the proprietor of the income of the business. This, in my opinion, constitutes a serious difficulty in the way of acceptance of the case for the defendant that there was a real gift in his favour in 1897. The release, in fact, furnishes strong evidence against the reality of the gift of 1897. It was drawn up at the instance of Muhammad Ibrahim; yet it mentions only one Heba (the other is apparently a buksisnama), whereby all properties (not excluding the Calcutta business) were given to the three sons. The description of the properties in the schedule shows that one-half of the Calcutta business belonged to Kader Buksh and not to Ibrahim, and consequently passed to the three sons by virtue of oral gift Besides, in his deed of gift, Hazir Buksh further stated that 10 or 12 years before, his brother Kader Buksh had, "for some politic reasons," substituted the name of Muhammad Ibrahim in the place of his own name in the papers and accounts of the firm and on declaration that Muhammad Ibrahim was the owner of his share of capital got the credit and debit entries in respect of capital, profit and loss made in the name of Muhammad Ibrahim. This clearly is a plain statement by Hazir Buksh that the transaction of 1897, which, be it noted, he does not describe as a gift, was not real and operative.

We have, in addition to all this, the remarkable fact that in an application for guardianship of his infant brothers, made by Muhammad Ibrahim on 9th June 1908, no trace is found of the alleged gift of 1897; on the other hand, the schedule describes that a two-thirds share of the Calcutta business and the Taltola House belonged to the infants, an allegation wholly irreconcilable with the theory of a real gift of the Calcutta business to Muhammad Ibrahim in 1897. On a review of all these circumstances, I do not see any escape from the conclusion that there was no real gift of the Calcutta business to Muhammad Ibrahim in 1897. I am not unmindful that in this country, as in England, the settled rule is that the burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record: *Lalljee Mahomed* v. *Dadabhai Jivanji Guzdar* (12) and *Colonial Securities Trust Co.* v. *Massey* (1), but the appellant has, I think, discharged this burden. In the view I take, it becomes needless to consider whether, if there was a real gift. it fulfilled the requirements of the Mahomedan law. I am not unmindful that under the Mahomedan law as administered by British Indian Courts, where the subject of the gift is incorporeal property not susceptible of physical possession, a gift thereof may be completed by such transfer of control as may be appropriate and possible in the circumstances: *Ameeroonnissa Khatoon* v. *Aledoounissa Khatoon* (13), *Mullick Abdool Guffoor* v. *Muleka* (14), *Anwari Begam* v. *Nizam-ud-din Shah* (15) and *Mahomed Buksh Khan* v. *Hooseini Bibi* (6). But the question whether the gift of a share in a partnership business can be validly effected by delivery, and, if so by what form of delivery, under Mahomedan law presents a problem of some nicety, as is clear from an examination of the following texts, and I reserve my opinion thereon:—

Text I.—When one of two partners says to his co-partner, "I make a gift to thee of my right in the profit," they (the jurists) say the gift is not valid if the property (i. e., capital stock) itself be in existence; because it is the gift of a Musha with respect to what is capable of division. But if the partner has consumed, destroyed, wasted the property, the gift is valid; because owing to its loss, destruction, it becomes a debt and a debt is not capable of division. Thus it is the gift of Musha with respect to what is not capable of division; therefore it is valid. (Fatawa Qadi Khan, Vol. IV, p. 282, Ed. Lucknow).

Text II.—If a person makes a gift to his partner, of his share in the partnership stock, capable of division, it is invalid, because of the invalidity of the gift of an undefined part of a divisible

12. (1916) 43 Cal 833=34 I C 807.
13. (1874-75) 2 I A 87=15 B L R 67 (P.C.)
14. (1884) 10 Cal 1112 (P. C.).
15. (1889) 21 All 165.

subject. (Hidayah, Vol. VII. p. 491, Ed. Cairo).

Text III.—If one of two partners says to his co-partner, "I make a gift to thee of my share in the profit;" if the property be in existence it is not valid; if destroyed, it is valid (Fatawa Sirajiyah p. 138, Ed. Lucknow).

Text IV.—If one of two partners makes a gift to the other of his share in the profit; if the property be in existence it is not valid because of its being capable of division; if it be destroyed, it is valid, because a debt is not capable of it (division). Thus it is laid down in the Muhit. (Bahr-al-Raliq, Vol. VII, p. 312, Ed. Cairo).

Text V.—When one of two partners says to his co-partners "I make a gift to thee of my share in the profit," they (the jurists) say it is not valid if the property be in existence because of its being a gift of Musha with respect to what is capable of division. But if the partner has destroyed the property, the gift is valid, because of its being then isqat (extinction). Thus it is laid down in the Zahiriyyah. Fatawa Alamgiri, Vol. IV, p-531, Edn. Calcutta).

Text VI. When one of two partners says to the other, "I make a gift to thee of my share in the profit," and the property is in existence, it is not valid because it is a gift of Musha with respect to what is capable of division. But if the partner has destroyed it, it (gift) is valid. (Radd-al-Muhtar, Vol. 4, p. 796, Ed. Constantinople).

By the second gift, it is alleged that Kader Bukhsh, on 19th July 1907, that is, about a month before his death, gave the remainder of his properties to his three sons. This raises two questions, namely first, whether there was in fact such a gift, and, secondly, if there was, did it fulfil the requirements of the Mahomedan law. It is worthy of note at the outset, before either of these questions is examined, that the second gift, even if established, would not affect the Calcutta business and the Taltola House, because the evidence does not show that these two properties form the subject-matter of the gift. The evidence to prove the second gift is based on the assumption that there was a real gift of the Calcutta business in 1897, and, consistently with that theory, seeks to establish that the transfer of the remainder of his estate was effected by Kader Bukhsh, by this supplementary gift. As regards the second gift, I am not satisfied on the evidence that it did as a matter of fact take place and was completed. There is no doubt oral evidence adduced by the defendant, but there are unexplained difficulties which cannot well be ignored. There is no mention of the second gift in the application for guardianship to which reference has already been made. The explanation is, to my mind, not quite satisfactory. Muhammad Ibrahim must be deemed to have been fully aware that the matter was of grave importance to him, and one would have expected him, as a man of ordinary prudence, to set out the title under which he claimed. There is also the fact that no document was executed; here again, any cautious man would have insisted upon the execution and registration of a deed of gift, when the result of that gift would be to deprive all the heirs, except the three sons of the donor, of what would otherwise devolve on them by right of inheritance.

We have, in addition to this, the circumstances that no attempt appears to have been made to give effect to the alleged gift, either by change of names in the records of the Collector or in the books of the various firms. There is, besides, the noticeable fact that Hazir Bukhsh makes no mention of the second gift in his deed of gift. We cannot also overlook that the document makes no provision whatever for the female members of the family, namely, the two wives of the donor and his five daughters. No reason has been assigned why a man in the position of Kader Buksh, possessed of considerable wealth, should make no provision whatsoever for his own wives and daughters, and leave all that he had to his three sons, two of whom were six and ten years old. In the face of these difficulties, should we accept the oral evidence on the record? I am clearly of opinion that how far the testimony of these witnesses is reliable, must be judged by the surrounding circumstance. In this connection, I may advert to the remark made by the Commissioner about the demeanour of some of the witnesses examined before him. Abdul Sattar is described as evasive and not trustworthy. Mahtabo, Hakima and Hadi Hassan appeared to him to have been tutored; it is difficult to say in whose interest they could have been so

tutored, other than that of Muhammad Ibrahim. The letter written by Muhammad Ibrahim on 9th February 1908 to Abdul Hamid furnishes some indication that Ibrahim was not above recourse to bribery. In this Court, a forlorn attempt was made to impute dishonesty to the Commissioner, who was a Judicial Officer of some standing. In my opinion, there is no foundation whatever for this charge.

I think there is also no force in the contention that the Commissioner could not have really appreciated whether a Pardanashin lady under examination before him was or was not a trustworthy witness; whether a witness is reliable or not may be judged, not merely from demeanour, but also from the mode and manner in which the answers are given. I do not overlook that Greaves J., thought that Muhammad Ibrahim is truthful and reliable and that the husband of the plaintiff is just the reverse; *Bombay Cotton Manufacturing Co.* v. *Raja Bahadur Motilal Shivlal* (16) and *Rivers Steam Navigation Co.* v. *Hathar Steamship Co.* (8), but we cannot at the same time overlook that Muhammad Ibrahim is deeply interested in the result of this litigation, and when the probabilities and the documentary evidence cannot be reconciled with his assertions, I cannot implicitly accept his assertions. My conclusion is that the evidence does not establish the second gift. If, however, the second gift is deemed to be established by the evidence, the question arises whether it is valid under the Mahomedan law. Upon an examination of the authorities, I have arrived at the conclusion that this question must be answered against defendant as is clear from the following texts;

Text 1.—If one person makes a gift of it (house) to two persons, it is not valid according to Abu Hanifah, but it is valid according to Abu Yusaf and Muhammad. (Al Quduri, Vol. 2, p. 10, Ed. Delhi).

Text—2. If one person makes a gift of it(house) to two persons, it is not valid according to Abu Hanifah, but it is valid according to Abu Yusaf and Muhammad."

For this is a gift of the entire (house) to two persons (jointly) as it is by a single act of transfer. Therefore no Musha is occasioned, as when (a house) is mortgaged with two persons. But according to him (Abu Hanifah), it is a gift of half the house to each of them. Therefore if it (the gift) is with respect to something incapable of division like a slave or slave girl and one of them (donees) accepts it, it is valid (with respect to his share). Also because property is established for each of them (donees) with respect to the half and therefore the transfer would be likewise as it (property) is its (transfer's) effect. This is contrary to mortgage, as its effect is detention and it is established for each of them perfectly. Therefore if the debt of one of them (mortgagees) is paid, nothing of the mortgaged property will be returned. (Al-Jawharat-al-Nayyirab, Vol. 2, p. 10, Ed. Delhi).

Text 3.—If he makes a gift of house to two of his sons one of whom is a minor in his charge, the gift is invalid according to all. (Fatawah Qadi Khan, Vol. 4, p. 183, Ed. Lucknow).

Text 4.—The Hedayah (Vol. 7, p. 496, Ed. Cairo) reproduce Texts 1 and 2.

Text 5.—"If two persons jointly make a gift of a house to one man it is valid." In the converse case it is not valid according to Abu Hanifah, but the two disciples declare it to be valid. (Al-Inayah, Vol. 7, p. 495, Ed. Cairo).

Text 6.—The Kafayah (Vol. 7, p. 496, Ed. Cairo) reproduces the reasons for the difference of opinion between the master and his disciples given in Text 2.

Text 7.—The gift of a house jointly by two persons to one man is valid. But its converse is not valid (according to Abu Hanifah) contrary to them (i e., the opinion of the two disciples)—Multaqua'l-Abhar by Ibrahim, b. al-Halabi d. 956 H. H.=1549 A. D., p. 137, Ed. Constantinople).

Text 8.—If he makes a gift of a house to two persons one of whom is an infant and the other adult and the infant is in his charge, the gift is not valid (lam tajuz) unanimously. For at the very moment of making the gift he becomes possessed of the share of the infant and thus the other half remains in a state of Musha. Thus it is laid down in the Muhit (Bahr-al-Raiq, Vol. 7, p. 315, Ed. Cairo).

Text 9.—If he makes a gift in favour of an adult person and in that of an infant in the charge of the adult; or in favour of two of his sons, one infant and

16. A I R 1915 P C 1=39 Bom 386=29 I C 229 =42 I A 110 (P C).

the other adult, it is not valid (lam tajuz) unanimously. (Durr-al-Mukhtar, Vol. 3, p. 498, Ed. Lucknow).

Text 10.—Al Hakim states: A man makes a gift of a house to two of his sons one of whom is adult and the other is a minor and the adult son takes possession (of it). The gift is absolutely void and this is the correct view. For the gift in favour of the minor is complete at the very moment of the declaration of the gift because the seisin or possession of the father is equivalent to his (minor's) seisin or possession (Qabz): Whereas the gift in favour of the adult son stands in need of acceptance. Thus the gift in favour of the minor precedes (that in favour of the adult) and thus confusion (shuyn) is occasioned. And the devise is that he (father) should deliver possession of the house to the adult son and then make a gift of it to both of them. Thus it is laid down in the Wajiz of Al Kardari (Fatawa Alamgiri, Vol. 4, p. 549, Ed. Calcutta).

Text 11.—Al-Tahtawi (Vol. 3, p. 400, Ed. Cairo), the celebrated commentary on the Durr-al-Mukhtar, reproduces Text 10.

Text 12.—"If he makes a gift of a house to two persons, etc." Al-Ramti says that it is obvious from this that if the two persons be both infants in his charge, it is valid and what is stated in the Bazzaziyah indicates this. But all this is in accordance with the opinion of the two disciples (Abu Yusuf and Muhammad) and not according to his (Abu Hanifah's) opinion. (Here Text 3 is quoted). Mauhat-al-Khaliq, Vol. 7, p. 315, Ed. Cairo. It is a commentary on the Bahr-al-Ra'iq by Ibn Abidin, the author of the Radd-ul-Muhtar, d. 1835 A. D.

Text. 13.—"Or in favour of two of his sons etc." Texts 3 and 11 is quoted here. (Radd-al-Mukhtar, the celebrated commentry on the Durr-al Mukhtar by Ibn Abidin 1835, Vol. 4, p. 514, Ed. Cairo). I do not overlook the unfavourable judicial comments made from time to time upon the principle of Musha, specially, the observation of Sir Barnes Peacock in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3):

"The doctrine relating to the invalidity of gifts of Musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rule: [see also *Mahomed Buksh Khan* v. *Hosseini Bibi* (6), *Ibrahim Goolam Ariff* v. *Saiboo* (17), *Kalidas Mullick* v. *Kanhaya Lal Pundit* (18), *Alabi Koya* v. *Mussa Koya* (19) and *Jahedunnessa Bibi* v. *Najibul Islam* (20)]."

But it is plain that the doctrine, though not favoured, cannot be altogether ignored or repudiated: *Vahazullah Sahib* v. *Boyapati Nagayya* (21) and *Ibrahim Goolam Ariff* v. *Saiboo* (17). In my opinion the case before us falls within the strict letter of the texts on the subject [*Nizam-ud-din* v. *Zabeda Bibi* (2)], and this indeed appears to have been realized by the defendant himself and his advisers. I refer to the remarkable passage in the deposition of Mahomed Ibrahim in which he describes the mode in which the gift was effected:

"My father said that he had already disposed of his share in the Calcutta firm in my favour, and he was disposing of the rest of his properties in favour of myself and my two younger brothers, and my father asked me to accept the same for myself and on behalf of my younger brothers, and he made over all the documents in respect of these properties as also in respect of the zemindari to me, requesting me to take charge of them on behalf of myself and of my two younger brothers."

I confess that this does bear the appearance of an attempt, in course of evidence to show that the requirements of the law were satisfied. It is extremely improbable that Kader Bux was aware of the device whereby the law of Musha could be avoided as described in the Fatawa Alamgiri. But it is plain that, even if the evidence be accepted, the device was not strictly carried out. My conclusion is that the evidence does not conclusively establish the second gift, and that if it does, the gift was not valid and operative under the Mahomedan Law. As regards the third question, Greaves, J. has found that the plaintiff has failed to establish her allegation that the release was obtained from her upon a misrepresentation as to the nature of the instrument. No attempt has been made in this Court to support the contention that the document was represented to be a power of attorney; in fact, that allegation has been abandoned in this Court. But the validity of the release has been questioned on the ground that it was executed under circumstances which do not make it binding upon a Pardanashin lady, and the view has been maintained that the

17. (1908) 35 Cal 1=34 I A 167 (P C).
18. (1885) 11 Cal 121=11 I A 218 (P C).
19. (1901) 24 Mad 513.
20. (1910) 8 I C 38.
21. (1907) 30 Mad 519.

Court, when called upon to deal with a deed executed by a Pardanashin lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her, or by some persons duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. How far the tests indicated are inflexible rules of law may be a matter for controversy, and it may not be easy to reconcile all the dicta to be found in various decisions of the Judicial Committee where the validity of deeds executed by Pardanashin ladies came under review.

The cases on the subject will be found analysed in the judgments of this Court in *Bindubashini Dasi* v. *Giridhari Lal Roy* (22), *Alikjan Biti* v. *Rambaran Shah* (23), *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (24), *Geresh Chunder Lahoree* v. *Mt. Bhuggobutty Debia* (25), *Syud Fuzzul Hossein* v. *Amjud Ali Khan* (26), *Ashgar Ali* v. *Delroos Banoo Beegum* (27), *Tacoordeen Tewary* v. *Nawab Syed Ali Hossein* (28), *Sudisht Lal* v. *Mt. Sheoburat Koer* (29), *Shambati Koeri* v. *Jago Bibi* (30), *Amarnath Sah* v. *Achan Kuar* (31), *Mahomed Buksh Khan* v. *Hosseini Bili* (6), *Sajjad Husain* v. *Abid Husain Khan* (32), *Ismail* v. *Hafiz Boo* (33) and *Kali Bakhsh Singh* v. *Ram Gopal Singh* (7). In view of the weighty observation of Lord Haldane, L. C, in *Kreglinger* v. *New Patagonia Meat and Cold Storage Company* (34) as the proper use of judicial procedure as binding authorities, it is plain that no useful purpose would be served by an analysis of the facts of each of these cases, which fall broadly into two groups, namely, first, where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and secondly, where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length.

In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the other class of cases, the Court will require the confidence and influence to be proved intrinsically; this is a fundamental distinction which does not appear to have been always kept in view. A great deal will also depend upon the intellectual attainments of the lady, and the Court will naturally not be inclined to set aside the deed, where the lady is proved to have been of business habits, to have been literate and to have possessed capacity to judge for herself. Tested in the light of these principles, how does the case before us stand? Here is a deed obtained by a brother from her sister. By that deed she parts with all her interest in the estate of her father for a sum of Rs. 4,500. There is no shadow of a doubt that the amount itself is wholly inadequate as the price of her share in the patrimony. It is represented to her that by the custom of the community, she is excluded from the inheritance. She is further told that her father had divested herself of all he possessed by two oral gifts. No doubt we have evidence given that the deed was read over to her and explained to her and that she had the advice of her husband.

It is clear, however, that the deed is so expressed that its meaning and effect are by no means quite beyond doubt even with the aid of the elucidation by learned Counsel. It is to my mind equally clear that the husband of the plaintiff was absolutely untrustworthy and was ready to sacrifice the interest of his wife for the sake of his personal benefit. If, as a matter of fact, the custom of exclusion existed, if in truth the oral gifts were real transactions and were operative in law, a deed of release was wholly superfluous. The deed, after the most careful consideration of attendant circumstances, does not impress me favourably; I do not attach much importance to the recitals, some of which at any rate may be deemed exhibitions of the art of the conveyancer which, whether mediaeval or modern, cannot be permitted to mislead the Court.

22. (1909) 3 I C 330.
23. (1910) 7 I C 166.
24. (1866-67) 11 M I A 551=8 W R 3 (P C).
25. (1869-70) 13 M I A 419=14 W R 7 (P C).
26. (1872) 17 W R 523 (P C).
27. (1877-78) 3 Cal 324=3 Sar 749 (P C).
28. (1873-74) 1 I A 192=13 B L R 427 (P C).
29. (1881) 7 Cal 245=8 I A 39.
30. (1902) 29 Cal 749=29 I A 127 (P C).
31. (1892) 14 All 420=19 I A 196 (P C).
32. (1912) 33 All 455=16 I C 197=39 I A 156=15 O C 271 (P C).
33. 33 Cal 773=33 I A 86 (P C).
34. (1914) A C 25=83 L J Ch 79.

I do not overlook the statement of the Registering Officer, which shows that the parties were careful to conform to all the formalities; but the substance of the matter still remains that the deed was obtained from the plaintiff by her brother on representation of a state of facts untrue in material particulars. In these circumstances I do not think the deed can stand. I am not unmindful of the importance of the rule that a settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny ignore or repudiate. This principle is deducible from a long line of cases which will be found collected in the judgment of this Court in *Upendra Nath Bose* v. *Bindeshri Prosad* (35), but that principle is not applicable to the circumstances of this case. The defendant does not assert that there was a compromise to put an end to dispute and to terminate or avoid litigation, and that the consideration for the compromise was, not the sacrifice of a right, but the abandonment of a claim. What we have here is a surrender of the rights of the plaintiff for a nominal consideration, obtained from her on the representation that she had no rights whatsoever; this cannot be deemed an honest settlement of an existing dispute which a Court of Justice should not permit the plaintiff to question.

As regards the actual payment of the consideration, the plaintiff has failed to satisfy me that she did not receive the money, so that she can be permitted to have her deed cancelled only on re-payment of that sum. This sum must consequently be debited against her when the accounts are taken under the decree. I hold accordingly that this appeal must be allowed, decree of Greaves set aside and the suit decreed with costs in both Courts in the terms indicated in the judgment of Woodroffe, J.

V.B./R.K. *Appeal allowed.*

35. (1916) 32 I C 468.

A. I. R. 1918 Calcutta 391 (1)

FLETCHER AND NEWBOULD, JJ.

Chhatrapat Sinha—Appellant.

v.

Maharaja Bahadur Sinha—Respdt.

Appeal No. 822 of 1915, Decided on 20th April 1917, from appellate decree of Dist. Judge, Murshidabad, D/- 16th February 1915.

Civil P. C. (1908), O. 6, R. 17—Scope.

A plaintiff who argued in the lower Courts that his suit was properly framed and presented to the Court, ought not to have, in second appeal, leave to amend the plaint on admitting that the suit was brought in a wrong form.

S. R Das and *Hemendra Nath Sen*—for Appellant.

Bepin Behari Ghose II and *Winkram Das Chakravarty*—for Respondent.

Fletcher, J.—This is an appeal by the plaintiff from a decision of the learned District Judge of Murshidabad, dated 16th February 1915, affirming the decision of the learned Subordinate Judge of the same place. The only question that has been argued in the present appeal is this. In the lower Courts, the plaintiff argued that his suit was properly framed and presented to the Court; but at the hearings before us the learned counsel who has argued the case for the the plaintiff has admitted that the suit was brought in a wrong form and he has argued that the plaintiff ought to have leave to amend his plaint so as to put the suit on a proper basis. That application is much too late and put forward now for the first time, and I am not sure that it can be raised in second appeal for the first time. The appeal is dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 391 (2)

FLETCHER AND RICHARDSON, JJ.

Azimuddin Choudhuri and *others* – Plaintiffs—Appellants.

v.

Peer Mahomed Bepari and *others*—Defendants—Respondents.

Appeal No. 1364 of 1915, Decided on 7th February 1917, from appellate decree of Addl. Sub-Judge, Rangpur, D/- 15th March 1915.

Landlord and Tenant—Option or covenant to obtain new settlement on expiry of term of kabuliyat—Term and rent of new settlement uncertain—Tenant holding over can be ejected without notice to quit.

A tenant holding under a kabuliyat, in which there is a certain option or covenant in his favour under which he is entitled, on the expiry of the term of the kabuliyat, either to have a new settlement or to leave the land, is liable to be ejected on the expiry of the term, if the so called option or covenant for the grant of a further lease is uncertain both as regards the term to be granted and the future rent, for in such a case there is no contract which the tenant can enforce. [P 392 C 1]

Such a case is not one of those cases in which it can be held on the construction of the covenant that the covenant for granting the new

lease means that the terms of the new lease were to be the same as those of the old lease.

[P 392 C 1]

When in such a case the tenant holds over without having been recognized as a tenant after the expiry of the lease, he may be ejected without notice to quit [P 392 C 1]

Jogesh Chandra Roy, Atul Chandra Gupta and *D. N. Bagchi*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs against a judgment of the learned Subordinate Judge of Rungpore, dated 15th March 1915, affirming the decision of the Munsif at Gaibandha. The plaintiffs who are raiyats sued to recover possession of 15 bighas of land from the defendants. The case has been disposed of in the lower Courts on the basis of a kabuliyat with a certain, what has been called, option or covenant in favour of the tenants, under which it is said that the tenants are entitled either to have a new settlement or to lease the land. The learned Judge of the lower appellate Court has found that the terms of this option or covenant in the lease are not certain or defined, either as regards the new term to be granted or the new rent to be payable. He has therefore held that the defendants are not liable to be ejected on that ground. That view, I think is clearly wrong. Once it is held that the so-called option or covenant for the grant of a further lease is uncertain both as regards the term to be granted and the future rent, there is no contract which the tenants can enforce. This is not one of those cases where it was held on the construction of the covenant that the covenant for granting the new lease meant that the terms of the new lease were to be the same as the old lease. It is agreed that that is not the meaning. The view taken by the learned Judge therefore, on the point that the tenants had a right under the lease to have a new term was not well founded. There was another point raised and that is that the defendants had held over for three years after the expiry of the term and therefore at any rate, they were not liable to be ejected without notice. The learned Subordinate Judge in the lower appellate Court has made this finding in that part of the case:

"There is nothing to show that the defendants have been recognized as tenants after the expiry of the lease."

We have been referred to certain rent receipts that have been put in by the defendants in the course of the trial. The documents were not referred to specifically by either Court in its judgment. But before us the documents have been gone into and it is admitted that there is nothing on the face of those rent receipts to show that any portion of the rent for the years 1318 and 1319 was received by or for the plaintiffs in this suit. There seems therefore to be ample evidence on which the Judge was warranted in finding that there was nothing to show that the defendants had been recognized as tenants after the expiry of the lease. In that view the plaintiffs are entitled to recover possession of the land. The appeal must therefore be allowed and the judgment of the Courts below set aside. The case having been decided only on the preliminary point on issue 5, it must go back to the Court of first instance for re-trial on the merits on the other issues. Costs will abide the result of the re-hearing.

Richardson, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 392

TEUNON AND BEACHCROFT, JJ.

Nabin Chandra Chakrabutty—Complainant—Petitioner.

v.

Rajendra Nath Banerjee and *others*—Accused—Opposite Parties.

Criminal Revn. No. 1155 of 1916, Decided on 17th January 1917, from order of Dist. Magistrate, Noakhali, D/. 28th August 1916.

Criminal P. C. (1898), S. 439—Summary disposel of appeal quashing conviction—High Court can set it aside.

The High Court can, in procceedings under S. 439, set aside an order passed by an appellate Court quasting a conviction where the judgment of the latter Court is very summary and contains a very inadequate discussion of the evidence or the materials placed before it. [P 393 C 2]

Where the District Magistrate on appeal, without discussing the evidence on the record, set aside the order of conviction by a summary judgment holding that the common object alleged in the charge has not been established, although the accused persons might have some other common object, the High Court in revision set aside the appellate order and sent the case back for a re-trial by the Sessions Judge on a due consideration of the evidence on the record.

[P 393 C 2]

P. K. Mozumdar and *Hit Lal Guha*—for Petitioner.

Satyendra Prasanna Sinha and *Suresh Chandra Talukdar*—for Opposite Parties.

Judgment.—This is a rule calling on the District Magistrate of Noakhali and the opposite party to show cause why appellate order of the District Magistrate, dated 28th August 1916, should not be set aside and the re-trial of the appeal directed on the ground that in the appellate judgment he has fallen into serious error. What was found against the opposite parties in the judgment of the trial Court was that in assertion of title to an eight-anna share in a certain homestead said to have been bought by one Mokunda Nag in the name of his wife a body of men, who appear to be servants of Mokunda Babu and numbering in all some 20 to 150 persons, entered upon the homstead, pulled down the walls of the complainant's cowshed, cut down trees on the homestead, plucked cocoanuts, removed timbers and plants and damaged the complainant's pots and pans.

It was in fact found by the trial Court that by reason of a prior purchase of the eight annas share Mokunda Babu or his wife had derived no title, and it was also clearly found that neither Mokunda Babu nor his wife had possession and that the complainant was in full possession of this homestead. When the case came on appeal before the District Magistrate, he disposed of it in what may well be described as a very summary judgment. In this he comes to no findings as to the number of men. He does not discuss the alleged title. He does not discuss, nor does he come to any finding on, the question of possession; and though he says that in fact the accused persons had probably committed mischief and also assaulted the complainant, he finds that the common object alleged in the charge, that is to say, to commit mischief, has not been established. He has also found that the case is extremely discreditable to Mokunda Babu who clearly does not restrain his servants from petty acts of oppression against weaker neighbours. Without any discussion of the question of possession, it is not quite clear how the District Magistrate in his appellate judgment could properly approach the question of mischief; there is no suggestion in his judgment as to what the common object, if any, of the 20 to 150 men in fact was; nor has he considered whether on the evidence without prejudice to the accused he could have substituted for the common object set out in the charge some other common object such as would seem to be suggested by his judgment itself.

Under these circumstances we cannot say that the appeal before the District Magistrate has been properly tried, and we have, therefore, no alternative but to set aside his appellate order and direct that the appeal be re-tried; and in view of the unsatisfactory nature of that judgment we direct that the re trial of the appeal shall be before the Sessions Judge.

V. B./R.K. *Retrial ordered.*

A. I. R. 1918 Calcutta 393

MOOKERJEE AND BEACHCROFT, JJ.

Durga Charan Acharjee—Defendant—Appellant.

v.

Khundkar Enamal Huq and *others*—Plaintiffs—Respondents.

Appeal No. 342 of 1915, Decided on 25th July 1917 from Appellate Decree of Sub-Judge, Hooghly, D/-26th October 1914.

(a) Cosharers—Exclusive possession of some land by joint owner by mutual arrangement—Possession cannot be disturbed without seeking partition.

One of the joint owners of an estate, who by mutual arrangement with the other cosharers has been placed in exclusive occupation of some of the joint lands as representing his share, cannot be equitably disturbed by the latter, unless they seek a partition of all the lands comprised in the estate. [P 394 C 1]

(b) Partition—Suit for—Right to be entitled to joint possession must be proved.

It is essential in a suit for partition that the plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession, because the object of the suit is to transform the joint possession into possession in severalty. [P 394 C 1]

Naçendra Nath Ghose—for Appellant.

A. K. Fazlul Haq—for Respondents.

Judgment.—This is an appeal by defendant 3 in a suit for partition of joint property. The lands are comprised in three plots and are included in an ayma estate within the Hooghly Collectorate. The case for the plaintiffs is that they have acquired a nine-tenths share of the lands and defendant 3 has acquired the remaining share. The plaintiffs accordingly seek to have these lands partitioned. One of the defences is that this is really a suit for a partial partition and is consequently not maintainable. The Court of first instance overruled this contention, on a ground which cannot be sustained

and which need not be examined for our present purpose. Upon appeal, the Subordinate Judge has confirmed the decree of the trial Court but the reasons assigned by him in support of his conclusion are not intelligible. He sets out the first question for determination in these terms; namely, whether the suit is one for partial partition and whether it is maintainable. But his discussion of the point is difficult to follow. Defendant 3 has purchased the lands in suit from defendant 4 and the recital in the conveyance shows that according to the vendors of the appellant he had a certain share in the entire estate and that the lands conveyed were in his occupation as representing that share. This is not admitted by the plaintiffs. If the allegation is true, it may furnish a complete answer to the claim for partition: *Mahomed Fazlur Rahman* v. *Mahomed Fayzur Rahman* (1), *Burugapalli Sriramulu* v. *Nandigam Subbarayadu* (2), *Sris Chandra* v. *Mahima Chandra* (3). If defendant 4, who was interested in all the lands of the estate, was, by mutual arrangement with his cosharers, placed in exclusive occupation of the lands now in controversy, as representing his share, that arrangement cannot equitably be disturbed by the plaintiffs, unless they seek a partition of all the lands comprised in the estate. In the present suit, however, they have limited their claim to the disputed lands which form only a small part of the entire land of the estate.

Consequently, the plaintiffs must establish that, in respect of the lands in suit, they and defendant 3 are joint owners and entitled to joint possession. In order to determine whether they are entitled to joint possession, it must be found whether the vendor of defendant 3 was entitled to exclusive possession or to joint possession. This point has not been investigated by either of the Courts below, and till the point has been determined, the validity of the claim for partition cannot be decided. It is essential in a suit for partition that the plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession, because the object of the suit is to transform the joint possession into possession in severalty *Atrabannessa Bibi* v. *Safatullah Mia* (4). The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for re-consideration. Costs will abide the result.

V.B./R.K. *Appeal allowed.*

1. (1911) 10 I C 354.
2. (1911) 10 I C 57.
3. (1916) 33 I C 17.
4. (1916) 43 Cal 504=31 I C 189.

A. I. R. 1918 Calcutta 394

FLETCHER AND NEWBOULD, JJ.

Nafar Joardar — Defendant—Appellant.

v.

Pratima Sundari Dassya and *others*—(Plaintiff) and Pro forma Defendant—Respondents.

Appeal No. 2960 of 1915, Decided on 25th June 1917, against appellate decree of Addl. Sub-Judge, Nadia, D/- 20th May 1915.

(a) Evidence Act (1872), S. 13—Private chittas are not admissible.

Semble.—Private chittas, however old, are not admissible in evidence under S. 13 [P 395 C 1]

(b) Civil P. C. (1908), S. 100—Private chittas admitted in evidence in lower Courts without objection—Objection to proceedings in lower Court cannot be allowed to prevail in second appeal—Practice, second appeal.

Where private chittas were admitted in evidence in the primary Court without objection and the Judges of the lower Courts and the Commissioner acted on them:

Held: that an objection to the proceedings in the lower Courts, on the ground that they were based on the terms of the chittas which were inadmissible in evidence, could not be allowed to prevail in second appeal. [P 395 C 2]

Sarat Chandra Roy Chowdhury and *Dhirendra Kumar Roy*—for Appellant.

D. N. Bagchi—for Respondents.

Fletcher, J.—This is an appeal by the defendant against a decision of the Additional Subordinate Judge at Nadia affirming the decision of the Munsif of Kushtea. The suit was brought for a declaration that the lands appertained to the jote of the plaintiff held by her under one Bama Sundari and that the defendant was a tenant under her at a rent payable in kind. There was a clear and definite finding made by the learned Judge of the lower appellate Court, quite apart from the question of the chitta and the exchange, that the defendant held on barga the disputed land under the plaintiff. If that finding is not displaced there is nothing to say in the case. The appeal has been argued on two points. First of all there was the point that the exchange had not been proved. I do not know that

having regard to the finding of fact it was necessary to prove the exchange. That, in any case, was merely a formal omission and probably, as Mr. Roy Chowdhury said, it was overlooked by everybody, as the learned Judge was trying four cases at one time. I suppose, not only a Judge but everybody else cannot do more than one thing at the same time and when one tries four cases at the same time he is liable to make some such slip. However, I do not think the question of exchange, having regard to the finding as to the relationship of landlord and tenant, is material to the case. If that relationship is established, as the defendant is, in fact in possession of this land in barga the rent being partly in kind, it does not matter whether the plaintiff got the land by exchange or not. The other point is a much more serious point and this is as to the admissibility of what is called a private chitta under the provisions of the Evidence Act. The chitta was, as the learned Judge remarks, a very old one. It is objected that these chittas are not admissible in evidence under any circumstances and, therefore, whatever conduct the appellant might have been guilty of in the lower Courts in arguing the case and in conducting the case both before the Judges and the Commissioner with reference to the chitta, yet as the document is adsolutely excluded from evidence under the provisions of the Evidence Act, the matter having been taken into consideration by the learned Judge, his decree cannot stand.

Of course, that is putting the case far too high. It may be that as against the objecting defendant a privite chitta cannot be given in evidenee without his consent, although the text-book writers suggest that these private chittas can be given in evidence under the terms of S. 13, Evidence Act. We all know that S. 13, Evidence Act has secured a very wide interpretation, probably in some cases too wide. We may take it substantially that most things that one cannot get in under any other section of the Evidence Act can be got in under S. 13. Having regard to the anthorities it is very difficult to say that the document is not admissible. I am not prepared as at present advised to dissent from Mr. Roy Chowdhury's argument that these documents, although the text-book writers say that they are admissible under S. 13, are not so. I think there are strong reasons for saying so. However, in this case, the document went in without objection. The Commissioner and the two Judges acted on it. It is quite impossible now at this stage to destroy the whole of the proceedings that have taken place on the terms of the chitta and to say that the whole suit must be tried again from its inception. I think, having regard to the finding about the defendant holding the land in dispute on barga, we should support, although not without some difficulty, the judgment appealed from and dismiss the appeal with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 395

CHATTERJEE AND WALMSLEY, JJ.

Panchanon Majumdar—Appellant.

v.

Binoy Krishna Banerjee—Respondent.

Appeal No. 519 of 1915, Decided on 21st December 1916, from Appellate Decree of Dist. Judge, Murshidabad, D/- 14th January 1915

(a) Hindu Law—Adoption—Widow—Anti-adoption agreement amounting to fair and reasonable agreement for enjoying of husband's property by widow is valid and binding on adopted son.

An anti-adoption agreement by the adoptive mother with the natural father of the adopted son, if it amounts only to a fair and reasonable arrangement for the enjoyment of her husband's property by the widow during her life-time, is valid and binding on the adopted son, especially where there is authority from the husband in that connexion. [P 396 C 1]

(b) Hindu Law—Adoption—Widow—Natural father cannot impose personal contract on minor adoptee.

Neither the adoptive mother nor the natural father of the adopted son has any legal authority to impose a personal contract upon the minor adoptee. Such an agreement between the adoptive mother and the natural father is void unless ratified by the minor. [P 396 C 2, P 397 C 1]

(c) Hindu Law — Adoption — Widow—Agreement that certain monthly allowance is to be paid to widow's brother's son during his life-time and is not binding on adopted son being in restriction of his rights.

A Hindu widow before making an adoption made an agreement with the natural father of her prospective adopted son that a certain monthly allowance was to be paid to her brother's son during his lifetime:

Held: that the agreement being in restriction of the adopted son's rights, was not binding upon him. [P 396 C 2]

Sarat Chandra Basack and *Bankim Chandra Mukherjee*—for Appellant.

Tarakeswar Pal Chowdhury—for Respondents.

Chatterjee, J. — A Hindu widow before making an adoption made an agreement with the natural father of her prospective adopted son that she was to receive a certain amount for her maintenance and a certain amount for the marriage of her relations: and Rs. 25 per mensem each was to be paid to her brothers son and grandson during their lifetime. These amounts were regularly paid so long as the widow was alive but on her death payment was stopped by the guardian appointed by the District Judge. The present appeal arises out of a suit by the brother's grandson of the widow for enforcing the contract against the adopted son. Both the Courts below have dismissed the suit. Hence this appeal.

The plaintiff's case was that the allowance was sanctioned by the will of the defendant's adoptive father—that he and his uncle were receiving their allowances from before the adoption and the giving of the allowance was the condition on which the adoption was made and would not have been made but for it. The defendant's plea was that he was not bound by the contract of his father. The alleged will of adoptive father has not been proved to be genuine and even if it were, its terms cannot be read as sanctioning the allowance to the plaintiff. Plaintiff's case, therefore, must stand or fall by the contract of the natural father with the adoptive mother. There is some divergence of judicial opinion on the general question whether anti-adoption agreements entered into by the natural father of an adopted son and operating in restriction of his legal rights as an adopted son are binding on him. Their Lordships of the Privy Council have expressed a leaning against the binding nature of these agreements: see *Bhaiya Robidai Singh* v. *Indar Kunwar* (1). This was a case, however, of an agreement made in violation of the terms of the will of the husband by which the authority to adopt was given and the real question for decision before their Lordships was the validity of the adoption, the contention being that the adoption was invalid by reason of the agreement which restricted the rights of the adopted son. In the case of *Visalakshi Ammal* v. *Sitaramien* (2) a Full Bench of the Madras High Court held that, an agreement with the adoptive mother by which the natural father agreed before adoption, that in case of a difference she would enjoy half the estate of her husband for life, the adopted son getting it on her death, was valid and binding: the real test in these cases being whether the arrangement was fair and reasonable.

In the case of *Vyasacharya Narayanacharya* v. *Venkubai Rangacharya Upadya* (3) a Full Bench of the Bombay High Court has held that a gift by the widow of a portion of her husband's estate to her daughter and assented to by the natural father of a subsequently adopted son at the time of the adoption, is not binding on the adopted son. This was a case of an alienation by the widow which would not bind reversioners if there were no adoption, as she was dealing with more than her life interest. There is no case exactly in point in Bengal. The case of *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhopadhya* (4) was that of an adoptive father authorising his widow to hold possession for her life and the natural father giving away his son with the knowledge of the restriction. The case of *Harendra Nath Avasti* v. *Shibo Sundari Debi Chowdhurani* (5) is also of the same nature, as the adoptive father made a similar restriction by his will. These cases do not seem to take the case further than validating fair and reasonable arrangements for the enjoyment of her husband's property by the widow during her life-time, especially when there is authority from the husband in that connection. The broad proposition, therefore, that all anti-adoption agreements by the adoptive mother with the natural father and operating in the restriction of the rights of the adopted son are valid cannot be supported, and it is hardly necessary in this case to go into further detail in this matter. The allowance in dispute was paid during the life-time of the widow and the objection is made after her death. There is no alienation by her of her husband's property. She has, with the consent of the natural father, tried to impose a personal contract upon the minor. Neither she nor the natural father had

1. (1889) 16 Cal 556=16 I A 53 (P C).
2. (1894) 27 Mad 577 (F B).
3. (1913) 37 Bom 251=17 I C 741 (F B).
4. (1882) 8 Cal 357.
5. (1909) 3 I C 378.

any legal authority to do so. It is true that the contract is not absolutely void and could have been ratified by the minor but he has not. In this view of the case we dismiss the appeal with costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 397

MOOKERJEE AND BEACHCROFT, JJ.

Gadadhar Ghosh—Defendant—Appellant.

v.

Midnapur Zemindary Co. Ltd. and *another*—Plaintiffs and Defendants—Respondents.

Appeal No. 1993 of 1915, Decided on 27th August 1917, from appellate decree of Addl. Dist. Judge, Midnapur, D/- 3rd May 1915.

Civil P. C. (1882), S. 310-A—Landlord withdrawing deposit made by transferee of non-transferable holding cannot dispute transferee's title.

A landlord who withdraws the amount deposited by the transferee of a non-transferable holding to set aside its sale under S. 310 A, cannot be permitted to urge that the transferee did not by his purchase acquire a valid title to the holding: 6 *C. L. J.* 601 and 9 *I. C.* 619 *Foll.* [P 398 C 1]

Biraj Mohan Mazumdar, *Mohini Mohan Chatterjee* and *Surendra Chandra Das*—for Appellant.

U. N. Sen Gupta and *Prabodh Kumar Das*—for Respondents.

Judgment.—This is an appeal by defendant 1 in a suit for recovery of possession of land on declaration of title. The case for the plaintiffs is that the disputed land constituted the non-transferable holding of Arun Chandra Biswas and Hriday Nath Biswas and that the present defendants are in occupation on allegation of a purchase which has conferred upon them no valid title as against the plaintiffs. The Court of first instance dismissed the suit: on appeal that decision has been reversed by the Subordinate Judge. The question in controversy between the parties is as to the effect of a deposit made by defendant 2 under S. 310 A of the Code of 1882, which was subsequently withdrawn by the plaintiffs. On 25th April 1903 the landlord in execution of a decree for arrears of rent against the recorded tenant purchased this property. On 25th May 1903, defendant 2 made a deposit under S. 310 A of the Code of 1882 with a view to the cancellation of the sale. He alleged that he had purchased the property from the admitted tenant on 4th September 1900, and that as his immovable property had been sold, he was competent to make a deposit under S. 310 A. The Court directed that the decree-holders auction-purchasers be called upon to show cause why the deposit should not be accepted and the sale set aside. Whether notice of this order was or was not served upon the Pleader for the decree-holders is not clear on the face of the record, but on the following day, the sale was set aside. Three days later on 29th May 1903, an application was made on behalf of the decree-holders for leave to withdraw the amount in deposit. The application was granted and the money was paid out in due course. The plaintiff instituted this suit on 10th February 1914 for declaration that the defendants had not acquired a good title by their purchase of 4th September 1900. The question thus arises, whether the plaintiffs are competent to succeed upon this allegation. The appellant has argued that on the principle of the decisions in *Thomas Barclay* v. *Syed Hossein Ali Khan* (1) and *Ahmed Ali* v. *Roshan Ali* (2), the plaintiffs cannot possibly succeed. We are of opinion that this contention is well-founded and must prevail.

Defendant 2 at the time of the application under S. 310 A, asserted his purchase and the conveyance of 4th September 1900 was filed in Court. The decree-holders auction-purchasers were then in a position to challenge his title to make an application under S. 310 A. which can be utilised only by a person whose immovable property has been sold. The then applicant alleged that his property had been sold on 25th April 1903 at the instance of the decree holders; the latter might and should have contended that the application was groundless, that what had been sold was not the property of the applicant, that he had not acquired a good title therein by his purchase of a non transferable holding, and that the land was the property of the recorded tenant when the sale was held. Such objection should have been pressed before the sale was actually cancelled, if notice of the deposit was duly given to the decree-holders. But whether such notice was or was not served, it is plain that the decree-holders became aware of the order for cancellation before 29th May

1. (1907) 6 C L J 601.
2. (1911) 9 I C 619.

1903. If an application for cancellation of the sale had not been made under S. 310 A, it would have been incumbent on the Court to confirm the sale in due course and to grant a sale certificate to the decree holders auction-purchasers. When the decree-holders found that a sum of money had been deposited under S. 310 A, by one who asserted a title by purchase they should have made enquiries and then at any rate they would have discovered the conveyance of 4th September 1900. The decree-holders did not adopt this obvious course, but withdrew the amount deposited in Court. In these circumstances, they cannot now be permitted to urge that the sale to the defendant was inoperative.

As a last resort, the respondents have argued that it would have been futile for the decree-holders to oppose the application under S. 310 A, because on the authorities as they then stood, the Court would have held that the purchaser of a non-transferable holding was competent to make a deposit under S. 310 A. No authority however has been brought to our notice which would have supported such a contention at the time. If the decree-holders auction-purchasers had taken exception to the deposit, the sole point for consideration would have been whether or not the person who had made the deposit was a person whose immovable property had been sold. This question would have required decision between the applicant on the one hand and the landlords-decree-holders on the other hand. If upon investigation the Court had held that the applicant, was a person whose immovable property had been sold, the matter would have been set at rest as between the parties. If on the other hand, it was decided that the applicant was not a person of that description the matter would equally have ended at that stage, the applicants would not have parted with their money and the sale to the decree holders would have been confirmed. It would be manifestly unjust to allow the decree-holders now to take up a position directly contradictory to what must be assumed to have been their view when they withdrew the deposited amount on 29th May 1903. The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 398

SANDERSON, C. J. AND MOOKERJEE, J.

Amjad Ali Hazi and *others*—Plaintiffs—Appellants.

v.

Ismail and *others*—Defendants—Respondents.

Letters Patent Appeal No. 103 of 1913, Decided on 11th May 1916, against decision of Beachcroft, J., in A. D. No. 2500 of 1911, D/- 31st July 1913.

Decree— Setting aside — Fraud—Circumstances equally consistent with allegation of plaintiff as with denial of defendant—Plaintiff must fail.

Where a plaintiff seeks to set aside a decree as having been obtained by fraud, and fraud is not proved, the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff fails for the very simple reason that he is bound to establish the affirmative of the proposition: *ei qui affirmat non ei qui negat incumbit probatio.* [P 399 C 1]

Birendra Chandra Das—for Appellants.

Ram Charan Mitra and *Biraj Mohan Mojumdar*—for Respondents.

Sanderson, C. J.—I do not think we can interfere in this case. It appears that the suit was brought for recovery of possession and for declaration that the decree in a certain rent suit was fraudulent. The Court of first instance found that this decree was obtained fraudulently. The learned District Judge in the first appellate Court gave judgment in which he impliedly decided that the decree in the rent suit was obtained by fraud. On appeal to this Court Beachcroft, J., acted upon that supposition. When the matter came in appeal under the Letters Patent to the Bench consisting of the late Chief Justice and N. R. Chatterjee, J., it was decided that the learned Judge of the first appellate Court ought to have come to a distinct finding on this all-important question whether the decree in the rent suit had been obtained by fraud. Therefore the matter was sent down to the District Judge for a finding upon the point. As has been already pointed out by my learned brother Mookerjee, J., the matter came before another District Judge, who investigated the matter and came to the conclusion that the plaintiff had failed to prove that the rent-decree was fraudu-

lent or collusive. Now, an objection has been taken to that finding, and the learned vakil has drawn our attention to the ground upon which he asks us to reverse that decision. As I understand the learned Judge's finding, it is that the facts which have been proved before him are suspicious; that they are consistent with fraud; and on the other hand they are also consistent with there being no fraud: and, that being so, he has come to the conclusion that the plaintiff has failed to prove what he set out to prove. In my opinion the principle which should be applied in such a case as this is laid down by Lord Halsbury in *Wakelin* v. *London and South Western Railway Co.* (1), where he says: 'That is the fact to be proved"—in the present case the fact to be proved by the plaintiff is that the rent decree was fraudulent and collusive.

> "If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; *Ei qui affirmat non ei qui negat incumbit probatio.*"

I think the finding of the learned District Judge is one with which we cannot interfere; and, as it is admitted that if that finding stands the appeal must be dismissed, the consequence is that, in my judgment, this appeal should be dismissed with costs.

Mookerjee, J.—I agree.

V.B./R K. *Appeal dismissed.*

1. (1886) 12 A C 41=56 L J Q B 229.

A. I. R. 1918 Calcutta 399

FLETCHER AND NEWBOULD, JJ.

Rajendra Nath Dass—Plaintiff—Petitioner.

v.

Abdul Hakim Khan—Defendant—Opposite Party.

Rule Nisi No. 119 of 1917, Decided on 20th April 1917.

(a) Arbitration—Pleader can be arbitrator.

A gentleman engaged in the legal profession does not become incompetent to act as arbitrator merely because on some occasions he was engaged by one of the parties as his pleader.

[P 399 C 2]

(b) Civil P. C. (1908), Sch. 2, para. 14—Remittance of award.

When a sum is awarded to a party by the arbitrator in a suit referred to his arbitration, the Court, before which an application is made to file the award and to pass a decree on it, cannot disallow the sum, but if it comes to the conclusion that the party is not legally entitled to the sum, it ought to remit the case to the arbitrator. [P 400 C 1]

(c) Civil P. C. (1908), Sch. 2, para. 15—Refusal of arbitrator to summon witness if in exercise of prudent discretion does not vitiate award.

The refusal of the arbitrator to summon witness cited by a party does not vitiate the award, where there is nothing to show that the arbitrator was not acting within his powers and where in the exercise of a prudent and wise discretion he declinedto summon the witnesses. [P 400 C 1]

(d) Contract Act (1872), S. 23—Scope.

Money lent for the purpose of assisting the borrower to visit brothels and bring in prostitutes cannot be recovered in a Court of law.

[P 400 C 1]

Ramgati Sirkar—for Petitioner.

Sarat Chunder Khan and *Hirendra Nath Ganguly*—for Opposite Party.

Fletcher, J.—This is a Rule obtained by the plaintiff calling on the opposite party, the defendant, to show cause why the order complained of should not be set aside. The plaintiff sued on a hand note. By agreement between the parties the case was referred to arbitration, the arbitrator being a pleader practising in the Court and, according to the statement of the petitioner in his petition, they engaged pleader of the defendant. There is no objection to the arbitrator having been engaged either on that occasion or on some other occasion as the pleader of the defendant. There ought not to be any objection that a gentleman engaged in the legal profession is not entitled to be appointed arbitrator because on some occasions he was engaged by one of the parties as his pleader.

It is a common case that members of the legal profession are appointed arbitrators in suits even in cases where they are engaged for one of the parties. I have seen many cases where the counsel engaged on one side has been appointed arbitrator to decide the case. There is no reason to think that merely on that ground the gentleman appointed as arbitrator will not honestly and fairly determine the suit. In this case, the arbi trator made this finding: He disbelieved the case of benami set up by the defendant. He found as a fact that the defendant did not borrow the money for the purpose stated by the plaintiff but that the money was paid by the plaintiff for the purpose of assisting the defendant, who was called in the award his boon companion, to visit brothels and bring in prostitutes. That is an immoral purpose

and the law will not enforce the payment under such circumstances. That being so, there could not be anything to say against the award of the arbitrator. But the arbitrator stated that the defendant admitted that there was a sum of Rs. 25 due to the plaintiff and that, therefore there should be a decree in favour of the plaintiff for that sum. An application was then made before the learned Judge to file the award and to pass a decree on it and an objection was made on the part of the plaintiff. The learned Judge set aside so much of the award as found that the sum of Rs. 25 was due to the plaintiff and dismissed the suit in full. That clearly the Judge was not entitled to do.

He ought to have remitted the case to the arbitrator, if he came to the conclusion that the plaintiff was not entitled to this sum. So far as the award stands, the plaintiff is entitled to a judgment for Rs 25. The defendant at the hearing of this Rule did not object to a decree being passed in favour of the plaintiff for this sum and the decree of the Court below being varied by awarding Rs. 25 to the plaintiff instead of dismissing the suit in full. The other matters are these:—First of all, the arbitrator fixed as a reasonable hour 8 o'clock in the evening for the sitting of his Court on one occasion. It is said that the plaintiff suffered such injury by this improper conduct of the arbitrator that he was unable to attend the arbitration Court. It is said that 8 o'clock in the evening is an unsuitable time. But the time should be selected by the arbitrator, of course, after taking into consideration the convenience both of himself and of the parties and it must be left to his discretion. Then there was an objection that the plaintiff wanted to summon three witnesses but that the arbitrator declined to summon them. There is nothing to show that the arbitrator was not acting within his powers and if, in the exercise of a prudent and wise discretion, he declined to summon them, there is nothing to say against it. The conclusion I come to is that the learned Judge of the Court below ought to have passed a decree in terms of the award made by the arbitrator in this case, that is for Rs. 25 only. That being so, I think we must set aside the order passed by the learned Judge and, in lieu of the order of dismissal, pass a decree in favour of the plaintiff for the sum of Rs. 25. The arbitrator having dealt with the costs in the suit in his award by directing the parties to pay the costs in proportion, I think we should also make a similar order with reference to the costs in the suit. There will be no order as to the costs of this Rule.

Newbould, J.—I agree.

V.B./R.K. *Order set aside.*

✻A. I R. 1918 Calcutta 400

TEUNON AND NEWBOULD, JJ.

Bijoy Kumar Addya and *others*—Petitioners.

v.

Rama Nath Barman—Opposite Party.

Civil Rule No. 4 of 1917, decided on 27th November 1917, against order of Sub-Judge, First Court, 24 Pargannahs.

✻ Civil P. C. (5 of 1908), S. 73—Sale-proceeds remaining in hands of purchasing decree-holder are held by Court—Refund under S 73 can be enforced by process in execution.

A and *B* obtained two money-decrees against certain judgment-debtors of whom some were common to the two decrees. On 19th September 1916 in execution of *A*'s decree certain properties of the common judgment-debtors were sold and purchased by *A*. On an application made on 18th September *A* had been allowed to bid at the sale and was ordered to pay into Court one-ninth of the amount of his bid in cash the reminder being set off against the amount of his decree. Meanwhile on 14th August *B* had applied for the execution of his decree, and on 21st September before A's bid was in fact accepted by the Court applied for rateable distribution of the sale-proceeds:

Held: (1) that the application was a paper application under S. 73 and that *B* was entitled to rateable distribution of the proceeds of the sale, inasmuch as although the money remained in the hands of the purchasing decree-holder *A*, it was open to the Court to direct him to pay that sum into Court and it was therefore in the power and at the disposal of the Court and was held by it within the meaning of S. 73. [P 401 C 2]

(2) that a refund of this sort might be enforced by process in execution: 11 *Mad* 356 and 30 *I C* 49, *Foll.* [P 402 C 1]

Mohendra Nath Roy and *Anilendra Nath Roy Chowdhury*—for Petitioners.

Surendra Chandra Sen—for Opposite Party.

Judgment.—In this case it appears that the petitioners on the one side and the opposite party on the other held two money decrees against certain judgment-debtors of whom four are common to the two decrees. Both parties applied each for the execution of their own decree in the Court of the Subordinate Judge of

the 24 Pergannahs. On the application of the opposite party in execution of his decree certain properties were put up to sale and were in fact sold by the officer of the Court on 19th September 1916. In an application presented on 18th September the opposite party applied that he should be permitted to bid at the sale to be held on the 19th and also applied that the amount of his bid, if accepted, should be set off against the money due under his decree. There is no express order on this application intimating that he would be permitted thus to set off the purchase-money against the amount due under the decree; but there is an order to the effect that to the extent of 1/9th for certain reasons the amount bid would have to be paid in cash into Court. From this it may legitimately be inferred that the understanding was that should the decree-holder be the successful purchaser he would be permitted as to the remaining 8/9ths to set off his bid against the amount due. Meanwhile on 14th August the petitioners had applied for execution of their decree and on 21st September before the proceedings conducted by the Nazir of the Court had been in fact reported to the Court for the acceptance of the decree-holder's bid, the petitioners applied that the sum realized at the sale should be rateably distributed between them and the opposite party. This application was refused by the Subordinate Judge on the ground that he had alreardy given permission to the opposite party to set off the amount of the purchase-money against the sum due under his decree, and it is against that order that the present Rule is directed.

Now from the language of S. 73, Civil P. C. and also from the decision of this Court in the Full Bench case reported as *Gonesh Das* v. *Shiva Lakshman* (1), the authority of which in our opinion has been in no way impaired by the insertion of the word "passed" in S. 73 of the new Code, in so far as the shares due from the four judgment-debtors common to the two decrees are concerned, that application was a proper application. In argument before us it is contended on behalf of the opposite parties, that the assets, that is to say, the amount bid at the sale by the opposite party decree-holder was never held by the Court, inasmuch as that money remained throughout in the hands of the purchasing decree holder. This is an argument which we are unable to accept. It is quite clear that it was open to the Court to direct the purchasing decree-holder to pay that sum into Court and it was therefore in the power and under the disposal of the Court, and, in our opinion, it was therefore held by the Court within the meaning of S. 73 Civil P. C. We can also see no reason why on 21st September the Subordinate Judge should not have made an order directing rateable distribution to which the petitioners were clearly entitled. It is quite true that the purchasing decree-holder might have said:

"I made my bid on certain conditions and if those conditions are altered now to my prejudice I may withdraw my bid,"

If he had taken up that attitude, it is fairly clear that the Subordinate Judge would have been bound to give way to it, but as a matter of fact neither then nor now has the purchasing decree holder desired that he should be permitted to withdraw his bid or that the sale in his favour should be set aside. Though he had received permission to bid on the understanding that the amount would be set off against the money due under his decree, there had been no formal order up to that time directing that the sum should be thus set off, and the money was as much at the disposal of the Court on the 21st as it was on 19th September. It has further been urged that we should leave the petitioners to their remedy under S. 73 (2) Civil P. C. It may be that as provided by that subsection they have a remedy by suit, but as has been held in the case reported for instance in *Madden* v. *Chappani* (2) and recently in *Gopal Chandra Bose* v. *Hari Mohan Dutt* (3), a refund of this sort, and this is essentially a refund, may be enforced by process in execution. Having regard to the time at which the petitioners decree-holders made their application, we think that they are entitled to the remedy that they asked for in these proceedings. It has lastly been urged that the judgment-debtors were necessary parties to these proceedings, but whether they should have been made parties or not, as there was no contention advanced on their behalf in the Court below to the effect that the petitioners' decree was not

1. (1908) 30 Cal 563.
2. (1888) 11 Mad 356.
3. (1915) 30 I C 49.

a valid subsisting decree, we think that this objection taken now in the rule that was issued more than ten months ago has been taken at too late a stage For these reasons we make this rule absolute. We set aside the order made by the Subordinate Judge on 21st September 1916 and remand the proceedings to him in order that he may ascertain to what sum the petitioners decree holders are entitled under the provisions of S. 73, Civil P. C. in respect of the shares due from the four judgment-debtors who are common to the two decrees. When he has ascertained the amount thus due he will direct the opposite party to pay that sum into Court, and if they fail to do so he will realise the same from him by summary process. The sum thus ascertained will carry interest at the rate of six per cent per annum from 21st September 1916, the date on which the decree holder opposite party resisted the just claim of the petitioners until the date of realization. The petitioners are entitled to their costs of this Rule, which we assess at four gold mohurs.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 402

FLETCHER AND SMITHER, JJ.

Abdul Gaffur Molla and *others*—Plaintiffs—Appellants.

v.

Golam Rahaman Naskar and *others*—Defendants—Respondents.

Appeal No. 1673 of 1914, Decided on 12th March 1917, from appellate decree of Addl. Dist. Judge, 24-Pergannahs, D/. 21st April 1914.

(a) Bengal Tenancy Act (1885), Ss. 161 and 167—Interest of mortgagee in portion of non-transferable occupancy holding can take effect against tenant but is not binding upon landlord nor is it encumbrance within S. 161.

The interest of an usufructuary mortgagee or a mortgagee by way of conditional sale in a portion of a non-transferable occupancy holding is not binding against the landlord of the holding or the person purchasing it in execution of a rent-decree and is not an encumbrance within the meaning of S. 161 which has to be annulled under S. 167. [P 403 C 2]

Such interest takes effect against the tenant who granted the mortgage on the ground of estoppel, but as against the landlord or any other person not a party or privy to that estoppel it cannot have any effect. [P 403 C 2]

(b) Civil P. C. (1908), O. 8 R. 5—Pleadings in mofussil are not given strict construction.

Written statements in the mofussil are not given the strict construction that is placed upon pleadings in England or in the Original Side of the High Court, notwithstanding what is laid down in O. 8, R. 5. [P402 C 2, P 403 C 1]

Provash Chander Mitter and *Tarakeswar Pal Choudhury*—for Appellants.

Mahendra Nath Roy and *Sasi Sekhar Bose*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs from a decision of the learned Additional District Judge of the 24-Pergannahs, dated 21st April 1914, reversing the decision of the Munsif of the first Court at Baruipore. The suit was brought by the plaintiffs to recover possession of 4 bighas 9 cottas of land, part of a holding of 21 bighas 21 cottas. The first Court decreed the plaintiffs' suit. On appeal to the learned Additional District Judge, the decision of the first Court has been reversed and the plaintiffs have appealed to this Court. The plaintiffs claimed title under an usufructuary mortgage or one by way of conditional sale in respect of a portion of this holding of 21 bighas odd, and they alleged that they had been dispossessed by the principal defendant who had purchased the holding in execution of a rent-decree and that no notice to annul the plaintiffs' encumbrance had been given under the provisions of S. 167, Ben. Ten. Act. The first Court held that the person through whom the plaintiffs claimed title, namely, the original holder who granted the usufructuary mortgage to the plaintiffs, was a raiyat holding at a fixed rate of rent or, if he was not so, then the interest of the plaintiffs was an encumbrance within the meaning of the Bengal Tenancy Act and must be annulled. The second Court held that the evidence did not establish that the tenancy was a permanent one, that the interest was that of an occupancy raiyat and that, therefore, the plaintiffs had no interest as against the landlord or the person claiming under a rent-decree and the interest, although it might have been good as against the original tenant, was not an encumbrance within the meaning of S. 161, Ben. Ten. Act.

The first point, I must confess, is not very clear. The plaintiffs in their pleadings set up the case that their mortgagor had a mokarari jama which I understand means land held at a permanent and fixed rent, and the written statement did not in direct terms traverse that. But the pleading in these written statements in mofussil, although, so far as I have seen them, they never admit anything and

never fail to charge the other side with every sort of improper conduct that is possible to charge them with, certainly never have been given the strict construction that is placed upon the pleadings in England or in the original side of this Court. O. 8, R. 5, Civil P. C., no doubt states that every statement of fact in the plaint, if not derived specifically or by necessary implication, must be taken to be admitted except as against a person under disability; but this is subject to the proviso corresponding to the proviso in S. 58, Evidence Act, that the Court may require proof of any fact taken to be admitted under the provisions of O. 8, R. 5, Civil P. C. In this case the point not having been taken before, the Court must have required the interest of the plaintiffs to be proved, notwithstanding the failure of the defendant to specifically deny the statement that the plaintiffs' mortgagor held the property on a mokarari jama as mentioned in para 1 of the plaint. If that is so, then I think that the finding of the learned Judge of the lower appellate Court, that the interest that the plaintiffs' mortgagor had was that of an occupancy raiyat with no power of transfer, is a finding of fact depending on a consideration of the evidence with which we cannot interfere in the present appeal, unless we hold that the Judge has misapplied his mind to the presumption that arises under S. 50, Ben. Ten. Act. I think that this point was clearly open to the Judge. The course that the case took in the Primary Court seems to me to be a sufficiently good guide on this point. Both parties argued before the learned Munsif as to the status of the mortgagor of the plaintiffs and the learned Munsif found in favour of the plaintiffs' contention. The decision has been reversed by the learned Judge of the lower appellate Court.

Then the next point that has been urged against the finding of the learned District Judge is that he misapplied his mind to the evidence having regard to the construction to be placed under S. 50, Ben. Ten. Act. The wording of the judgment is not very clear, but the Judge obviously considered the facts in this way. He says:

"It is clear to my mind on the documentary evidence that in 1243 the property was described as ticca land. No doubt 1243 is a good long time back but it is later than the date of the Permanent Settlement and it is quite clear that there was no permanent interest then in the land of the predecessor-in-title of the plaintiff's mortgagor. I should therefore think that the presumption to be implied under S. 50, Ben. Ten. Act, by an uniform payment of rent for a period of more than 20 years is rebutted."

It is a method which a Judge who is a final Judge of fact is entitled to follow, when he considers the evidence along with the presumption which can be rebutted arising under the provisions of the Act. I think there are no grounds for us to interfere with the judgment of the learned Judge on this point. The next point in dispute is that even assuming that the interest of the plaintiffs' mortgagor was that of an occupancy raiyat of a non-transferable holding, whether the interest of the plaintiffs was an encumbrance within the meaning of S. 161, Ben. Ten. Act. The interest that the plaintiffs had was not binding as against the landlord. It is quite true that, so long as the original tenant retained a portion of the holding, the landlord's right to re-enter could not be enforced on the ground that there had been no abandonment. But the interest being non-transferable, it is quite clear that the purported transfer to the plaintiffs could not affect the landlord and when the landlord came to enforce the right that the law gave him, namely, of bringing the holding itself to sale for arrears of rent the interest created in favour of the plaintiffs could not be an encumbrance within the meaning of S. 161, Ben. Ten. Act. It was not an interest or right created by the tenant on his tenure or holding or in limitation of his own interest therein, but the interest of the plaintiffs as against their own mortgagor was an interest that took effect purely on the ground of estoppel. As against a person who was not either a party or privy to that estoppel, clearly, the estoppel cannot have any effect. In that view I think that the interest that the plaintiffs had was not an encumbrance under S. 161, Ben Ten. Act. In the result the present appeal fails and must be dismissed with costs.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 404

MOOKERJEE AND BEACHCROFT, JJ.

Girish Chandra Bit and *another* — Plaintiffs—Appellants.

v.

Bipin Behari Khan and *others*—Defendants—Respondents.

Appeal No. 1924 of 1915, Decided on 6th August 1916, from appellate decree of Dist. Judge., Bankura, D./ 10th May 1915.

(a) **Practice—Pleadings—Parties cannot be allowed to take inconsistent position.**

It is an elementary rule based on the most obvious grounds of justice, equity and good conscience that parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents. [P 405 C 1]

(b) **Landlord and Tenant—Tenancy—Suit for recovery of possession against *K*—Suit dismissed on allegation of *K* that lease granted by plaintiff to *S* was in force at date of suit—Subsequent suit for recovery of possession against *K* and *S*—*K* alleging that lease in favour of *S* had terminated before previous suit and plaintiff should have also claimed possession against *S*—Plaintiff can succeed on proving that no sub-tenancy existed at institution of second suit and *K* could not be allowed to take inconsistent pleas.**

In 1906 plaintiff sued *K*. for recovery of possession of land on declaration of title. *K*. objected to the plaintiff's claim for recovery of possession on the ground that a lease granted by the plaintiff to *S*. was in existence at the date of the suit, *K*.'s objection was given effect to and though plaintiff's title was declared, his claim for recovery of possession was disallowed on the ground that the lease in favour of *S*. was in force at the date of suit. Subsequently, in 1913 plaintiff brought the present suit for recovery of possession against *K*. and *S* The suit was opposed by *K*. on the ground that it was not maintainable inasmuch as the plaintiff could and should have made the same prayer for possession against *S*. in the previous suit since the lease in favour of *S*. had terminated before the institution of the previous suit:

Held: that the plaintiff was entitled to succeed on proof that no sub-tenancy created by him existed at the date of the institution of the present suit. [P 405 C 1]

That it would be manifestly unjust, if the defendants were allowed to defeat the present claim on proof that, contrary to their previous allegation, a decree for recovery of possession might and should have been made in favour of the plaintiff in the previous suit. [P 405 C 1]

Karunamoy Bose—for Appellants.

Dwarka Nath Chackerbutty and *Bijoy Kumar Bhattacharjee*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The disputed land is claimed by the plaintiffs as situated within their village Bhuluk Khulla and by the Khan defendants as comprised within their village Sriramanipur. The Courts below have found that the title of the plaintiffs has been established, and that only question in controversy is whether the plaintiffs are entitled to a decree for recovery of possession. There are two sets of defendants, the Khans and the Sheikhs. There was a previous suit between the plaintiffs and the Khans, which was instituted on 13th September 1906 and terminated on 29th April 1912. The plaintiffs in that suit claimed possession of the land now in dispute. The suit was dismissed by the Court of first instance, but, on appeal, was decreed by the Subordinate Judge. On second appeal to this Court, Coxe, J., remanded the case to the Subordinate Judge for trial of 2 issues. The defendants at the time urged before Coxe, J., that even if the title of the plaintiffs was established and was found not to have been extinguished by limitation, they were not entitled to actual possession, inasmuch as a lease granted by them to the Sheikhs was still in force. Coxe, J., gave effect to this contention and ruled upon the authority of the decision in *Gulzar Singh* v. *Kalyan Chand* (1) that the plaintiffs could obtain not actual possession, but only declaration of their title. When the case went back to the Subordinate Judge, the plaintiffs offered to give evidence to show that the Sheikhs had relinquished their tenancy and that they themselves were consequently entitled to recover actual possession on establishment of their title.

The Subordinate Judge held that the judgment of the High Court on the point was conclusive and that it was not competent to him to hold that the lease in favour of the Sheikhs had terminated before the institution of the suit. On the merits he found that the disputed land was within the village whereof the plaintiffs were the admitted proprietors. As regards possession, he found that the plaintiffs were in occupation up to 1891, that in 1892 they let out the land to one Harbansa and that the tenant had possession till he was dispossessed by the Khans in 1898. Subsequently, in 1901, the plaintiffs purchased the holding of Harbansa at a sale in execution of a decree for arrears of rent. The Subordinate Judge finally held that the plaintiffs became entitled to recover

1. (1893) 15 All 399.

possession only when they purchased the holding in 1901. But as the lease granted to the Sheikhs in 1892 had not yet terminated, the plaintiffs were not entitled to recover actual possession. The result was that on 29th April 1912 a declaratory decree was made in favour of the plaintiffs. On 5th April 1913 the plaintiffs instituted this suit against the Khans and the Sheikhs for recovery of possession. The Court of first instance decreed the suit against both. The Sheikhs did not appeal, but on the appeal of the Khans the District Judge has dismissed the suit as against both sets of defendants. He has held in substance that there is no new cause of action for this suit and that the plaintiffs cannot now sue for a relief which they could and should have obtained in the previous litigation. In our opinion this position cannot possibly be supported.

The Khans now contend that the lease granted by the plaintiffs to the Sheikhs had terminated prior to the commencement of the previous suit. This is inconsistent with the allegation which the Khans made in the previous litigation. It is an elementary rule, based on the most obvious grounds of justice, equity and good conscience, that parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents. The plaintiff and the Khans are both equally bound by the decisions of Coxe, J., that the lease in favour of the Sheikhs was in force at the time of the institution of the previous suit, and presented an effective bar to the recovery of actual possession by the plaintiffs. The plaintiffs are now entitled to succeed on proof that on the date of institution of this suit there was not in existance a sub-tenancy created by them which could bar a decree for recovery of possession in their favour. It would be manifestly unjust, if the defendants were allowed to defeat the present claim on proof that contrary to their previous allegation, a decree for recovery of possession might and should have been made in favour of the plaintiffs in the prior suit. In this view, the decree of the District Judge cannot be supported. But it has been very inconsistently argued that the plaintiffs cannot succeed in this litigation unless they prove affirmatively that the lease granted by them in favour of the Sheikhs in 1902 had terminated before 5th April 1913. There is abundant evidence to show that the Sheikhs gave up their tenancy in 1905.

The suit is thus in time, whether the time is taken to run against plaintiffs from the date of the decree in the previous litigation or from the date of the accrual of the cause of action as determined in the previous litigation, namely, May 1901. The result is that the appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 405

FLETCHER AND RICHARDSON, JJ.

Prodyat Kumar Tagore and *another*—Plaintiffs—Appellants.

v.

Maharulla Sandar—Defendant—Respondent.

Appeal No. 1494 of 1915, Decided on 2nd February 1917, from appellate decree of Dist. J., Rungpore, D / 17th April 1915.

Bengal Tenancy Act (1885), S. 29—Stipulation to pay certain rent after enjoying remission of portion thereof for some years is invalid.

Where in a kabuliyat executed by an occupancy raiyat the tenant agreed to pay Rs. 3-5-0 as the yearly talabi rent until the expiry of the term, after which the rent was stated to be Rs. 7-15-0, and in a schedule to the document there was a statement of the rent (Rs. 7-15-0) and the deduction allowed for the term of the kabuliyat:

Held: that the landlord was not entitled to recover rent from the tenant at the rate of Rupees 7-15-0 a year, as the stipulation in the kabuliyat was an attempt to recover from the tenant an enhanced rate of rent in breach of the provisions contained in S. 29. [P 406 C 1]

Ram Charan Mitter and *Mukunda Nath Roy*—for Appellants.

Debendra Narain Bhattacharjee—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned District Judge of Rungpore, dated 17th April 1915, affirming the decision of the Munsif of the same place. The suit was brought to recover rent in arrears. The rent sought to be recovered was at the rate of Rupees 7 12-0 a year for the years 1318 and onwards. The defendant executed a kabuliyat in which there is a term which is not confined to the present case only, but I have noticed it to exist in many other cases. The tenant promised to agree to

pay Rs. 3-5-0 as the yearly (payable) talabi rent until the expiry of the term. On the expiry of the term, the rent was stated to be Rs. 7-15-0. In the schedule that precedes the document there is a statement of the rent and the deduction. But the contract in this particular case is quite clear. The yearly talabi rent which the tenant promised to pay was stated to be Rs. 3-5-0 and on the expiry of the term, it was stated that the tenant agreed to pay according to the above-mentioned arrangement the sum of Rs. 7-15-0. The facts found by the lower appellate Court are these. Prior to this kabuliyat, the tenant held the land at a rent of Rupees 2-7-0 per annum; that he had been in possession of the land for many years and that therefore he had a right of occupancy in the land. The rent was raised from Re. 2-7-0 to Rs. 3-5-0 at the time of the execution of this kabuliyat on 12th Chaitra 1311 B. S. That being so, an attempt to recover from the tenant Rs. 7-15-0 a year was clearly in breach of the provisions contained in S. 29, Ben. Ten. Act, namely, that the rent payable by the tenant having a right of occupancy should not be increased by more than the amount stated in that section. That seems to be amply sufficient to dispose of this case. The rent having been found to have been prior to 1311 Rs. 2-7-0, it is manifest that if due regard be had to the provisions of S. 29, Ben. Ten. Act, under no possible condition can the landlord enhance the rent so as to amount to Rs. 7-15-0. That being the case, the present appeal must fail and be dismissed with costs.

Richardson, J.—I agree.

V.B /R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 406

RICHARDSON AND BEACHCROFT, JJ.

Manhari Chowdhury—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1109 of 1917, Decided on 28th November 1917, against order of Chief Presy. Magistrate.

Criminal P. C. (1893), Ss 403, 236 and 237—Person in possession of bales of jute charged under Ss. 380 and 411 P. C. and acquitted—Proceedings under S. 54-A, Calcutta Police Act, against him are not maintainable—Calcutta Police Act (1866), S. 544—Penal Code (1860), Ss. 380 and 411.

Under S. 403, an accused cannot be tried a second time on the same facts for an offence cognate to or involved in the offences with which he was previously charged. [P 407 C 2]

The petitioner was found in possession of certain bales of jute with reference to which he was tried on charges framed in the alternative under Ss. 380 and 411, I. P. C., and was acquitted, and an order for the return of the bales of jute to him was made. When removing the jute from the thana he was re-arrested, and proceedings under S 54-A, Calcutta Police Act, were started against him:

Held: that as the petitioner might have been charged in the previous trial with an offence under S. 54-A, Calcutta Police Act, the present proceedings against him, which related to the same act or series of acts to which the previous trial related, came within the prohibition contained in S. 403, Criminal P. C. [P 407 C 2]

Probodh Chandra Chatterjee—for Petitioner.

Orr—for the Crown.

Judgment.—This Rule was issued on the Chief Presidency Magistrate to show cause why certain proceedings taken against the petitioner under S. 54-A, Calcutta Police Act, should not be quashed. The petitioner is a dealer in jute carrying on business at 115, Beniatola Street, Calcutta. It appears that he was found in possession of certain bales and half bales of jute. With reference to that jute he was placed on his trial before a Presidency Magistrate on charges framed in the alternative under Ss. 380 and 411, I. P. C. He was convicted by the learned Magistrate in the alternative on those charges. He then moved this Court, which set aside the conviction and directed that the jute which was the subject-matter of the charge should be returned to him. Apparently, he was removing this jute in five carts from the thana where it had been stored when he was again arrested, the jute being again seized, in order that the present proceedings might be taken against him under S. 54-A, Calcutta Police Act. That section runs as follows:

"Whoever has in his possession, or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe to have been stolen or fraudulently obtained shall, if he fails to account for such possession or act to the satisfactiou of the Magistrate, be liable to fine, etc. etc.,"

The point taken before us on the petitioner's behalf is that having been acquitted of the charges made against him at the previous trial, he cannot now be tried again for the offence created by S. 54-A, which I have read. There is no doubt that the act or possession made punishable by S. 54 A is an offence within the definition in the Criminal Procedure Code, by which "offence" includes any act made punishable by any law for the time being

in force. S. 403, Criminal P. C., enacts in its para. 1 that

"a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S 236, or for which he might have been convicted under S. 237".

The question here is whether the petitioner is now to be tried on the same facts for an offence with which he might have been charged at the previous trial under S. 236 or of which he might have been convicted at that trial under S. 237. S. 236 provides that

"if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences".

For the present purposes S. 237 carries the matter no further and need not be more particularly referred to. It is not disputed that the present proceedings relate to the same act or series of acts which were the subject of the previous trial. Mr. Orr, who has appeared for the Crown, does not deny that all the evidence which was relevant at the previous trial would be relevant on the present charge. The trial in other words, will take place on the same facts and it is not suggested that there are any additional facts to be placed before the Court. In that state of things we can see no reason why the accused should not have been charged at the previous trial under the provisions of S. 236 with the offence for which he is now being prosecuted. As I have stated, the present proceedings relate to the same act or series of acts to which the previous trial related, and it appears to us that before that trial it it might have been said in the terms of S. 236 that it was doubtful whether the facts which could be proved would constitute theft or receiving stolen property or an offence under S. 54 A, Calcutta Police Act. If that be so, the case clearly falls within Illus (a), S. 236, and the illustration attached to S. 237. Reference was made in the course of the argument to the case of *Queen Empress* v. *Croft* (1). In our opinion that case is clearly distinguishable. The offences there in question were separate and distinct offences which were separately triable and punishable. It seems to us that the petitioner in the present case is about to be tried a second time on the same facts for an offence cognate to or involved in the offences with which he was previously charged. It is not suggested that if the previous conviction and sentence had been upheld by this Court, the petitioner could now be punished a second time under S. 54-A. The proceedings, therefore, come within the prohibition contained in S. 403, Criminal P. C. In that view of the matter, the rule must be made absolute and the proceedings quashed, and we direct accordingly. With regard to the jute, we direct that it be re-delivered to the petitioner.

V.B./R.K. *Rule made absolute.*

1. (1896) 23 Cal 174.

A. I. R. 1918 Calcutta 407

CHATTERJEA AND RICHARDSON, JJ.

Birendra Kishore Manikya—Plaintiff—Appellant.

v.

Ahmud Ali and *others*—Defendants—Respondents.

Appeal No. 2093 of 1915, Decided on 19th July 1917, from appellate decree of Sub-Judge, Tipperah, D/- 22nd May 1915.

Bengal Tenancy Act (1885), Ss. 161 and 167—Assignment of portion of rent payable to landlord—Tenure holder amounts to incumbrance within meaning of S. 161.

The holders of a tenure, who had granted a miras (under-tenure) of the entire tenure at a permanent rent of Rs 45, sold by a conveyance to the mirasdar (under-tenure-holder) their right to receive rent to the extent of Rs. 33 out of the Rs. 45 reserved as the miras rent, describing it in the conveyance as their malikana masahara. The tenure was sold in execution of a rent decree and purchaser brought a suit for rent against the mirasdar, claiming the full yearly rent of Rs. 45 originally reserved as the miras rent:

Held: that what was assigned to the mirasdar by the conveyance was a portion of the rent payable to the holders of the tenure for the miras and not a portion of the tenure itself, and as such the assignment was an incumbrance within the meaning of S. 161, Ben. Ten. Act, which it was necessary for the auction-purchaser to have annulled by a notice under S. 167 of the Act before he could avoid it. [P 409 C 1]

D. N. Chuckerbutty and *Romesh Chandra Sen*—for Appellant.

D. L. Kastgir—Respondents.

Judgment.—This appeal arises out of a suit for rent under the following circumstances. It appears that a brahmatter

tenure was held by one Golak and Chandratarn within the zamindari of the Maharaja of Tipperah. The latter brought a suit and obtained a decree for resumption of the lakhraj against Golak in the year 1862, but no rent was assessed on the tenure at the time. On 27th March 1866 Golak and Chandratarn granted a miras to two persons at a permanent rent of Rs. 45. The latter sold the mirasi to one Abkjan Bibi on 28th February 1871. On 23rd August of the same year, Golak and Chandratarn sold the right to receive rent to the extent of Rs. 33 out of the Rs. 45 reserved as the miras rent, which was described in the conveyance as malikana masahara, to the then holder of the miras, Abkjan Bibi. Subsequently in the year 1875 the Maharaja sued Golak Chandratarn as well as Abkjan Bibi for assessment of rent. The suit was dismissed by the Court of first instance but was decreed on appeal against Golak and Chandratarn only and was dismissed against Abkjan on the ground that she being an under-tenant, she ought not to have been made a party to the suit. In that suit not only was the rent assessed but the Maharaja obtained a decree for arrears of rent, and in execution of that rent decree, the tenure held by Golak and Chandratarn was sold and purchased by the decree-holder, the Maharaja himself in 1888. In 1893 a notice under S. 167, Ben. Ten. Act, appears to have been served upon the plaintiffs, who are the heirs of Abkjan. No suit however was brought by the Maharaja to recover khas possession of the miras. He dispossessed the mirasdar and took possession himself. Thereupon the defendants brought a suit against him for declaration of their miras title and the suit was decreed. The question of rent, however was not decided in that litigation

The present suit was instituted by the Maharaja on 6th February 1913 for recovery of rent at the rate of Rs. 45 against the defendants who represented Abkjan, the mirasdar. The defence was that by the kobala by which the malikana was sold to Abkjan on 23rd August 1871 the rent of the miras had been reduced from Rs. 45 to Rs. 12; that Golak and Chandratarn, the landlords, had not realized rent for more than Rs. 12 since the date of that conveyance and that in any case the encumbrance not having been annulled, the Maharaja was not entitled to get anything more than Rs. 12 as rent of the miras. The Court below has given effect to these contentions of the defendants and the plaintiff has appealed to this Court. The question involved in the appeal turns upon the determination of what was transferred by the convevance dated 23rd August 1871. The kobala states that it was a sale of malikana masahara of the permanent mokurrari jama (the miras), and it purports to convey the profits to the extent of Rs. 33 per year out of the fixed mokurrari annual profit or rent of Rs. 45 which is described as the annual malikana. It further states that the purchaser on being entitled to the said malikana of Rs. 33 in the right of the vendors will continue to enjoy the same down to their heirs with the right of gift and sale. The concluding paragraph of the kobala says that after deducting Rs. 33, the profits sold to the mirasdar, the latter would pay to the vendors and their heirs a malikana of Rs. 12 only and that the latter shall not be entitled to claim more than the said jama of Rs. 12.

We do not think that there was any reduction of the jama of the miras to Rs. 12. The terms of the document which we have quoted above go to show that there was a transfer of a portion of the rent or profits receivable from the mirasdar, although the effect of such transfer was that the mirasdar became thenceforth liable to pay an annual rent of Rs. 12 only to the vendor. Then the question is whether there was any transfer of the lakhiraj right, or merely an assignment of rent to Abkjan Bibi. There is nothing in the document to show that any portion of the resumed lakhiraj was transferred.

It is contended however before us that the tenure having been let out in miras settlement permanently, the interest of the landlord was really nothing more than the right to receive rent from the mirasdar, so that Rs. 45, which is referred to in the document as the malikana represented the entire interest which the landlord had in the property and that therefore when the brahmattardars sold Rs. 33 malikana out of Rs. 45, they intended thereby to transfer their interest in the tenure to the extent of Rs. 33. But in the first place, there is not a single word in the document showing that the right of the vendors in the property itself was going to the transferred. If it was in-

tended to transfer any portion of the property, one would have expected the boundaries of the property and the share which was transferred stated in the document. Moreover there is nothing in the kobala to show that the purchaser to the malikana to the extent of Rs. 33 was to be liable for any portion of the head rent, that is, the rent payable to the Maharaja. It is true that the rent had not been assessed at that time. But the lakhiraj had already been resumed by the Maharaja and the parties surely expected that the rent would be assessed on the property: and if there was a transfer of a portion of the property itself, meaning thereby the invalid lakhiraj property, there would have been some provision in the kobala for the purchasers being made liable for a part of the rent which might have to be paid to the Maharaja. It is contended that notwithstanding the form in which the property was conveyed and the expressions used in the kobala, there was really a transfer of a portion of the property to the extent of 33/45; that the defendants, therefore, stood in the position of cosharers of the mirasidars Golak and Chandratarn; and that their interest also passed by the sale held in execution of the rent decree at which the plaintiff purchased, and in that case it was not a mere encumbrance within the meaning of S. 161, Ben. Ten. Act.

It appears, however, that the suit by the Maharaja in 1875 against Golak Chandratarn and Abkjan was instituted after Abkjan had purchased the malikana for Rs. 33. The suit was dismissed as against her on the ground that she was an under tenant under Golak and Chandratarn, so that it was decided between the parties, so far back as 1875, that Abkjan's interest was merely that of an under-tenant, although it appears that she produced the kobala by which she had purchased the malikana from Golak and Chandrataran. For all these reasons we are of opinion that Abkjan had not purchased any portion of the tenure itself but was an assignment of a portion of the miras rent payable to the lakhirajdars, Golak and Chandratarn. The assignment of a portion of the rent, we think, was an encumbrance within the meaning of S. 161, Ben. Ten. Act and that being so, it was necessary for the plaintiff to have it annulled under the provisions of S. 167, Ben. Ten. Act. That was not done. The plaintiff cannot, therefore, recover more rent than what Golak and Chandratarn had been realising before the sale at which the plaintiff purchased. The appeal accordingly fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 409

TEUNON AND NEWBOULD, JJ.

Anandiram Mandal—Plaintiff—Petitioner.

v.

Goza Kachori and *others*—Defendant—Opposite Parties.

Civil Rule No. 640 of 1917, Decided on 7th February 1918, against decision of Dist. Judge, Assam D/- 19th April 1917.

(a) Contract Act (1872), S. 23 — Creditor advancing sum to two brothers for marriage expenses—One of them always to work in consideration—Interest to be liquidated by service of one or other—Creditor to feed them only—Agreement whether opposed to public policy as slavery bond was doubtful.

The plaintiff advanced a sum, for marriage expenses to two brothers on their executing a bond, by which they agreed in consideration of the sum advanced that one of them should always work for the plaintiff. It was further stipulated in the bond that interest at the rate of 2½ per cent, per mensem, that would accrue on the principal was not to be paid in cash but was to be liquidated by the services of the one or the other of the two brothers whom the plaintiff undertook to feed but not to clothe:

Held: that it was doubtful whether the agreement was opposed to public policy as a slavery bond as under its terms while one brother was working for the plaintiff it would be possible for the other brother to earn money elsewhere and in course of time to pay of the principal debt.

[P 410 C 1]

(b) Contract Act (1872), S. 23—Money paid under agreement opposed to public policy can be recovered.

A suit is maintainable for the recovery of a sum of money actually advanced pursuant to an agreement which is opposed to public policy.

[P 410 C 1, 2]

Probodh Chandra Ray—for Petitioner.

Judgment.—This is a rule calling on the opposite party to show cause why the judgment and decree complained of should not be set aside and such other order made as to this Court may seem fit and proper. The plaintiff who is the petitioner before us brought this suit to recover a sum of Rs. 147 with interest and costs. The plaintiff's allegations were that he advanced a sum of Rs. 120 for marriage expenses to the two defendants, who are brothers, on their executing a bond by which they agreed in consideration of the sum advanced that

one of them should always work for the plaintiff. Interest was agreed on at 8 annas per Rs. 20, i. e. 2½ per cent. per mensem, and the sum of three rupees due on this account each month was not to be paid in cash but was to be liquidated by the services of one or other of the two brothers whom the plaintiff undertook to feed but not to clothe. Both the lower Courts have held that the bond was a slavery bond and not enforceable as being opposed to public policy. The suit has been dismissed on the pleadings without any evidence being taken.

We are doubtful whether the lower Courts were right in holding that the terms of this agreement between the parties were such that it cannot be enforced on the ground of being opposed to public policy. If one of the brothers alone had executed the contract, the case of *Ram Sarup Bhagat* v. *Bansi Mandar* (1), cited by them, would support their view. But in the present case while one brother was working for the plaintiff, it would be possible for the other brother to earn money elsewhere and in course of time pay off the principal debt, and release them both. But it is unnecessary to discuss this aspect of the case at greater length. In any case the contract for service is not one that can be specifically enforced and even if the agreement be opposed to public policy yet when the facts have been fully ascertained, it may be that on the equitable principles embodied in S. 38 and 41, Specific Relief Act, the plaintiff may be found entitled to restitution of the whole or some part of the money advanced. It was held by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2) that these sections give a discretion to the Court when, under the circumstances of the case, justice requires the return of money paid in respect of a transaction held to be void. We may also refer to the case of *Bakshi Das* v. *Nadu Das* (3), where following the decisions of this Court in *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty* (4) and *Ram Chand Sen* v. *Audaito Sen* (5), it was held that a suit was maintainable for the recovery of the sum actually paid pursuant to an agreement which was opposed to public policy. We accordingly make this rule absolute and direct that the case be sent back to the Munsif of Gauhati to be tried according to law. As the opposite party did not appear we make no order as to costs.

V.B./R.K. *Rule made absolute.*

1. (1915) 42 Cal 742=30 I C 955.
2. (1903) 30 Cal 539=30 I A 114 (P C).
3. (1905) 1 C L J 261.
4. (1870) 14 W R 154=5 B L R 395.
5. (1884) 10 Cal 1054.

A. I. R. 1918 Calcutta 410

TEUNON AND NEWBOULD, JJ.

Bipro Dass Paul Chowdhury—Defendant—Appellant.

v.

Surendra Nath Basu and *others*—Respondents.

Appeals Nos. 270 of 1912, and 2303 and 2878 of 1915, Decided on 21st November 1917, from appellate decree of District Judge, Nadia, D/- 28th October 1911.

Bengal Tenancy Act (1885), S. 22 (2)—Cosharer landlord purchasing non-transferable occupancy holding is not entitled to exclusive possession.

A cosharer landlord cannot, by purchasing a non-transferable occupancy holding in execution of a decree for the rent of his share, retain exclusive possession as against his cosharer landlord; 32 *Cal.* 386: *Dist.* [P 410 C 2]

Section 22 (2) applies only to a case in which a transferable occupancy holding is the subject-matter of the purchase. 27 *Cal* 473, and *A. I. R.* 1915 *Cal* 120, *Appl.* [P 411 C 1]

Amarendra Nath Bose—for Appellant.

Baranashibasi Mukerjee for *Mohini Mohan Chatterjee*—for Respondents.

Judgment.—In these three appeals the only question for our consideration is whether by virtue of the provisions of S. 22 (2), Ben. Ten. Act, as amended in 1907 a cosharer landlord, who has purchased a non-transferable occupancy holding in execution of a decree for the rent of his share, is entitled to retain exclusive possession as against his cosharer landlords. In the appeal reliance has been placed on the Full Bench decision reported as *Ram Mohan Pal* v. *Sheikh Kachu* (1) and also upon the language of S. 22 (2). Now clearly the case reported as *Ram Mohan Pal* v. *Sheikh Kachu* (1) does not affect the present question, for in that case the holding in question was a transferable and not a non-transferable occupancy holding. The result is that that Full Bench case in no way affects or impairs the authority of the prior decision reported as *Girish Chandra Chowdhry* v. *Kedar Chandra* (2). This has

1. (1905) 32 Cal 386.
2. (1900) 27 Cal 473.

already been pointed out in the later case of *Lakhi Kant Das* v. *Balabhadra Prosad Das* (3). There it has been clearly held that S. 22 (2) applies only to a case in which a transferable occupancy holding is the subject-matter of the purchase. Here, as we have said, the holding is a non-transferable holding, and we may point out that in so far as the question whether S. 22 (2) applies only to transferable or both to transferable and non-transferable holdings, the language of the section has not been altered by the amendment made in 1907. In our view also the Full Bench decision in the case of *Dayamoyi* v. *Ananda Mohan Roy* (4), in so far as it specifies the cases in which the transfers of holdings are operative against the landlord, in fact, supports the case for the plaintiffs cosharers. In this view and on the authority of the cases we have cited. Appeal No. 270 is dismissed and Appeals Nos. 2303 and 2878 are decreed with costs in each case.

V.B./R.K. *Order accordinlgy*

3. A I R 1915 Cal 120=25 I C 546.
4. A I R 1915 Cal 242=27 I C 61=42 Cal 172.

A. I. R. 1918 Calcutta 411

RICHARDSON AND BEACHCROFT, JJ.

Sakhiuddin Saha and *others*—Plaintiffs—Appellants.

v.

Sonaulla Sarkar and *others*—Defendants—Respondents.

Appeal No. 230 of 1915, Decided on 8th February 1918, from appellate decree of Addl. Sub-Judge, Rungpur, D/- 7th November 1914.

(a) Mortgage—Suit on—Mortgagees' interests are severable or partible.

In equity co-mortgagees are presumably tenants-in-common of the mortgage debt and their interests are severable or partible among themselves; so that one of them can sue on the mortgage provided those who are unwilling to be joined as plaintiffs are made defendants.

[P 412 C 1]

(b) Transfer of Property Act (1882), S. 60—Some co-mortgagees precluding themselves on ground of estoppel from enforcing right against purchaser of portion of property and puisne mortgagee of remainder—Court can sever their interests from the rest and pass decree in favour of latter.

Where some of several co-mortgagees have by their conduct precluded themselves on the ground of estoppel from enforcing their rights under the mortgage against purchasers of a portion of the mortgaged property and a puisne mortgagee of the remainder, it is open to the Court to sever their interests from those of the other co-mortgagees who are under no disability or disqualification and to make a decree in favour of the latter in proportion to their interests in the mortgage debt

[P 412 C 1]

(c) Transfer of Property Act (1882), S. 54—Mortgage debt is immovable property—Registration Act (1908), S. 17.

A mortgage-debt is immovable property both for the purposes of S. 54, T. P. Act and for the purposes of S. 17, Registration Act. Where a mortgage-debt is transferred by an instrument in writing and the value of the right, title and interest transferred is Rs. 100 or more, the writing requires registration under the Registration Act.

[P 413 C 1, 2]

Atul Chandra Gupta—for Appellants.

Satya Charan Sinha for *Jitendra Nath Roy*—for Respondents.

Richardson J.—This is a suit brought by the plaintiffs as mortgagees to enforce their security. Plaintiff 12 is one of the two original mortgagees and plaintiffs 1 to 11 are the heirs and the successors of the other. Defendants 1 to 3 are the mortgagors. Subsequent to the mortgage defendants 4, 5 and 6 purchased a portion of the mortgaged property and defendant 7 took a puisne mortgage of the remainder. In connection with those transactions however, it has been found, and cannot now be disputed, that the plaintiffs 1, 2 and 12 led defendants 4 to 7 to believe that the whole property was unencumbered. The position, therefore, is that plaintiffs 1, 2 and 12 are precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against those defendants. In that state of things the Courts below have concurred, in dismissing the suit so far as plaintiffs 1, 2 and 12 are concerned and in making in favour of the remaining plaintiffs a mortgage decree in the usual form entitling them to sell the whole of the mortgaged property in satisfaction of their share of the original mortgage debt. The plaintiffs have appealed to this Court and the first point which arises is free from difficulty.

As regards defendants 4 to 6, who took an apparently absolute title in the portion of the property which they purchased, the claim of plaintiffs 1, 2 and 12 has been rightly dismissed. But as regards defendant 7 the effect of the estoppel, under S. 78, T. P. Act, is to postpone them (in respect of their share of the original debt) to that defendant. As between plaintiffs 1, 2 and 12 and defendant 7, therefore, the suit should not be dismissed and the decree should declare that the property mortgaged to defendant 1 is hypothecated to plaintiffs 1, 2 and 12

for their share of the original mortgage-debt and that their rights as mortgagees are postponed to those of defendant 7. The decrees of the Courts below will be modified accordingly. The further contention on behalf of the plaintiffs, who may be described as innocent plaintiffs, that they are in a position to demand that a decree should be made in favour of the mortgagees as a body for the whole of the mortgage-debt, is untenable. Nor are we obliged to tell defendants 4—7 that their only remedy lies in an action for deceit. In equity co-mortgagees are presumably tenants-in-common of the mortgage-debt and their interests are severable or partible among themselves. One of them can sue on the mortgage, provided those who are unwilling to be joined as plaintiffs are made defendants. *Davenport* v. *James* (1). There is nothing to take the present case out of the general rule.

The innocent plaintiffs are not damnified by the way in which the case has been dealt with. Some of the mortgagees have by their conduct precluded themselves from enforcing their rights under the mortgage, and it was open to the Court to sever their interests from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt. The contention last dealt with has been advanced solely for the purpose of evading the ruling of the Courts below on another question which has given rise to some discussion before us, The two original mortgagees were brothers and they each had an eight-anna share in the mortgage. It is said that there was a partition of the joint property by which the bond in suit was allotted to the deceased brother, the predecessor of plaintiffs 1—11. On that footing plaintiff 12 was in the first instance made a defendant. He was made a plaintiff by direction of the learned Munsif when he found that the partition had not been proved, a finding which has been affirmed by the learned Subordinate Judge. The objection taken is that in dealing with this part of the case the Courts below have wrongly refused to receive in evidence two documents by which the partition of the bonds in which the brothers had a joint interest was effected. These documents are not registered and have been rejected on that ground on the authority of *Upendra Nath Banerjee* v. *Umes Chandra Banejree* (2), where it was held that a deed of partition, either declaring certain rights over immovable property or reciting the allotment of lands and containing an agreement to act accordingly, is compulsorily registrable. In my opinion the rejection of these documents has, as the language of the two judgments shows, largely, influenced the conclusion at which the Courts below have arrived on the question of partition or no partition. If the Subordinate Judge intended to say that even if these documents be taken into account, the partition is not proved, he has not expressed himself very happily. The point raised therefore seems to me to require consideration. It is contended for the plaintiffs that the case cited below has no application, because the transfer of a simple mortgage such as the bond in suit or a share in such a mortgage is not a transfer of immovable property within the meaning of S. 54, T. P. Act, and the document by which the transfer is effected is not a document which purports or operates:

"to create, declare, assign, limit or extinguish whether in present or the future, any right, title, or interest, whether vested or contingent . . . to or in immovable property"

within the meaning of S. 17 (b), Registration Act In support of this contention it is said that the transfer of a simple mortgage is merely the transfer of a debt on which the security is attendant, the security passing to the transferee with the debt under S. 8, T. P. Act. For authority, reference is made to *Gous Mahomed* v. *Khawas Ali Khan* (3) *Baiji Nath Lohea* v. *Binoyendra Nath Palit* (4) and *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Battacharya* (5). These cases are perhaps not entirely consistent with the earlier decision of this Court in *Koob Lall Chowdhury* v. *Nittyanund Singh* (6) or with the decision of the Allahabad High Court in *Abdul Majid* v. *Muhammud Faizullah* (7). However that may be, they relate to the transfer of mortgage decrees and the considerations which apply to such transfers may not be

1. (1847) 7 Hare 249.
2. (1910) 6 I C 346.
3. (1896) 23 Cal 450.
4. (1902) 6 C W N 5.
5. (1908) 12 C W N 625.
6. (1883) 9 Cal 839=12 C L R 39[illegible].
7. (1891) 13 All 89.

altogether applicable to the transfer of mortgage bonds. O. 21, R. 16, Civil P. C., appears to contemplate the transfer of a decree "by assignment in writing," though the Code does not say whether the writing must be registered when the decree transferred is a mortgage decree. If therefore we confine ourselves to transfers of mortgage-bonds or morgages, it has first to be noticed that "a debt secured by mortgage of immovable property" is expressly excluded from the definition of "actionable claim" added to S. 3, T. P. Act, by the Amending Act of 1900, (Act No. 2 of 1900). And inasmuch as S. 8 of the Act speaks of "a debt or other actionable claim" (in the clause which deals with the passing of the securities therefor), S. 8 can be of no assistance to the appellants for the present purpose, though in other connexions the principle underlying the section will, no doubt, be applicable (Ghose's Law of Mortgage in India, Edn. 7, Vol 1, pp. 70, 71, and Vol. 2, p. 667). The transfer of actionable claims is governed by S. 130 of the Act which requires the execution of an instrument in writing signed by the transferor or his duly authorised agent, and it can hardly be supposed that debts secured by mortgages of immovable property were excluded from the definition of actionable claims in order that they might pass by word of mouth without any writing. The inference would seem to be that the legislature regarded such debts as immovable property within the definition in S. 3 (25), General Clauses Act of 1897:

"Immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."

For the purposes of the Transfer of Property Act that definition is only qualified by the clause in S. 3 of that Act, which says that "immovable property does not include standing timber, growing crops or grass." And if a mortgage-debt is within the definition of immovable property in the General Clauses Act, it is also within the definition of such property in S. 2(6), Registration Act of 1908. It would follow that a mortgage-debt is immovable property both for the purposes of S. 54, T. P. Act, and for the purpose of S. 17 (b), Registration Act. If that be the true view, it would be sufficient in the case before us to say that where a mortgage-debt is transferred by an instrument in writing and the value of the right, title or interest transferred is one hundred rupees or more, the writing requires registration under the Registration Act. In the work already referred to the learned author remarks, quite generally and without reference to any statutory definition, that:

"whatever may be the form of the mortgage, it operates as a transfer of an interest in the land which is given as security."

(The Law of Mortgages in India, Edn. 4, Vol. 1, p 72). If a mortgage, even a simple mortgage, creates an interest in land, its transfer must be the transfer of an interest in land. In Vol. 2 of the same work at p. 729, it is said that "a mortgage on land is immovable property" and reference is made to *Hoyles, In re*, *Row* v. *Jagg* (8). The learned pleader for the plaintiff cited the cases of *Malcolm* v. *Charlesworth* (9) and *Gresham Life Assurance Society* v. *Crowther* (10). But those cases turn on the provisions of an English Statute which permit the registration of assurances by which lands are "affected," and have no application to the different language of the Registration Act. The conclusion at which I arrive is that the cases on which the learned pleader relies are at any rate distinguishable and that the Courts below have taken a correct view of the requirements of the Registration Act. We are not referred to any decision of this Court precisely in point, but the conclusion is supported by the ruling of the Bombay High Court in *Ganpat Pandurang* v. *Adarji Dadabhai* (11) and see also *Joharmal* v. *Tejram Jagrup* (12). The result is that in my opinion, subject to the modification above directed, the decrees of the Courts below should be affirmed and the appeal dismissed. The appellants having substantially failed, the respondents are entitled to their costs of the appeal.

Beachcroft, J.—I agree that the appeal should be dismissed subject to the modification in the decree proposed by my learned brother for the reason given by him. But I express no opinion on the question whether the learned Subordinate Judge was right in his view on the question of registration, for, as I under-

8. (1911) 1 Ch 179=80 L J Ch 274.
9. (1836) 1 Keen 63=48 E R 230.
10. (1915) 1 Ch 214=84 L J Ch 312.
11. (1878-79) 3 Bom 312.
12. (1893) 17 Bom 235.

stand his judgment, he finds as a fact that no partition was made between Bhetu and Nitu, whether the evidence which he holds to be inadmissible be excluded from or taken into consideration.

V.B./R.K. *Appeal dismissed.*

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CHATTERJEA AND RICHARDSON, JJ.

Oli Sha others—Defendants—Appellants.

v.

Farid Sardar and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 1046 of 1914, Decided on 12th July 1917.

Possession—Suit for—Burden of proof—Suit for khas possession of land on declaration of title—Defendant admitting land to be joint but pleading separate title on ground of partition—Burden of proof is on plaintiff to prove title.

In answer to a suit by the plaintiffs for khas possession on declaration of their title to a two-thirds share of a land, on the allegation that they, along with one of the defendants, joined in purchasing certain lands which included the land in suit, the defendants alleged that the land had long ago been partitioned and that the disputed portion had fallen to their share:

Held: that the burden lay upon the plaintiffs to prove their title, notwithstanding the defendants' plea that the land was originally included within a joint property and on partition fell to their share. [P 414 C 2]

Surendra K. Bose and *Phanindra Lal Mottra*—for Appellants.

Bimal Chandra Das Gupta—for Respondents.

Judgment.—It is common ground between the parties to this suit that three persons Nidhi, Suba and Hakim, who were related in some degree to each other, joined in purchasing in the year 1281 certain land, including the land in dispute. The plaintiffs, the respondents before us, are the representatives of Suba and Hakim. The representatives of Nidhi are described by the District Judge as pro forma defendants, but it appears from the judgment of the Munsif that they as well as the tenant defendants, contested the suit. The plaintiffs brought the suit for a declaration that they were entitled between them, as heirs of Suba and Hakim, to a two-thirds share of the disputed land and for khas possession to the extent of the share claimed. The defendants alleged that the land purchased in 1281 had long ago been partitioned and that the disputed land had fallen to Nidhi's share. The suit was dismissed by the learned Munsif whose decree, however, was reversed by the learned District Judge on appeal. The respondent tenants claim under a settlement or under-settlements from Nidhi, and both the Courts have found that the lands originally purchased had been partitioned before these respondents were settled upon it and certainly long before 1307, the date to which the plaintiffs ascribed the lease of the kha land. Having come to that finding in agreement with the learned Munsif, the learned District Judge states the questions for decision as follows:—

"The point is, however, whether allowing that plaintiff's story as regards the partition is incorrect there is anything to show that Nidhi or his successor got the lands in suit on partition."

Now, the plaintiff's story as regards the partition was that it took place in 1307 after the settlement of the disputed land with the respondent tenants. That story was clearly rejected and it is difficult to see why its rejection should shift the burden of proof on to the defendants in the suit. According to the ordinary rule, the burden was upon the plaintiffs to prove their title. The learned Judge, however, as is apparent from the mode in which he stated the point for decision, placed the burden on the defendants. That he did so is confirmed by his further observation that,

"the land having been originally joint, the burden of proof was clearly on defendants to show that Nidhi got it on partition but they have not been able to do so."

We are of opinion that the learned Judge's mode of dealing with the burden of proof was erroneous. Then the Judge goes on to say:

"Both sides clearly set up a false case: so it devolves upon the Court to extract as much truth as possible from the materials before it and plaintiffs no more than defendants, can be confined to their original case."

The judgment, read as a whole, seems to us to show that if the Judge had recognized that the burden of proof lay on the plaintiffs, he could not have arrived at a decision, in their favour. In the circumstances, we are of opinion that it would be idle to remit the appeal to be re-heard and that the course that we ought to take is to set aside the judgment and decree of the District Judge and restore the judgment and decree of the Munsif with costs of the Court and of the lower appellate Court. We order accordingly.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 415

SANDERSON, C. J., TEUNON AND WALMSLEY, JJ.

Kumar Chandra Kishore Roy Chowdhury—Appellant.

v.

Basat Ali Chowdhury and *another*—Respondents.

Letters Patent Appeal No. 5 of 1916, Decided on 28th August 1917, against decree of Chatterjea and Mullick, JJ., D/- 3rd April 1915.

(a) Letters Patent (Cal) Cl. 15—Decision of Single Judge setting aside order of District Judge and remanding case is "judgment"

A decision of a single Judge of the High Court, by which an order of a District Judge reversing in appeal an order of a Munsif cancelling a sale is set aside and the case is remanded to the District Judge for re-hearing, is a 'judgment' within the meaning of Art. 15, Letters Patent. [P 417 C 1, P 418 C 2]

(b) High Courts Act (1881), S. 15—High Court cannot under S. 15 interfere with decision from which no appeal or revision lies under Civil P. C. (1908).

Per *Sanderson, C. J., and Walmsley, J.*—The High Court cannot, by exercising its power of superintendence under S. 15 High Courts Act, 1861, interfere with the decision of a subordinate Court from which no appeal or revision under S. 115, Civil P. C., lies to the High Court. [P 417 C 1, P 419 C 1]

(c) Civil P. C. (1908), S. 115 (c)—Decision of District Judge held not subject to revision although based upon grave mistake of facts—Mistakes held to be in regard to question which he had jurisdiction to decide (Per *Curiam Teunon, J.* contra).

Where a District Judge reversed in appeal an order of a Munsif setting aside a sale under O. 21, R. 90, Civil P. C., on erroneously holding that the property sold was a 1/3rd share in a patni whereas it was the undisputed 2/3rds share that was sold, and that the auction-purchaser was a 'new comer' whereas in fact he was a co-sharer in the property, and without coming to any definnite conclusion as to the publication of the sale proclamation:

Held: Per *Curiam* (*Teunon, J.* dissenting).—that the decision of the District Judge was not subject to revision under S. 115, Cl. (c), Civil P. C., as the mistakes upon which he based his judgment, though grave mistakes of fact, were in regard to questions which he had jurisdiction to decide. [P 416 C 2]

Per *Teunon, J.* (*contra*).—As the property sold was clearly specified in the sale proclamation as the judgment-debtor's 2/3rds share in the patni and as there was no dispute between the parties as to that share, the decision of the District Judge, based as it was on the imaginary finding that the property sold was a 1/3rd share, was open to revision by the High Court under S. 115 (c) Civil P. C., as it was the duty of the District Judge to decide secundum allegata et probata; although if the parties had been in dispute as to the judgment-debtor's interest in the patni, and if, however erroneously, the District Judge had decided that his interest was not 2/3rds but 1/3rd, that would have been merely an erroneous decision on a question of fact with which the High Court acting under S. 115, Civil P. C., could not interfere. [P 418 C 1]

Mohendra Nath Roy and *Romesh Chandra Sen*—for Appellant.

Mohini Mohan Chakravarty—for Respondents.

Sanderson, C. J.—This is an appeal under S. 15, Letters Patent, arising from a difference of opinion between Chatterjea, J., and Mullick, J. The facts are as follows:—The landlord of the judgment-debtor obtained a decree for rent against him, and in execution thereof, the judgment debtor's interest in a Patni tenure was sold. His interest was a 2/3rds share. At the sale the debtor's interest was bought for Rs. 2,755 by Kumar Chandra Kishore Roy Chowdhury, who was the owner of the remaining 1/3rd share. The judgment-debtor applied under O. 21, R. 90, to have the sale set aside: the Munsif in the Court of first instance set aside the sale on the ground that he was not satisfied that the sale proclamation was duly published, and on the further ground that the price was deliberately understated in the proclamation and that the disputed property was a valuable one and might be worth Rs. 6,000, as alleged by the judgment-debtor.

The auction-purchaser appealed from the order of the Court of first instance and the District Judge allowed the appeal. On the motion of the judgment-debtor, a rule was issued by the High Court which came on for hearing before Chatterjea, J., and Mullick, J. Chatterjea, J., held that the Court had power to interfere under Cl. (c), S. 115, Civil P. C., or under S. 15, High Courts Act, 1861. On the other hand, Mullick, J., came to the conclusion that having regard to the limited operation of S. 115, the Court had no jurisdiction to interfere: he expressed no opinion as to S. 15, High Courts Act. The opinion of the Senior Judge prevailing, an order remanding the case was made and a rehearing was directed: hence this appeal by the auction-purchaser. The grounds upon which Chhatterjea, J., based his judgment were:—

(1) that the learned District Judge did not come to any finding, (a) as to whether there was a deliberate misstatement as to value in the sale proclamation; or (b) as

to the publication of the proclamation; (2) that the learned District Judge started with a misconception on a fundamental point, in that he based his judgment upon the assumption that what was sold was one third share of the Panti Taluq, whereas in fact it was two-third share; (3) that the learned District Judge assumed that the purchaser was a new comer', whereas he was himself a co-sharer in the Patni tenure to the extent of one-third. The question is, whether under the above circumstances the case comes within Cl. (c), S. 115, Civil P. C. The clause provides as follows:—115.

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears . . . . (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

This clause has been the subject of judicial decision in this Court, e. g., in *Shew Prasad Bungshidur* v. *Ram Chunder Haribux* (1), Jenkins, C. J. said:

"It appears to me that S. 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section."

In *Krishna Mohini Dossee* v. *Kedarnath Chuckerbutty* (2) Petheram, C. J., speaking of S. 622, Civil P. C. of 1882, which was in terms similar to the section now under discussion, said:—

"But then comes a very different and more difficult question, and that is the question whether this order can be revised by the Court under S. 622, Civil P. C. This is a section which has been a good deal enquired into,"

In our opinion it is a section of very limited operation. What the section says is that the High Court may revise a decision of the Court by which the case was decided if the Court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. Now, it seems to us, that the meaning of this section is that, whenever a Court has jurisdiction to decide a question, whether it is a question of law or a question of facts, its decision on that question is not revisable by this Court. Both of these decisions were based upon the decision of the Judicial Committee of the Privy Council in *Amir Hoosan Khan* v. *Sheo Baksh Singh* (3). The question therefore is, can it be said that the District Judge acted in the exercise of his jurisdiction illegally or with material irregularity, and having regard to the construction put on Cl. (c) S. 115, was the failure of justice due to such a fault of procedure as is indicated in this clause. As regards the misstatement of value in the proclamation, as I read the District Judge's judgment, he assumed that there was such a misstatement but he thought it was not a material irregularity. As regards the alleged want of finding with reference to the publication of the proclamation, I think that the learned District Judge should have arrived at a definite conclusion on this point, but in view of his finding that the price obtained for the property was adequate, this matter was apparently considered by him as of no material importance to his judgment. As regards his misconception as to what was sold, and as to the position of the auction-purchaser, the learned Judge made a grave mistake of fact.

The learned Judge, however, had jurisdiction to decide all these questions, and if he made a mistake as to law or fact, this Court cannot interfere by way of revision. He had to decide whether the price obtained for the property was adequate. To arrive at a conclusion thereon he would naturally first have to decide what was the plaintiff's interest in the Patni taluk and whether the purchaser was a person who would pay a fair price. He stated that the property sold was a 1/3rd share; and therein he made a grave mistake, as the plaintiff's interest was a 2/3rds share; he also considered the purchaser to be a "new comer' whereas he was himself a cosharer. These are questions which, in my judgment, the learned Judge has jurisdiction to decide, and although he made grave mistakes of fact, upon which he based his judgment with respect to these matters, in view of the construction placed upon the section in the above-mentioned cases, with which I agree, his decision is not revisable by this Court. It may be noted that the judgment-debtor was not without a remedy; he could have applied to the learned District Judge for a review and if the attention of the learned Judge has been drawn to the serious mistake of fact

1. A I R 1914 Cal 388=23 I C 977=41 Cal 323
2. (1888) 15 Cal 446.
3. (1885) 11 Cal 6=11 I A 237 (P. C.).

which he had made, it is almost impossible to believe that the application for review would have been refused. As regards the contention that this Court has power to interfere under S. 15, High Courts Act, 1861, having regard to the circumstances of this case, in my judgment this Court has no such power.

There was no right of appeal from the order of the District Judge, and in my opinion, as already stated, under the circumstances of the case, this Court has no jurisdiction under S. 115, Civil P. C. to revise the judgment of the District Judge; if this Court were to interfere, basing its interference upon the powers conferred by S. 15, High Courts Act, it would, in my judgment, be straining the meaning of the word "superintendence" unduly. It would mean that although there was no right of appeal and no power to revise under S. 115 of the Code, this Court could by exercising its power of "superintendence" in effect bear an appeal, or act in revision. I am not prepared so to hold, and indeed it is not necessary to put upon the section in question any such strained meaning, because, as already stated, there was an obvious remedy available to the judgment-debtor. viz., by way of review, by means of which the unfortunate mistake could have been put right. A preliminary point was taken that there was no right of appeal. In my judgment an appeal lies on the ground that Chatterjea, J.'s judgment was one which deprived the auction-purchaser of the benefit of the District Judge's judgment, which confirmed the sale, and consequently it was a judgment which materially affected the merits of the question between the parties. For these reasons, in my judgment, the appeal should be allowed with costs both in this Court and before Chatterjee and Mullick, JJ., the Rule should be discharged and the order directing a re-hearing should be set aside. We assess the hearing fee at two gold mohurs for each hearing in this Court.

Teunon, J.—This is an appeal under Art. 15 of the Letters Patent against the decision of Nalini Ranjan Chatterjea, J. By his decision he sets aside an order of the District Judge of Dinajpur and remands the case in which the order was made for re-hearing. A preliminary objection was taken that against the decision of Chatterjea, J. no further appeal lay under Art. 15 of the Letters Patent. On this point I agree with the decision of this Court in *Chandi Charan Saha* v. *Jnanendranath Bhattacharjee* (4) (though that was an appeal against a judgment in second appeal) and, therefore, this objection in my opinion, cannot be sustained. The appeal arises out of an application made by the judgment-debtor under the provisions of the Civil P. C., O. 21, R. 90, for the setting aside of a sale in execution.

The property sold was the judgment-debtor's 2/3rd share in a certain Patni Taluq. The trial Court held that in the sale proclamation the value of the property had been deliberately under-estimated, that the sale proclamation had not been duly published and that by reason of these irregularities or frauds an adequate price had not been realised. Against the order setting aside the sale on the grounds just stated the auction-purchaser appealed. The District Judge at the hearing of the appeal came to no clear finding as to the publication of the sale proclamation, held that the statement of value (Rs. 600) though a gross misstatement, was not calculated to deter possible bidders and that the price fetched at the sale (Rs. 2, 755) was not seriously inadequate. He therefore decreed the appeal. Against this decision there was an application in revision to this Court. At the hearing of the Rule then obtained it was contended that the District Judge had failed to value the property sold, namely, judgment debtor's 2/3rd share in a certain Patni Taluq.

His judgment in fact makes it apparent that he conceived that he was required to value a 1/3rd share. Moreover, his judgment indicates that he has fallen into a further error regarding the area, that is he appears to think that the judgment-debtor's statement of area, 600 bighas, applies not to his own share (2/3rd) but to the whole Patni of which the Judge, therefore proceeds to value 1/3rd, i. e., 200 bighas. The learned Judges who heard the Rule differed, Mullick, J. who has himself apparently misapprehending the District Judge's statement regarding area, holding that the error committed by the District Judge did not bring the case within the scope of S. 115, of the Code, while the Senior Judge, Chatterjea, J. was of opinion that under S. 115 of the Code and also under S. 15 Charter Act,

4. (1917) 41 I C 250.

the Court could and should interfere. Against the latter's decision the present appeal has been preferred by the auction purchaser. At the hearing before us, it has been contended on behalf of the appellant that the error into which the District Judge has fallen is merely one of those erroneous decisions or sad mistakes to which the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (3), decided by their Lordships of the Judicial Committee, and the case of *Shew Prosad Bangshidhar* v. *Ram Chunder Haribux* (1) should be held to apply. To this contention I am unable to assent. It may be that if the parties had been in dispute as to the judgment-debtor's interest in the Patni and if, however erroneously, the District Judge had decided that his interest was not 2/3rd, but 1/3rd (and the area not 600 bighas but 200 bighas), this would have been merely an erroneous decision on a question of fact with which, acting under S. 115 of the Code, we could not and should not interfere.

But the case here appears to me to be different. The property sold was clearly specified in the sale proclamation as the judgment-debtor's 2/3rd share. As to the extent of the judgment-debtors' interest there was no dispute between the parties. Specified shares are distinct entities. It is the duty of a Judge to decide secundum allegatta et probata. Instead of doing so, the learned Judge here has set himself to value not the property sold but an entirely different property, and on his finding as to the value of this different or imaginary property he has declined to set aside the sale of the judgment-debtor's property valued by the judgment-debtor at more than double the price realised. By way of analogy merely, I should refer, in support of the view I take to two cases decided by the Bombay High Court and reported as *Gorakh Babaji* v. *Vithal Narayan Joshi* (5), *Venkubai* v. *Lakshman Venkoba Khot* (6). For these reasons and differing with all respect from my learned colleagues, I am of opinion that the present appeal should be dismissed with costs.

Walmsley, J.—This appeal is against an order passed by Chatterjea on an application made by the present respondent. The circumstances are as follows: The respondent's landlord obtained a decree for rent against him, and in execution of that decree he caused respondent's share in a Patni Taluq to be put up for sale. The share was two thirds of the Taluq. In the sale, the share was bought by the owner of the remaining one-third share. Subsequently the respondent applied to have the sale set aside, and this application was granted by the Munsif. Then the auction-purchaser preferred an appeal, and the order setting aside the sale was reversed and the sale was confirmed. Thereupon the judgment-debtor preferred a motion in this Court, a Rule was issued, and in due course the Rule came on for hearing before Chatterjea J. and Mullick J. The former held that the case was one in which it was right to interfere and directed that the appeal should be heard again by the District Judge. The latter, however, was of opinion that the circumstances were not such as to bring the case within the scope of S. 115, Civil P. C. The auction-purchaser has lodged this appeal against Chatterjea J's, order directing that the appeal should be reheard.

A preliminary objection was taken at the hearing by the learned Pleader for the respondent, to the effect that no appeal lay, and he referred to the case of the *Justice of the Peace for Calcutta* v. *Oriental Gas Company* (7). I do not think that that case supports his argument. The learned Chief Justice said there: "We think that 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability." Applying that definition to Chatterjea J.'s judgment, it is clear that it affects the merits of the question in a very material degree. The effect of the decision by the lower appellate Court was to confirm the sale, but by Chatterjea J's order the Munsif's order setting aside the sale is restored, until the auction-purchaser has convinced the District Judge at a second hearing of the appeal that it ought to be reversed. I hold, therefore, that the preliminary objection cannot be sustained and that the appeal does lie.

For the appellant it is urged that the reasons given by Chatterjea J. cannot be brought within any of the clauses of S. 115, Civil P. C. It is clear that clauses (a) and (b) have no application. Can it be said that the learned

5. (1887) 11 Bom 435.
6. (1888) 12 Bom. 617,
7. (1872) 8 B L R 433.

District Judge "acted in the exercise of his jurisdiction illegally or with material irregularity?" The learned Pleader for the respondent says that because the lower appellate Court treated the property as being one-third of the Taluq instead of two-thirds, there was no proper trial of the case. He stated this argument in several ways; that the learned Judge did not apply his mind to the case really before him; that he decided a case about the one-third share and not about the two-thirds share; that he did not try the judgment-debtor's case at all. Stated in any form, the argument is, if I may use the epithet without offence, nothing but a specious way of saying that the learned Judge made a very serious mistake, regarding the extent of the interest which had been sold. A mistake of fact, however, and a wrong decision based on it, do not constitute illegality or irregularity. I think this view is in accordance with a recent decision of this Court [*Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (1)] and with a decision by their Lordships of the Privy Council [*Amir Hassan Khan* v. *Sheo Bakhsh Singh* (3)]. In my opinion, therefore, the present case does not come within the scope of S. 115, Civil P. C.

For the respondent it is urged that if he cannot obtain relief under S. 115, Civil P. C. at any rate the provisions of S. 15, High Courts Act, are wide enough to cover his case. Attempts are often made to put an elastic interpretation upon the word 'superintendence.' Personally I think the word should be construed very narrowly. It is not necessary, however, to consider what meaning should be given to it, for there is one fact in the present case which prevents the respondent from asking us to go beyond the provisions of the Civil P. C. That fact is his failure to apply to the lower appellate Court for a review of judgment. It is clear that the respondent was "aggrieved by a mistake apparent on the face of the record," and if he had made a proper application under O. 47 he would, doubtless, have obtained relief.

Although I share Chatterjea J's sympathy for the judgment debtor, I think we cannot uphold his order. In my opinion the appeal should be allowed, the order directing the appeal to be reheard by the District Judge should be set aside, and the Rule obtained by the judgment-debtor should be discharged. I, therefore, concur in the orders of the learned Chief Justice.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 419

MOOKERJEE AND BEACHCROFT, JJ.

Surendranath Dey and *others*—Plaintiffs—Appellants.

v.

Rajindra Chandra Chandra and *others*—Defendants—Respondents.

Appeal No. 501 of 1915, Decided on 30th July 1917, from appellate decree of Dist. Judge, Bankura, D/- 7th December 1914.

Transfer of Property Act (1882), S. 100—Mortgage of non-transferable interest—Subsequent acquisition of transferable interest by mortgagor—Mortgage is binding charge on alienee from mortgagor.

A mortgage of non-existent property, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property the moment it is acquired by the mortgagor and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. [P 420 2 C]

If, therefore, at the date of the mortgage the mortgagor has only a non-transferable interest in the property mortgaged but subsequently he acquires a transferable interest in it and conveys a portion of the mortgaged property to a third party, the mortgage operates as a valid charge on the whole property (including the portion conveyed) enforceable at the instance of the mortgagee immediately on the acquisition of the transferable interest. Such a charge covers not only the original advance but also any money subsequently paid to save the property. [P 421 1 C]

Mohini Mohan Chatterjee—for Appellants.

Dwarkanath Mitra and *Bijoy Kumar Bhattacharjee*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit to enforce a mortgage dated 1st September 1901. Two questions are in controversy at this stage, namely, first, is the second parcel subject to an enforceable charge; and secondly, what is the amount still due to the plaintiff? The property in question originally formed part of a ghatwali tenure. Before the mortgage was executed, an agreement had been made on 5th August 1901 between the Government, the zamindar and the ghatwal to the effect that on resumption the land would be settled with the ghatwal. On the same day, the ghatwal executed a mourasi mukarari kabuliyat in favour of the zamindar, and on 17th December 1901, the zamindar executed a

mourasi mukarari patta in favour of the ghatwal. The ghatwal, however, was not released from his police duties till 17th June 1902. Between the execution of the mortgage and the completion of the resumption proceedings the ghatwal, on 19th May 1902, sold the second parcel to the predecessors-in-interest of the contending defendants who, in their turn, on 31st May 1909, conveyed the property to the respondents. The question taken up by the contesting defendants is that on the date of the execution of the mortgage, the second parcel was still non-transferable ghatwali land, and consequently, no valid charge was created thereon. This view did not commend itself to the trial Court, and a mortgage decree was made in respect of the disputed parcel as also the other lands included in the security. On appeal, the District Judge took a different view and held that there was no valid mortgage enforceable against this property. In our opinion this conclusion cannot be supported.

It not necessary for our present purpose to determine, whether ghatwali property is inalienable in the sense that if it is transferred by the ghatwal to a stranger the transferor himself is entitled to question the validity of the alienation, for whether ghatwali land is or is not inalienable in the sense, our ultimate decision must be in favour of the plaintiffs. The position of the plaintiff cannot be worse than that of a mortgagee of non-existent property. On 1st September 1901, the ghatwal was entitled to the land, subject to certain restrictions on his right of alienation. These fetters were removed, let us assume, on 17th June 1902. But in anticipation of such removal, he had executed a mortgage in favour of the plaintiffs. If not immediately operative, the mortgage would, in equity, by operative, at least as an agreement to grant a mortgage. The true position then is best described in the words of Westbury, L. C., in *Ho'royd* v. *Marshall* (1).

"It is quite true that a deed which professes to convey property which is not in existence at the time, is, as a conveyance, void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract."

To the same effect are the observations of Jessel, M. R., in *Collyer* v. *Isaacs* (2):

"A creditor had a mortgage security on existing chattels and also the benefit of what was in form of assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment in fact constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity treating as done that which ought be done, fastens upon that property, and the contract to assign thus becomes a complete assignment: see also *Tailby* v. *Official Receiver* (3),"

These principles were applied in the case of *Khobhari Singh* v. *Ram Prosad Roy* (4), where the Court was called upon to decide the validity of a mortgage of property, purchased at a sale for arrears of revenue, the title wherein had not at the time of the execution of the mortgage vested in the auction-purchaser. It was ruled that a mortgage of non-existent property though inoperative as a conveyance is operative as an executory agreement, which attaches to the property the moment it is acquired, and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. The same doctrine had been previously applied in the cases of *Mackinlay* v. *Dunlop* (5) and *Baldeo Parshad Sahu* v. *Miller* (6). Reference may also be made to the decisions of the Allahabad High Court in *Bansidhar* v. *Sant Lal* (7) and *Gaya Din* v. *Kashi Gir* (8).

It is worthly of note that if this view were not adopted, the respondents would have to be left out of the suit as persons who had no interest in the mortgaged

1. (1862) 10 H L C 191=33 L J Ch 193,
2. (1882) 19 Ch D 342=51 L J Ch 14.
3. (1888) 13 A C 523=58 L J Q B 75.
4. (1908) 7 C L J 387.
5. (1850) 1 Taylor & Bell 498.
6. (1904) 31 Cal 667.
7. (1888) 10 All 133.
8. (1907) 29 All 163.

Property at the date of its institution. If the contention of the respondents is well founded, on 19th May 1902, when the ghatwal transferred the disputed property to the predecessor-in-interest of the defendants, no title passed from the ghatwal. On 23rd November 1912, when this suit was instituted, the respondents had not acquired a title by adverse possession. The result would thus follow that the defendants were not proper parties to the suit. This position they are not prepared to accept; they maintain that as soon as the resumption was completed on 12th June 1902, the title vested in them by virtue of the conveyance of 19th May 1902. But precisely the same argument is available to the plaintiffs; and they urge that the moment the resumption was completed on 12th June 1902, the mortgage of 1st September 1901 ripened into an unimpeachable transfer. In our opinion there is no possible escape from the position that there is a valid charge on the second parcel enforceable at the instance of the plaintiffs.

We may add that as a last resort, reliance was placed upon the decision in *Purna Cuhaha* v. *Sasidamini* (9). That case is clearly distinguishable. There the purchaser set up title by purchase at a sale in execution of a money decree. His position accordingly was that he had purchased the right, title and interest of the judgment-debtor as it stood when the attachment was effected. If on that date the judgment debtor had no valid interest the execution purchaser acquired no title. *Prosonna Kumar Mukherjee* v. *Srikant Rant* (10). In the view we take, it is clear that there is not only a charge on the property, but that the charge covers the original advance as also the money subsequently paid to save the property. The result is that this appeal is allowed the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the lower appellate Court.

V.B./R.K. *Appeal allowed.*

9. Second Appeal No. 1884 of 1903.
10. (1918) 40 Cal. 173=16 I C 365.

A. I. R. 1918 Calcutta 421

CHITTY AND BEACHCROFT, JJ.

Abhoya Charan Ghose and *others*—Petitioners—Appellants.

v.

Raj Kumar Ghose and *others*—Opposite-Parties—Respondents.

Rule Nisi No. 501 of 1917, Decided on 13th July 1917, against order of Sub-Judge, Dacca, in Appeal No. 502 of 1915.

Practice—Procedure—Appeal heard after death of respondent—Application to rehear appeal in presence of representatives of deceased can be entertained though appeal is made to High Court, against decision of lower Court.

An application made to the lower appellate Court to re-hear an appeal as against the heirs and legal representatives of a deceased respondent after substituting them in the place of that respondent, on the ground that he had died shortly before the hearing of the appeal in that Court, was refused by that Court on the ground that the application was one for review which that Court had no jurisdiction to grant inasmuch as an appeal against its decision had been preferred to and was pending in the High Court:

Held: that the lower appellate Court should have entertained the application and if it found on the merits of that applictien that the abatement of the appeal against the deceased respondent, which took place on the date of his death, ought to be set aside, then it should have set it aside and brought the representatives of the deceased on the record and re-heard the appeal as far as they were concerned, in their presence. [P 422 C 1]

Sarat Chander Basak and *Bepin Chunder Bose*—for Petitioners.

Manmatha Nath Mukherjee—for Opposite Parties.

Judgment.—In this case an appeal was filed in the Court of the Subordinate Judge against a decision of the Munsif on 9th August 1915. In September 1915 defendant 8 Amar Chand Dutt died. No substitution was made of his heirs. The appeal was heard in July 1916 and, on 27th July, the lower appellate Court's decree was passed. Against that decision an appeal was filed in this Court on 30th August 1916 with the name of defendant 8 as a party. The appellants say that they came to know of defendant 8's death on 10th February 1917 when an attempt was made to serve the notices of the appeal. An application was made to the lower appellate Court to re-hear the appeal against the heirs and legal representatives of defendant 8 on the ground that the latter had died shortly before the hearing of the appeal in that Court. The learned Subordinate Judge declined to entertain the application re-

garding it as one for review and considering that the case being under appeal to this Court, he had no jurisdiction to go into that question. We think that the learned Subordinate Judge was in error and that he should have entertained the application to substitute the heirs of defendent 8 on its merits. If he found on the merits of that application that the abatement against defendant 8, which took place on the date of his death, ought to be set aside then he should have set it aside and brought the representatives of the deceased on the record and re-heard the appeal so far as they were concerned in their presence. We think that that is what ought now to be done. It will, of course, be open to the learned Subordinate Judge to decide whether the abatement should be set aside or not on the merits of the application. The rule is accordingly made absolute. We make no order as to costs. Let the record be sent down at once and let the Subordinate Judge be requested to dispose of the matter as early as possible in order not to delay hearing of the appeal in this Court.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 422

WALMSLEY AND GREAVES, JJ.

Kaseswar Mukerjee and *others*—Defendants—Appellants.

v.

Annoda Prosad Patra and *others*—Plaintiffs—Respondents.

Appeal No. 3324 of 1914, Decided on 19th July 1917, from appellate decree of Sub-Judge, Hooghly, D/- 12-8-1914.

(a) Easements—Right to discharge surface water—Owners of higher lands have right to discharge surface water in all seasons.

Owners and occupiers of higher lands have the right to discharge surface water of their lands on to the contiguous lower lands not only in the dry season but in all seasons of the year.

[P 423 C 1]

(b) Easements—Right to discharge surface water—Right of owners of higher lands is not curtailed by natural changes enhancing burden of lower ground.

This right is not curtailed by any natural changes such as the silting up of an adjoining river, in consequence of which the burden of the lower ground is enhanced. [P 423 C 2]

(c) Limitation Act (1908), S. 23—Obstruction to discharge of surface water is recurring cause of action.

An obstruction to the discharge of surface water constitutes recurring cause of action, so that no question of limitation can arise in regard to a suit for the removal of the obstruction.

[P 423 C 2]

Ram Chandra Majumdar and *Hira Lal Chakrabarty*—for Appellants.

Mohendra Nath Roy, *Hara Kumar Mitter* and *Rupendra Kumar Mitter*—for Respondents.

Walmsley, J.—Plaintiff 1 is the proprietor, and the other plaintiffs are tenants, under him of two villages Khasnan and Bishubera. To the east of these villages lie the villages of Sonamni and Gazipur, owned by the defendants. It is conceded that the plaintiffs' villages are higher than the defendants' villages, and that the natural flow of surface water from the former is eastwards over the latter. Formerly the surface water of the four villages found an outlet into a stream called the Banspati on the east of defendants' villages, but the bed of this stream has gradually risen until it is above the level of the fields lying to the west of it. A band separates Bishubera from Gazipur and Sonamni, called the pakband, and another band lies between the two latter villages and the stream on the east. In each of these bands is a "hana" or opening through which the water used to flow: but both hanas were closed by the defendants several years ago. The plaintiffs sued for a declaration of their right to discharge their surface water over the defendants' villages, for a direction upon defendants to open the hanas, for a permanent injunction upon the defendants restraining them from closing the hanas, and for compensation.

The defendants denied the assertions made by the plaintiffs, but that attitude has been given up, and they now resist the plaintiffs' claim, on the grounds that the plaintiffs had no right to discharge the water on to their lands, that any right the plaintiffs may have had has been extinguished by the defendants' right to block the water exercised for a number of years, that the plaintiffs' have lost the right to sue for the enforcement of their right, and that the silting up of the stream has so changed the natural features of the four villages that the plaintiffs cannot discharge their surface water eastwards without ruining the defendants' villages. The Court of first instance dismissed the suit; the appellate Court decreed it in part. On appeal to this Court the judgment of the appellate Court was set aside and the appeal was remanded to be re-heard. The appellate Court has again decreed the suit in part, awarding

to the plaintiffs a declaration that they have a right to discharge water from their villages to the east during the dry season, but denying them the right to keep the hanas open throughout the year. Against this decree plaintiff 1 preferred a second appeal, but it was dismissed under O. 41, R. 11. The defendants also preferred a second appeal, and in response the tenant plaintiffs filed a memorandum of cross-objections under O. 41, R. 22. We are now concerned with this appeal, and the cross-objections.

The first question for decision is whether the plaintiffs as owners and occupiers of the higher ground had the right to discharge surface water on to the contiguous lower ground. On behalf of the appellant-defendants it is urged that there cannot be any such natural right. This contention I think is opposed to the view which has been taken by this Court in a number of cases, viz., *Hameedoonnissa* v. *Anundamoyee Dossee* (1), *Kopil Pooree* v. *Manick Sahoo* (2), *Imam Ali* v. *Poresh Mundul* (3) and *Abdul Hakim* v. *Ganesh Dutt* (4). Without alluding to these cases in detail, it is enough to say that they distinctly recognize the right of the owner of higher land to discharge surface water over adjacent lower land or, as it is expressed in one of the judgments, a servitude of lower lands to receive the natural drainage of adjoining lands on a higher level. English cases have been quoted but it is unnecessary to refer to them as the view taken in this country seems so well established. The only case mentioned before us which lends any support to the defendants is a Madras case, *Mahamahopadyaya Rangachariar* v. *Municipal Council Kumbakonam* (5), but the circumstances were very different and I do not think that any help can be derived from that decision.

In my opinion, therefore the plaintiffs had this right. It is urged however that even if they once had it, they have lost it. In the first place it is said that the defendants have acquired by prescription a right to close the hana and keep the water from coming on their land. This argument fails on the finding of the lower Court; the closing of the hana is too recent for the defendants to have acquired such a right. Secondly, it is said that the plaintiffs cannot now sue for an order directing the hana to be opened because it was closed more than six years before the institution of the suit. To this the answer is that the closing of the hana constitutes a recurring cause of action. Thirdly, it is said that the change in the bed of the Banspati river has made it impossible for defendant's land to receive the water without very serious loss and therefore, the plaintiffs' right ought to be regarded as extinguished. In this connection it is pointed out that plaintiffs speak of their right as a right to discharge their surface water on to defendant's land through the pakband hana and then through the hana in the second band into the Banspati. If that were really the right belonging to the plaintiffs the change in the bed of the Banspati would affect it very materially. But I think too much is being made of mere words: it is quite clear that the plaintiffs claim the right to discharge their surface water into defendants' land and then went on to state that as a matter of fact such water found its way through a second hana into the Banspati. I may add that it is for this reason that I have spoken of the pakband hana in these remarks and that I think the decree should be limited to the opening of the pakband hana. If we leave out of consideration this quibble about the phrasing of the plaint, there is no force in the argument based on the change in the Banspati. It is very unfortunate for the defendants, but the burden is not enhanced by anything that the plaintiffs have done and therefore, the plaintiffs still have the right which they claim.

The arguments put forward on behalf of the defendants are not tenable and their appeal must be dismissed with costs. With regard to the objection filed by the plaintiffs it is urged that the plaintiffs' right is not curtailed because natural changes have taken place. It is certainly difficult to understand how a Court can declare that they have a right to discharge water on to the defendants' land but that they may exercise it only in the dry season. The plaintiffs have not contributed in any way to the changes which have taken place and they are entitled to continue the exercise of their right. It is for the defendants to take

1. W R Full Bench Ruling 25.
2. (1873) 20 W R 287.
3. (1882) 8 Cal 468.
4. (1886) 12 Cal 323.
5. (1906) 29 Mad 539.

such steps as may be advisable to deal with the difficulties created by the rise in the bed of the Banspati. The decree must therefore, be modified but as the landlord's appeal was dismissed the declaration must be limited so as to be for the benefit of the tenants and their successors-in-interest so long only as the tenancies exist.

I think, therefore, that the tenant plaintiffs' cross objection should be allowed as indicated above. The decree will be to this effect, that the right of the plaintiffs to discharge water from the villages of Khasnan and Bishubera through the pakband hana on to the defendants' village Sonamni and Gazipur is declared; that so far as the plaintiffs-tenants and their successors-in-interest are concerned, this right may be exercised at all times of the year so long as their tenancies continue to exist; and that the defendants be directed to open the pakband hana within 15 days from the date of this decree and that if they fail to do so the plaintiffs tenants be authorized to do so at the expense of the defendants and to recover the cost of doing so from the defendants; and that a permanent injunction be issued upon the defendants restraining them from closing the pakband hana. The plaintiffs tenants will recover their costs in the cross-objection from the defendants.

Greaves, J.—I agree.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 424

CHATTERJEA AND NEWBOULD, JJ.

Ali Mamud—Plaintiff—Appellant.

v.

Miarish—Defendant—Respondent.

Apeal No. 60 of 1916, Decided on 15th January 1917, from appellate order of Sub-Judge, Mymensingh, D/- 30th November 1915.

(a) Mortgage—Decree for foreclosure—Time allowed for redemption runs from date of decree of Court of first instance.

In a decree for foreclosure the period of time allowed to the mortgagor to redeem runs from the date of the decree of the Court of first instance, unless in an appeal from the decree the appellate Court enlarges the time: 25 *Cal* 311; 11 *C W N* 679, *Ref.* [P 424 C 2]

(b) Civil P. C. (1908), O. 34, R. 3 (2)—Court cannot accept payment after final decree is passed.

The Trial Court cannot in the exercise of the discretion under O. 34, R. 3 (2), accept payment after the final decree has been passed. [P 424 C 2]

Birendra Kumar De—for Appellant.

Surendra Nath Das Gupta—for Respondent.

Judgment.—The decree-holder, who is the appellant in this case, obtained a decree for foreclosure upon a mortgage. The decree gave six month's time to the mortgagor to redeem. The latter preferred an appeal. The appeal was dismissed and there was no direction in the decree of the appellate Court that the six month's time would run from the date of that decree. The date of the original decree was 27th August 1913 and the appeal against that decree was dismissed on 1st December 1914. On 11th February 1915, the decree-holder applied for the decree being made absolute, and a final decree was passed. Subsequently on 24th May the mortgagor deposited the money in Court and that was accepted by the Munsif. Subsequently that order was set aside at the instance of the decree-holder, when it was pointed out to the Court that the final decree had already been passed. The order of the Munsif was set aside by the lower appellateCourt, on the ground that the six month's time had run from the date of the appellate Court's decree. We think that the view taken by the lower appellate Court is erroneous, In the absence of any direction in the decree of the lower appellate Court, the period of six months would run from the date of the decree of the Court of first instance: see *Bhola Nath Bhattacharjee* v. *Kanti Chandra Bhuttacharjee* (1) and *Faijunai Sardar* v. *Asimuddi Biswas* (2). It is true that the Court has the power, under O. 34, R. 3, proviso, to enlarge the time for redemption. But the final decree had been passed before the judgment-debtor deposited the money. Under the circumstances, we do not think that the Court had any power to accept the money long after the expiry of the time within which the judgment-debtor was to put in the money. The appeal must accordingly be allowed, the order of the lower appellate Court set aside and that of the Court of first instance restored. Each party will bear its own costs in all the Courts.

V.B./R.K. *Appeal allowed.*

1. (1898) 25 Cal 311,
2. (1907) 11 C W N 679.

A. I. R. 1918 Calcutta 425 (1)

FLETCHER AND RICHARDSON, JJ.

Emaduddin Chowdhury — Plaintiff—Appellent.

v,

Danesh Mamud and *others* — Defendants—Respondents.

Appeal No. 1557 of 1915, Decided on 5th February 1917, from appellate decree of Dist. Judge, Rangpur, D/- 8th April 1915.

Landlord and Tenant—Ejectment—Ejectment of korfa raiyat on expiry of term—He must be shown to be under-raiyat before ejectment.

Where on the expiry of the term of a kabuliyat in which the defendant admitted that he was a korfa raiyat, the landlord brought a suit for ejectment on the ground that the status of the tenant being that of an under-raiyat, he was liable to be ejected on the expiration of the term:

Held: that as the expression "korfa raiyat" did not necessarily mean an under-raiyat, the onus was upon the landlord to prove that the defendant was an under-raiyat and, therefore, liable to ejectment on the expiration of the term of his lease. [P 425 C 1]

Mahendra Nath Roy, Sarat Chandra Khan and *Atul Chandra Gupta* — for Appellant.

Probodh Kumar Das—for Respondents.

Fletcher, J.—This is an appeal from a decision of the learned District Judge of Rungpore, dated 8th April 1915, reversing the decision of the Munsif of the same place. The suit was brought for ejectment. The right of suit was based on a kabuliyat the term of which had expried. The kabuliyat, a translation of which is before us, is the sole document which has been referred to in this case. Under the kabuliyat, it is stated in the argument, that it is admitted by defendant 1 that his right is that of an under-raiyat within the meaning of the Bengal Tenancy Act. That depends on what the meaning of the words "korfa raiyat" is. Personally I do not know the Bengali language; but the learned gentlemen, who appear in this case, and my learned brother, who is sitting with me, say that the words "korfa raiyat" do not necessarily mean an "under-raiyat" but may mean a raiyat under a tenure-holder or some other person. If that is so, it seems to me to be quite clear that the learned Judge in the Court of appeal below rightly placed the onus on the plaintiff, because in this case the question of onus seems to be the only question in the appeal. If the onus has been rightly placed the appeal cannot succeed having regard to the view that the learned Judge has taken on the facts proved before him. I accept the statement that "korfa raiyat" does not necessarily mean a raiyat holding under a raiyat but is consistent with the other view that it may be a raiyat holding under some person other than a raiyat. In that view of the case, this appeal must fail and be dismissed with costs.

Richardson, J.—I agree. It is not necessary to define the term "korfa raiyat." The kabuliyat speaks of the defendants as having a "korfa right". When such a right is subordinate to a jote, the question whether the tenant is a raiyat or an under-raiyat must depend on the character of the jote.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 425 (2)

CHATTERJEE AND WALMSLEY, JJ.

Ketabdi Sheikh - Defendant — Appellant.

v.

Tola Bibi and *others*—Plaintiffs—Respondents.

Appeal No. 806 of 1915, Decided on 10th January 1917, from appellate decree of Sub Judge., Jessore, D/- 19th January 1915.

Adverse possession—Cosharer—To acquire title against cosharers their title must be disclaimed to their knowledge.

In order to acquire title by adverse possession against cosharers, it muet be proved that the title of the cosharers was disclaimed to their knowledge, and possession held by excluding them for the statutory period. [P 426 C 2]

Surendra Chandra Sen—for Appellant.

Jatindra Lal Banerji—for Respondent.

FACTS. material to this report will appear from the following extracts from the judgment of the lower appellate Court: "This appeal arises out of a suit brought by the plaintiffs-appellants for declaration of their title to certain lands and for khas possession of the same. Plaintiffs' case was that the plots Nos. 1 to 8 appertain to a jama of Rs. 4-7-6, which belonged to Nazibulla, and plot No. 9 appertains to a jama of Rs. 4, which belonged to his son Kefatulla, that Kefatulla after the death of his father possessed both these jamas, and that after Kefatulla's death his widow Tola Bibi (plaintiff 1) and his two sons got those jamas and after the death of those sons Tola Bibi alone got the two jamas and was in possession of the same, that she executed

a kobala in favour of plaintiff 2, Kajem, and that thereafter both Tola Bibi and Kajem were in joint possession of the lands of the two jamas, that in 1316 they granted mauroosi settlement of the lands to one Adiladdi Biswas, and the plaintiff took sub-lease of some of the lands from him at a rent of Rs. 11, per year, and that the lands in suit appertain to that jama of Rs. 11, and that the plaintiffs were in possession of those lands till they were dispossessed by defendants 1 and 2 in collusion with defendants 3 and 4 in Falgun 1317, that defendant 4 never possessed the land and that the mother of defendant 3 died before Nazibulla and that the plaintiffs have acquired right by adverse possession.

The defence by defendant 1 was that the suit is barred by limitation and estoppel, that the jama of Rs. 4 was not self-acquired property of Kefatulla, but it really belonged to Nazibulla, that the mother of defendant 3 died after Nazibulla and that the plaintiffs did not acquire any right by adverse possession and that plaintiff 1 was never in exclusive possession of the disputed lands, that the sons of Kefatulla predeceased her husband Kefatulla and they did not inherit anything from their father, and plaintiff 1 could not get anything from her sons, that Nazibulla died leaving a son Kefatulla and two daughters, viz., mother of defendant 3 and mother of defendant 4 and that each of the daughters inherited 4 annas share after the death of Nazibulla and 6 annas share after the death of Kefatulla * * * * *

The lower Court has decreed the suit in part and has declared plaintiff's right to 2 annas share of plots Nos. 1 to 8 and 4-annas share of plot No. 9, and the plaintiffs have appealed against that decree while defendant 1 has also filed a cross-appeal....There was no satisfactory evidence on the side of the defendants to come to a conclusion that the two daughters of Nazibulla ever possessed the jamai land, so I find that they did not possess....There was evidence on the side of the plaintiffs that plaintiff 1 executed a kobala in favour of plaintiff 2 who is a relative of plaintiff 1 ..... and that plaintiff 2 and Reajuddi used to cultivate the land and make over half share of the crops to plaintiff 1, so that this kobala ..... can be taken as assertion of right to those jamas by Tola Bibi alone ..... Tola Bibi alone paid rent up to 1315 ..... so it is clear that Tola Bibi alone was in possession of the jamai lands in exclusion of others for more than 12 years and has acquired a right to it by her adverse possession....Plaintiff 1 was the registered tenant under the malik up to 1315, plaintiff 1 had possession of the land till 1316. There was no evidence that defendants 1 and 2, or defendants 3 or 4 had possession of it for upwards of 12 years. ..... The decree of he lower Court be reversed and the suit be decreed with costs and plaintiff 1's right be declared and that the plaintiff shall get possession of it." Against the above decision of the lower appellate Court the defendants preferred this second appeal to the High Court.

Judgment.— The learned Judge has found on appeal that:

"it is clear that Tola Bibi alone was in possession of the jamai lands in exclusion of others for more than 12 years and has acquired a right of it by her adverse possession."

It appears, however, that these others are her cosharers. Now, in order to acquire a title by adverse possession against cosharers, it must be proved that the title of the cosharers was disclaimed to their knowledge, and possession held by excluding them. It does not appear that the mind of the learned Judge was directed to this aspect of the case. We think, therefore, that there ought to be a clear finding on this point, that is to say, whether the possession of Tola Bibi in the jamai lands was adverse to the knowledge of her cosharers for the statutory period, so as to give her a statutory title. The appeal will be retained on the file of this Court. The finding must be returned to this Court within six weeks under O. 41, R. 25, Civil P. C.

V.B./R.K. *Issue remanded.*

A. I. R 1918 Calcutta 426

CHATTERJEA AND RICHARDSON, JJ.

Lakhi Charan Saha and *others*—Plaintiffs—Appellants.

v.

Hamid Ali and *others*— Defendants — —Respondents.

Appeal No. 1883 of 1912, Decided on 28th August 1917, from appellate decree of Dist. Judge, Chittagong, D/- 1st April 1912.

(a) Bengal Tenancy Act (1885)—Raiyat acquiring right of occupancy before passing

of Act can retain his rights— Landlord and Tenant.

A raiyat who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy raiyat, although his rent has been fixed in perpetuity by reason of which he becomes a raiyat holding at fixed rates according to the classification of raiyats in the Bengal Tenancy Act. [P 428 C 1]

(b) Bengal Revenue Sales Act (1859), S. 37 —Person acquiring occupancy right — Subsequent grant of fixed rent—He is still protected from ejectment under S. 37.

A person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right, and such a person is protected from ejectment under S. 37. [P 428 C 2]

Dhirendra Lal Kastgir and *Jogesh Chandra Bose*—for Appellants.

Mohendra Nath Ray, *Monmatha Nath Roy* and *Khitis Chandra Sen*— for Respondents.

Judgment.—This appeal arises out of a suit by the plaintiff-appellant, who is the purchaser of an entire estate under Act 11 of 1859, to eject the defendants. The defendants and their predecessors-in-interest, it is found, has been holding the lands at any rate from 1838 as raiyats, and had acquired a right of occupancy in the lands in suit, but the defendant Chunnu Miah and another in 1881 executed a daimi kaimi chirasthai (permanent Raiyati Kabuliyat). The Courts below have held that the interest of the defendants was protected under S. 37, Act 11 of 1859, and the plaintiff was not therefore entitled to khas possession but was entitled to fair and equitable rent for the lands. The plaintiff has appealed to this Court. Under S. 37, Act 11 of 1859, the purchaser at a revenue sale is not entitled to eject any raiyat having a right of occupancy at a fixed or at a rent assessable according to fixed rules under the laws in force. On the facts stated, the defendant's interest prima facie is that of a "raiyat having a right of occupancy at a fixed rent."

At the time when the Revenue Sale Law (Act 11 of 1859) was passed, the law relating to landlord and tenant in force was Act 10 of 1859, and under S. 6 of that Act every raiyat who cultivated or held land for 12 years acquired a right of occupancy in such land. Under that Act there were two classes of occupancy raiyats viz., raiyats at fixed rates of rent, and occupancy raiyats who did not hold at fixed rates of rent (see Ss. 3, 4, 5 and 6). Both these classes of occupancy raiyats are protected under the proviso to S. 37, Act 11, which provides that the purchaser shall not be entitled to eject any raiyat having a right of occupancy at a fixed rent, or at a rent assessable according to fixed rules under the laws in force. "Occupancy raiyats at fixed rates of rent" do not find any place in the classification of "raiyats" under the Bengal Tenancy Act. Under that Act there are occupancy raiyats and raiyats holding at fixed rates. But if a raiyat had a right of occupancy at a fixed rent under Act 10 of 1859 (as the defendants in the present case had), we do not think that he lost his right of occupancy and the privileges attaching to it after the passing of the Bengal Tenancy Act, merely because occupancy raiyats holding at fixed retes of rent are not separately mentioned in the classification of raiyats under the Bengal Tenancy Act.

It is contended on behalf of the appellant, on the authority of the case of *Bhutnath Naskar* v. *Monmotho Nath Mitra* (1), that a raiyat at fixed rates cannot have a right of occupancy. The question which had to be considered in that case was, whether the interest of the defendants was a protected interest within the meaning of S. 160, Cl. (d), Ben. Ten. Act, Doss, J., held upon a construction of the lease in that case that the interest of the defendants was a tenure, and that if the defendants were treated as raiyats holding at fixed rates, their interest was not protected under S. 160 of the Act. On appeal under the Letters Patent, the learned Chief Justice affirmed the judgment of Doss, J., on the ground that the interest of the defendants was a tenure and therefore not protected under S. 160, and did not express any opinion on other question. Mookerjee, J., confirmed the judgment of Doss, J., not only on that ground, but also on the ground that a raiyat holding at a fixed rates is not protected under S. 160, Ben. Ten. Act. It is necessary to consider in the present case, whether a raiyat holding at fixed rates is protected under S. 160, Ben. Ten. Act, as the present case has to be considered with reference to S. 37, Act 11, 1859, the wording of which differs materially from that of S. 160, Cl. (d), Ben. Ten. Act. Reliance however is placed on behalf of the appellants on the observations of Mookerjee, J., in that case, in support of the proposition that a raiyat holding at

1. (1909) 2 I C 675.

fixed rates cannot have a right of occupancy. No doubt, the mere fact that a holding is held at fixed rates, does not make it an occupancy holding for a raiyat holding at a fixed rent may be created only a month before the revenue sale, and the raiyat, in such a case, cannot certainly be called a raiyat having a right of occupancy. The defendants in the present case had acquired a right of occupancy before their rent was fixed in perpetuity, which again was before the passing of the Bengal Tenancy Act. It is unnecessary therefore to consider, in the present case, whether a raiyat holding at fixed rates after he has held the land for 12 years in a village can become a settled raiyat of the village and acquire a right of occupancy—a question upon which there is divergence of judicial opinion. See the unreported cases, Second Appeal No. 1115 of 1915 decided on 15th February 1917 and Second Appeal No. 847 of 1913 decided on 26th May 1915 (*Akhil Chandra Sen* v. *Tripura Charan* (2)). The only question for consideration is whether a raiyat who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy raiyat although his rent has been fixed in perpetuity, by reason of which he becomes a raiyat holding at fixed rates according to the classification of raiyats in the Bengal Tenancy Act. S. 19 provides that every raiyat who immediately before the commencement of the Act has a right of occupancy in any land shall, when the Act comes into force, have a right occupancy in that land, and S. 178 (1), Cl. (b), Ben. Ten. Act, provides that nothing in any contract between a landlord and tenant made before or after the passing of the Act shall take away an occupancy right in existence at the date of the contract. In the present case the kabuliyat executed in 1881, by which the rent of the defendants was fixed, did not even purport to take away any right which the defendants had at the date of the kabuliyat. The right of occupancy therefore which the defendants had, was not affected by the kabuliyat by which the rent was fixed.

Mookerjee, J., in referring to the omission of a raiyat holding at fixed rates' from S. 160, suggests that

"the policy of the legislature was to protect the raiyat, but not necessarily to the complete detriment of the purchaser of a tenure at a sale for arrears of rent. If a raiyat holding at a fixed rate of rent were protected from ejectment, the purchaser would acquire the property in an incumbered condition; for he would be unable, not only to eject the raiyat, but also to enhance the rent. On the other hand, if occupancy raiyats and non-occupancy raiyats alone were protected from ejectment, while their possession would be maintained, they would be liable to have their rent enhanced from time to time, at the instance and for the benefit of the purchaser of the tenure."

Those considerations however do not arise in connection with the proviso to S. 37, Act 11 of 1859. That proviso expressly lays down that the purchaser shall not be entitled to enhance the rent of an occupancy raiyat otherwise than in the manner prescribed by law or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do. Now the rent of an occupancy raiyat, who holds at a fixed rate of rent from the time of the Permanent Settlement, could not be enhanced under Act 10 of 1859, nor can the rent of such a raiyat be enhanced under the Ben. Ten. Act. S. 37, Act 11 of 1859 having expressly laid down that the purchaser at a revenue sale is not entitled to enhance the rent of such raiyats, no question arises as to the "detriment of the purchaser" under that section. Where however the occupancy raiyat holds at a fixed rent not from the time of the Permanent Settlement, but only under an engagement made since the time of settlement, he is not protected from enhancement, because the former proprietor would have been, irrespectively of the engagement, entitled in a proper case to raise the rent of such a raiyat. The purchaser however is not entitled to eject occupancy raiyats of either of the two classes. The rights of the purchaser as regards enhancement of rent having been clearly laid down by S. 37, Act 11 of 1859, the considerations relied upon by Mookerjee, J., do not arise in connection with cases coming under S. 37, Revenue Sale Law. The case of *Abdul Gani* v. *Muktul Ali* (3), in so far as it holds that a person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right and that such a person is protected from ejectment under S. 37, supports the view we take and to that extent we agree with

2. (1915) 29 I C 563,

3. (1915) 42 Cal 745=31 I C 19.

that decision. If the opposite view were taken, raiyats who might be holding lands for generations and who might have acquired rights of occupancy would be liable to be ejected by a purchaser at a revenue sale, simply because they may come under the description of raiyats holding at fixed rates under the Bengal Tenancy Act, by reason of their rent being fixed in perpetuity by contract, or by reason of their holding at the same rent from the time of the Permanent Settlement or by reason of a presumption arising under S. 50, Ben. Ten. Act, that they have been so holding, when the clear intention of the legislature is to protect such raiyats from ejectment at the hands of a purchaser at a revenue sale.

We are of opinion that as the defendants had acquired rights of occupancy they were protected from ejectment under the proviso to S. 37, Act 11 of 1859, although they held at a fixed rent. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 429

FLETCHER AND RICHARDSON, JJ.

Kali Charan Shaha and *others*—Plaintiffs—Appellants.

v.

Gobinda Sunder Sanyal and *others*—Defendants—Respondents.

Appeal No. 450 of 1913, Decided on 13th February 1917, from original decree of Offg. Sub-Judge, Rajshahye, D/- 16th April 1913.

Landlord and Tenant—Rent suit for—Person acquiring interest in tenancy prior to suit must be joined as party if plaintiff becomes aware of such interest after suit is instituted—Bengal Validation Act (1903).

In a suit for arrears of rent of a tenure, the plaintiff if he desires to affect or override the interest of a person in the tenure acquired prior to the institution of the suit must, if he becomes aware of such interest subsequent to the institution of his suit, join such person as a party to the suit. [P 430 C 1]

A landlord sued for arrears of rent of a tenure the tenure-holder, whose interest in a part of the tenure had been purchased by the defendants before the institution of the suit at a sale in execution of a money-decree against the tenure-holder but the landlord's fee was not deposited till after the confirmation of the sale. After the institution of the suit the landlord became aware of the defendants' interest in the tenure but did not make them parties to the rent suit and got a decree against the tenure-holder. In execution of that decree the landlord purchased the tenure:

Held: that having regard to the terms of the Validation Act (1 B. C. of 1903), the defendants acquired an interest in the tenure before the plaintiff instituted his suit for rent and as he did not make the defendants a party to that suit when he became aware of that interest subsequent to the institution of the suit, he could not affect or override that interest of the defendants by his purchase of the tenure in execution of his decree for rent against the original tenure-holder. [P 430 C 1]

Dwarka Nath Chakravarty and *Jatindra Nath Lahiri*—for Appellants.

Hiralal Sanyal and *Bireswar Bagchi*—for Respondents.

Judgment.—This is an appeal by the plaintiffs from the judgment of the learned Subordinate Judge of Rajshahye, dated 16th April 1913. The facts so far as they are relevant to the present appeal are as follows:—One Khormannessa on 27th March 1897 created a permanent tenure in favour of persons who have been called the kundus in the present case in certain property. The property consisted of shares in certain toujis as well as the whole of the mokarari interest of portions of the same lands. On 17th July 1902 the plaintiffs purchased the interest of Khormannessa in all the lands leased out to the kundus. The plaintiffs on 6th June 1904 brought a suit for rent against the kundus and obtained a decree on 21st November 1904. The tenure was put up for sale in execution and purchased by the plaintiffs on 21st May 1906. In the meantime on 18th January 1904, the defendants purchased at a sale in execution of a money-decree the interest of the kundus in a portion of the property.

This sale was confirmed on 21st May 1904 but the Court, before confirming the sale, did not require the deposit of the landlord's fee as required by S. 18, Ben. Ten. Act. The deposit was however, made on 12th July 1904. The plaintiffs had instituted their suit agaist the kundus on 6th June 1904, and they did not, even after they became aware of the defendants' purchase, apply to add the defendants as defendants to the suit they had brought against the kundus for rent. It has been argued on this appeal that as the plaintiffs were not aware at the date of the institution of their suit against the kundus of the interest acqiured by the present defendants, they were entitled to neglect the interest acquired by the present defendants when they came to hear of it after the institution of their

suit. The argument does not appear to be well founded. Having regard to the terms of the Validation Act (1 of 1903 B. C.) it is clear that the defendants acquired an interest in the property before the plaintiffs instituted their suit for rent against the kumlus. Many cases have been cited on both sides to show that in such a case the plaintiff in a suit can or cannot neglect an interest, he first comes to hear of after the institution of his suit.

These cases seem to me to have little, if any, bearing on the point in debate. The real question is whether a plaintiff desiring to effect or override the interest of a person acquired prior to the institution must, if he becomes aware of such interest subsequent to the institution of his suit, join such persons as a party to his suit before he can affect or override such interest. On general legal principles I think he is so bound and if he fails to do so, the interest acquired prior to suit will not be affected. The defendants having acquired an interest in the property, it cannot be that such interest known to the plaintiffs before decree is liable to be sold in a suit brought against another person and to be determined without the defendants having an opportunity of paying the rent and saving their property. I agree, therefore with the conclusion of the learned Subordinate Judge in this respect. One other matter was raised on the hearing of this appeal, viz., that the learned Judge had dismissed the suit as regards the land mentioned in schedule una to the plaint. The defendants, save as hereinafter mentioned, do not claim that the land mentioned in schedule una was included in their sale-certificate, but say that the lands in schedule gha to the plaint are also included in schedule una. The parties are agreed that the decree passed by the learned Judge should be amended by awarding possession to the defendants of the land mentioned in schedule una to the plaint, but that this shall not prejudice or affect the right of the defendants declared by the judgment in the lands mentioned in schedule gha to the the plaint.

Subject to this amendment, the judgment appealed from must be affirmed and the appeal dismissed with costs, one hundred rupees. The parties have to day put in the terms on which the decree in this case should be drawn up. Let the decree be prepared in those terms.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 430

FLETCHER AND RICHARDSON, JJ.

Jagabandhu Dutt—Plaintiff — Appellant.

v.

Rajani Kanta Pal and *others*—Defendants—Respondents.

Appeals Nos. 324 and 337 of 1915, Decided on 25th January 1917, against appellate decrees of Dist. Judge, Chittagong, D/- 13th November 1914.

(a) Bengal Land Revenue Sales Act (11 of 1859), S. 36 — Object is to prevent true owner from disputing title of benamidar.

The object of S. 36, Act 11 of 1859 is to prevent the true owner from disputing the title of his benamidar (certified purchaser), and not to preclude a third party from enforcing his claim against the true owner in respect of the benami property. [P 431 C 1]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 36—Sale under Act—Suit by third party to enforce his right in respect of property sold — Court can consider whether defendant purchased property benami.

In a suit by a third party to enforce his right in respect of property sold under Act 11 of 1859, the question whether the defendant purchased the property benami is not excluded from the consideration of the Court by reason of S. 36 of Act 12 *Cal.* 302 *Ref. to.* [P 431 C 1]

(c) Appeal—Duty of Court—Court finding appellant to be mere benamidar—It should not go into other matters affecting rights of respondents—Benamidar.

In an appeal by a defendant in which he is found to be a mere benamidar, it is not open to the Court to go into other matters that affect the rights of the respondents. [P 431 C 2]

Prabodh Kumar Das—for Appellant.

Khitish Chandra Sen — for Respondents.

Judgment.—These are two appeals preferred against a decision of the learned District Judge of Chittagong, dated 13th February 1914, reversing the decision of the Munsif of Satkhira. The plaintiffs brought the suit to recover a share in a certain revenue-paying estate sold at a revenue sale for arrears of revenue and said to have been purchased by defendant 1 in the benami name of defendant 2 and alternatively he asked that if the sale was a valid sale, he might be given his share in the surplus sale proceeds which had been withdrawn from the Collectorate by defendant 1. The case came on for trial before the Munsif who found, first of all, that defendant 2 was a benamidar of defendant 1

and that the real purchaser was, in fact, defendant 1. The learned Munsif also found, for reasons which commended themselves to him, that as between the plaintiff and defendant 1, the plaintiff was entitled to recover the share he sued for, less a particular share which the plaintiff alleged he acquired title to by a document called a mukhtiarnama. Against that decision defendant 2 appealed to the learned District Judge. The learned District Judge on hearing the appeal agreed with the finding of the Munsif that defendant 2 was a benamidar of defendant 1, and that, therefore, he had no interest in the property. Prima facie, therefore, directly the learned District Judge came to the conclusion that defendant 2 had no interest in the property, provided the point was capable of being entered into in the suit, the rest of his judgment was unnecessary and improper because no appeal had been filed by defendant 1, and having come to a clear conclusion that defendant 2 had no interest in the property, it was not necessary for the Judge to enquire into the other matters in order to adjust the rights of the parties before him. The case that has been made before us is that the finding as to defendant 2 being a benamidar was a matter which was excluded from the consideration of the Court, having regard to S. 36, Act 11 of 1859, under which these revenue-paying estates are sold for arrears of revenue. That section is in these terms :

"Any suit brought to oust the certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person, not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

The matter has been the subject of judicial decisions and the matter is concluded so far as this Court is concerned. In the case of *Chundra Kaminy Deblea* v. *Ram Ruttun Pattuck* (1) it was held that S. 36, Act 11 of 1859, was passed in order to prevent the true owner from disputing the title of his benamidar (certified purchaser), and not to preclude a third party from enforcing his claim against the true owner in respect of the benami property. That is exactly the case here. S. 36 is, therefore, no bar to the plaintiff's rights in the present suit. That being so, directly the Judge came to the conclusion on the appeal before him that defendant 2 had no interest in the subject-matter in dispute and was merely a benamidar, it was not open to him in that appeal to go into the other matters that affected purely the rights of the respondents in that appeal and to vary the judgment of the first Court in the manner he has done in the course of his judgment. The result, therefore, is that the appeal of the plaintiff, namely Appeal No. 324 of 1915, must be allowed with costs and the appeal of defendant 2, that is, Appeal No. 337 of 1915, must be dismissed with costs; that is to say, the decree of the Munsif will be restored with costs to the plaintiff in all Courts.

V.B./R.K. *Order accordingly.*

1. (1886) 12 Cal 302.

A. I. R. 1918 Calcutta 431

WOODROFFE AND SHAMSUL HUDA, JJ.

Mahamed Idris Meah — Defendant—Appellant.

v.

Mahamed Isahak and *another*—Plaintiffs—Respondents.

Appeal No. 3387 of 1915, Decided on 21st August 1917, from appellate decree of Dist. Judge, Chittagang, D/- 26th August 1915.

Practice—Appeal—Order refusing to record compromise should be appealed against and not consequent decree — Civil P. C. (5 of 1908), O. 23, R. 3—Compromise.

Where a Court, after making an order refusing to record a petition of compromise filed by the parties, goes on to try the case on the merits and gives a final judgment, the remedy of the dissatisfied party is to appeal from the order refusing to record the petition, and not from the judgment dealing with the case on the merits.

Chandra Sekhar Sen—for Appellant.

Protode Kumar Das—for Respondents.

Judgment.—This appeal is based on the ground that the Court failed to exercise jurisdiction in not recording any order on the petition of compromise and that the Court of appeal should have given effect to the compromise petition filed by the parties. A petition was filed on 16th July 1915 and on 22nd July an order was passed which, I think, should be read as an order refusing to record the compromise. The remedy, therefore, of the appellant before us was to appeal from that order instead of, as he has done, appealing from the final judgment dealing with the case on the merits dated 26th August 1915. The appeal, therefore, fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 432

MOOKERJEE AND WALMSLEY, JJ.

Shib Chandra Banerjee — Plaintiff — Appellant.

v.

Surendra Chandra Mondal and *others* — Defendants — Respondents.

Appeals Nos. 112 and 158 of 1915, Decided on 3rd May 1917, from appellate decrees of Sub-Judge, 2nd Court, Burdwan, D/- 18th November 1914.

(a) Chowkidari Chakran Lands—Chawkidari Chakran Lands form part of revenue paying estate in which they are situated—Zemindar has qualified title and does not become trespasser if he comes in possession on being vacated by chawkidar before resumption and transfer under Chowkidari Act—Settlement by zemindar before resumption proceedings are not invalid as against person obtaining under-tenure from zemindar after resumption proceedings.

Chowkidari chakran lands form part of the revenue paying estate within whose ambit they are situate, and the zemindar has a qualified title thereto. Therefore when such lands being vacated by the chawkidar pass into the possession of the zemindar, before they are resumed and transferred by the Collector to the zemindar under the provisions of the Chowkidari Act, the latter does not become a trespasser and a settlement made by him of those lands prior to the resumption proceedings cannot be held to be invalid as against a person who obtains a permanent under-tenure in respect thereof from the zemindar, after the resumption proceedings. [P 432 C 2]

(b) Chawkidari Chakran Lands—Estate after resumption — New estate vesting in zemindar is in continuation of pre-existing interest.

The new estate which vests in the zemindar in respect of the chowkidari chakran lands transferred to him under the Chowkidari Act is in continuation and confirmation of his pre-existing interest in those lands. [P 432 C 2]

(c) Bengal Village Chawkidari Act (1870), S. 51—Application of S. 51 is not limited only to cases of contract in respect of lands other than chowkidari chakran Lands.

The object of S. 51 of the Chowkidari Act is to maintain the validity of contracts made by the zemindar in respect of chowkidari chakran lands and it is immaterial whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings. [P 433 C 1]

The application of the section cannot be limited to cases where there has been a contract by the zemindar in respect of lands other than chowkidari chakran lands. [P 433 C 1]

Ram Chandra Majumdar—for Appellant.

Jogesh Chandra Roy and *Haradone Chatterjee*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of possession of lands on declaration of title. The lands were originally chowkidari chakran lands included in a revenue paying estate situated within the jurisdiction of the Collector of Murshidabad. The chowkidars who were in occupation disappeared many years ago. The zemindar thereupon appropriated the lands, dealt with them as included in his estate, and settled them with the defendants as tenants. The Subordinate Judge has found that the defendants have been in occupation for many years as tenants under the proprietor. On 21st January 1909, the lands were resumed by the Government, and on the day following they were transferred to the zemindar in accordance with the provisions of the Village Chowkidari Act, 1870. On 23rd December 1911, the plaintiff obtained a permanent under-tenure from the zemindar and, on 3rd October 1912, he instituted this suit for ejectment of the defendants on the ground that they were trespassers, unlawfully in occupation of the disputed lands. The Court of first instance decreed the suit. Upon appeal, that decision has been reversed by the Subordinate Judge. In this Court, the decision of the lower appellate Court has been attacked on the ground that on the facts found, the zemindar had no authority to settle the lands with the defendants before they had been resumed and transferred to him under the provisions of the Village Chowkidari Act and that the defendants must consequently be treated as trespassers. In our opinion, there is no foundation for this contention.

The decision of the Judicial Committee in the case of *Ranjit Singh* v. *Kali Dasi Debi* (1), leaves no room for doubt that these chowkidari chakran lands formed part of the revenue paying estate and that the zemindar had a qualified title therein. Consequently when the lands were resumed under the Village Chowkidari Act and were transferred to the zemindar in accordance with its provisions the estate taken by the zemindar was in confirmation and by way of continuance of his existing estate. It is thus impossible to maintain the proposition that when the land vacated by a chowkidar passed into the possession of the zemindar the latter became a trespasser. The zemindar no doubt incurred a liability to pay additional revenue to the Government in respect of this land. The amount

1. A I R 1917 P C 8=44 Cal 841=40 I C 981=44 I A 117 (P C).

of such revenue was determined by an appropriate proceeding under the Village Chowkidari Act when the lands were resumed and transferred to the zemindar. But as explained by the Judicial Committee the zemindar had a subsisting interest in the land, and the new estate vested in him was merely in continuation and confirmation of that pre-existing interest. What then is the true position? The chowkidars vacated the lands; the grantor of the plaintiff thereupon took possession of those lands and allowed the defendants to occupy the lands as his tenants possibly on the erroneous assumption that they formed mal lands of his zemindari; subsequently a transfer was effected in his favour under the provisions of the Village Chowkidari Act.

The plaintiff is clearly not competent to contend that the defendants, who were brought upon the lands as tenants by his grantor, are trespassers. An argument has been based on S. 51, Village Chowkidari Act, to the effect that the section applies only to cases where there has been a contract by the zemindar in respect of lands other than chowkidari chakran lands. In our opinion there is no foundation for this limited construction of S. 51. The object of S. 51 is to maintain the validity of contracts made in respect of chowkidari chakran lands, and it is immaterial whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings. We hold accordingly that the Subordinate Judge has taken a correct view of the relative rights of the parties and that the suit has been properly dismissed. It is not necessary for us to determine the precise status of the defendants as tenants under the plaintiff; for it is a sufficient answer to the claim for ejectment that the defendants are not trespassers but tenants. The decree of the Subordinate Judge is accordingly affirmed and this appeal dismissed with costs. The judgment will govern the other appeal (Second Appeal No. 158 of 1915) which is also dismissed with costs.

V.B./R.K. *Appeals dismissed.*

1918 C/55 & 56

A. I. R. 1918 Calcutta 433

TEUNON AND NEWBOULD, JJ.

Guru Prosanna Lahiri and *others* — Plaintiffs—Petitioners.

v.

Samiruddin Sarkar and *others* — Defendants—Opposite Parties.

Rules Nos. 593 and 621 to 634 of 1917, Decided on 17th December 1917, against order of Munsif, Dhuri.

Civil P. C. (1908), O. 1, R. 10 (2)—Suit for recovery of rent against one heir of original tenant — Remaining heirs can be added as parties althongh not necessary parties.

In a suit for recovery of arrears of rent instituted against one of the heirs of the original tenant whose name was recorded in the landlord's sherista, the remaining heirs of the tenant were on their application added as parties to the suit:

Held: that although the added defendants were not strictly necessary parties to the adjudication of the question arising between the plaintiff and the original defendant, yet they were not improperly added as parties to the suit: 6 *I. C.* 570, *Foll.* [P 433 C 2; P 434 C 1]

Rash Behari Ghose, and *Debendra Nath Bagchi*—for Petitioners.

Sarat Chandra Roy Chowdhury and *Janendra Mohan Das* — for Opposite Parties.

Judgment.—These 15 Rules arise out of 15 suits for arrears of rent instituted three in the Court of the Subordinate Judge and twelve in the Court of the Munsif of Goalpara. The suit is brought by the admitted landlord and as instituted was against one of the heirs of the original tenant, a person of the name of Taripat who died in 1316. The heirs other than the original defendant being eight in number, two sons of Taripat and and six female heirs applied that they should be added as parties to the suit. Their application was opposed by the plaintiff mainly apparently on the ground that the original defendant, the eldest son of Taripat, was the person whose name was recorded in his sherista. But in dealing with the application of the remaining heirs the Courts below have found that they are in fact heirs of Taripat and are in possession equally with defendant 1 in the holdings in question. On these facts we are unable to distinguish these cases from the case of *Basli Bibi* v. *Hanif-ud-din* (1), and though speaking for myself I am not prepared to say that the added defendants were strictly necessary parties to the adjudication of the questions that arise between the plaintiff

1. (1910) 6 I C 570.

and defendant 1, yet in view of the decision to which we have referred we are unable to say that the Courts below have exercised their discretion improperly by adding the cosharer tenants of the holdings as parties to these suits. In this view these Rules are discharged with costs. We assess the hearing fee at the aggregate sum of five gold mohurs.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 434

FLETCHER AND NEWBOULD, JJ.

Rajani Sundari Dasi and *another* — Pro-forma Defendants—Appellants.

v.

Hara Sundari Dasi and *others* — Plaintiffs and Defendants—Respondents.

Appeal No. 1506 of 1916, Decided on 6th July 1917, from appellate decree of Sub-Judge, Nadia, D/- 25th March. 1916.

(a) Bengal Tenancy Act (1885), S. 88—Express consent in writing does not mean consent implied from contain documents.

An express consent in writing within S. 88, does not mean a consent which is to be implied from certain documents. [P 434 C 2]

Therefore the consent, if any, which arises by implication from the rent-receipts granted by a landlord in respect of a part of the tenure or holding, with a knowledge that the tenancy has been sub-divided by the tenants, or from jama wasil bakis or from road-cess returns filed by a cosharer of the landlord, cannot be a consent in writing within the meaning of S. 88. [P 434 C 2]

Such documents cannot be taken as principal evidence to prove a consent in writing which does not, in fact, exist ; they can only be used as evidence of such consent, when it is proved that there was in fact an express consent in writing which for some reasons cannot be produced. [P 435 C 1]

(b) Bengal Tenancy Act (1885), S. 88:—Jama wasil baki is not rent-roll.

An jama wasil baki (an annual statement of the rents payable and received from a particular estate) is not a rent-roll within the meaning of the proviso to S. 88. The rent-roll mentioned therein is in a jamabandi—a permanent document kept in the estate office or sherista of a landlord which contains a list of the tenants and the rents payable by them and which is kept up and amended from time to time.

[P 434 C 2; P 435 C 1]

Mohendranath Roy and *Manmothanath Roy*—for Appellants.

Baranashi Bashi Mukerjee— for Respondents.

Fletcher, J.—This is an appeal by defendants 27 and 28 against a decision of the learned Subordinate Judge of Nadia dated 25th March 1916, reversing the decision of the Munsif, Chuadanga. The plaintiff brought the suit as cosharer landlord to recover rent in arrears. Defendants 27 and 28 are admittedly cosharer landlords. The plaintiffs' case was that the rent was Rs. 49 odd. The case set up by the defendants-appellants was that the rent was Rs. 49 odd but that the tenancy had been sub-divided and instead of one holding held at the rent of Rs. 49 odd there were two holdings, one of which was held at a rent of Rs. 34 odd of which the principal defendants were the tenants and another held at a rent of Rs. 14 odd of which defendant 27 was the tenant. The first Court adopted the view of the appellants. The second Court has reversed that decision. The main point in this case turns on the provisions of S. 88, Ben. Ten. Act, as applicable in Bengal or Behar. We are not concerned with the Act as it now is in Eastern Bengal or formerly in Bengal proper. The case turns on this : First of all, whether certain rent-receipts that have been produced show an express consent in writing to the division of the tenure or holding or the distribution of the rent payable in respect thereof as mentioned in that section. An express consent means a consent opposed to one which is to be implied from the documents. There are no express words in these rent-receipts of a consent. The consent, if any, arises from the implication that the landlord received the rents and granted the receipts with a knowledge that the holding had been sub-divided. It is impossible to say from these rent-receipts that there was an express consent.

The next point that has been urged is that S. 88, Ben. Ten. Act is qualified by a proviso. It is not always easy for the tenant to produce an express consent. It may be verbal or acted on by both parties or may be lost. So the Legislature provided that an entry in the landlord's rent-roll to the effect mentioned above should be prima facie evidence of the consent mentioned in the former part of the section. The question is whether the document produced in the present case is a rent-roll. The learned Judge of the lower appellate Court states that the document produced is not a rent-roll. The document is what is called a jama wasli baki ; that is, I understand, an annual statement of the rents payable and received from a particular estate. The jamabandi is what is

called in England a rent roll, namely, a permanent document kept in the estate office or the sheristha of a landlord, which contains a list of the tenants and the rents payable by them and which, I suppose, is kept up and amended from time to time. That I suppose, is the rent-roll mentioned in the proviso of the section. However there seems to be no reason to think that the learned Judge in the lower appellate Court was not right when he said that this document, the jama wasil baki, was not the rent-roll. Therefore the presumption which arises by virtue of the proviso did not arise in the present case.

The last point that was urged was that in a road cess return made in the year 1901 by one of the cosharers not the plaintiff the sub-division of the tenancy was referred to. That, of course, cannot be taken to be an express consent in writing. I think it may be evidence of consent. But the question is "does it evidence a consent in writing"? Before looking into a document like this to establish a consent in writing, it must be proved, first of all, that there had been a consent in writing, and secondly, that consent in writing, although sought for, could not be produced and therefore it must be presumed, at any rate, against the person who made it that there had been a consent and that that consent was in writing as stated by some witnesses who were believed to have proved it. A document like this cannot be taken in evidence as principal evidence to prove a consent in writing, which apparently did not exist. In my opinion, the learned Judge of the lower appellate Court arrived at a correct conclusion. The present appeal therefore fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 435

MOOKERJEE AND BEACHCROFT, JJ.

Bandiram Mookerjee—Appellant.

v.

Purna Chandra Roy—Respondent.

Appeal No. 1 of 1917, Decided on 22nd August 1917, from order of Dist. Judge, Birbhoom, D/- 19th September 1916.

(a) Civil P. C. (1908), Ss. 99, 100 and 103—Appeal against appellate decree passed without jurisdiction is maintainable — Appeal, maintainability.

No Court can entertain an appeal which it is not expressly authorized by law to hear.

Where a decree has been made without jurisdiction, appeal lies against it precisely in the same manner as if it had been made with jurisdiction. [P 436 C 1]

(b) Bengal Civil Courts Act (1887), S. 21 (1)—District Judge cannot hear appeals in proceedings out of orders over Rs. 5,000.

Under S. 21, sub-S. (1), a District Judge has no jurisdiction to hear an appeal from a decree or order, where the value of the suit in which or the proceedings arising out of which the decree or order was made exceeds Rs. 5,000 : 16 *I. C.* 940 ; 27 *Cal.* 362 ; 35 *I. C.* 248 ; 13 *All.* 575 and 13 *Mad.* 273, *Foll.* [P 435 C 2]

Bepin Behari Ghosh, II and *Sarat Chandra Dey*—for Appellant.

Jitendra Lal Banerjee—for Respondent.

Mookerjee, J.—This is an appeal from an appellate order passed in execution proceedings on the basis of a decree in a mortgage suit which was valued at above Rs. 5,000. The order of the District Judge, which modifies the order of the Subordinate Judge, is challenged on the ground that the appeal from the order of the Subordinate Judge lay to this Court and not to the District Judge. This contention is clearly well-founded. S. 21, sub-S. (1), Bengal Civil Courts Act 1887, provides that an appeal from a decree or order of a Subordinate Judge, shall lie to the District Judge where the value of the original suit in which or in proceedings arising out of which the decree or order was made does not exceed Rs. 5,000 and to the High Court in any other case. In the case before us the value of the original suit exceeds Rupees 5,000. Consequently, an appeal against an order made in a proceeding arising out of the decree in the suit lies to this Court and not to the Court of the District Judge. The order of the District Judge was consequently made without jurisdiction. The question thus arises, whether this Court is competent to reverse that order in the exercise of its appellate jurisdiction. There can be no question that the order of the District Judge made under S. 47, is a decree within the meaning of S. 2, Civil P. C. As the order was passed in appeal, a second appeal lies to this Court under S. 100, provided the reason assigned in support of it, namely, that the District Judge acted without jurisdiction, falls within

scope of one or other of the three clauses of sub-S. (1) of that section.

The decision of the District Judge is, in our opinion, contrary to law; for although he does not explicitly state that he was competent to hear the appeal which had been preferred to him contrary to the provisions of S. 21, Bengal Civil Courts Act, yet his decision necessarily implies that he had jurisdiction to entertain the appeal; it is an elementary rule that no Court can entertain an appeal which it is not expressly authorised by law to hear. We must hold accordingly that the decision of the District Judge is contrary to law, because passed without jurisdiction, and must be set aside by this Court under S. 100, Civil P. C. This view is in conformity with the principle recognised in *Ranjit Missir* v. *Ramudar Singh* (1), namely, that when a decree has been made without jurisdiction, an appeal lies against it precisely in the same manner as if it had been made with jurisdiction. This doctrine has been repeatedly affirmed in a long line of cases. *Abdul Hussein* v. *Kasi Sahu* (2), *Gangadhar Karmakar* v. *Shekharbasini Dasya* (3), *Jwala Prasad* v. *Salig Ram* (4) and *Velayudam* v. *Arunachala* (5). This view is also supported by the terms of S. 99, Civil P. C., which applies to appeals from appellate decrees by virtue of S. 108. The result is that this appeal is allowed, the order of the District Judge set aside and that of the Subordinate Judge restored. We do not, however, express any opinion as to the correctness of the order of the Court of first instance. As the point was not taken in the lower appellate Court and as the present appeal has not been opposed, there will be no order for costs either here or in the Court of Appeal below.

Beachcroft, J.—I agree.

V.B./R K. *Appeal allowed.*

1. (1912) 16 I C 940.
2. (1900) 27 Cal 362.
3. (1916) 35 I C 348.
4. (1891) 13 All 575.
5. (1890) 13 Mad 273.

A. I. R. 1918 Calcutta 436

CHITTY AND RICHARDSON, JJ.

Ram Narayan Acharjee—Petitioner.

v.

Atul Chandra Das—Opposite Party.

Criminal Revn. No. 448 of 1917, Decided on 18th May 1917.

Criminal P. C. (1898), Ss. 250 and 386—Order for compensation not included in order for acquittal is not illegal—Imprisonment in default cannot be included in order for compensation.

An order for compensation against a complainant, made after calling upon the latter to show cause and recorded as a postscript to, and at the same time as the order of acquittal, on the same piece of paper and forming part of the same order, is not illegal merely on the ground that it has not been included in the order of acquittal [P 436 C 2]

An order for imprisonment in default of payment of compensation cannot be included in the order for compensation made against a complainant, as the imprisonment cannot be ordered until some attempt has been made to levy the compensation in the manner provided by S. 386, for the levy of fine. [P 437 C 1]

Bhagirath Chandra Das—for Petitioner.

Monmotho Nath Mukherjee, Rishindra Nath Sarkar and *Sarat Chandra De*—for Opposite Party.

Judgment.—This Rule was granted to the petitioner Ram Narain Acharjee who has been ordered to pay Rs. 50 as compensation to the accused in the case which he had brought against him for causing hurt. The ground which has been taken that the order for compensation is not included in the order of acquittal cannot, we think be sustained. It is clear that the complainant was then and there called upon to show cause and the order against him for compensation was made at the same time by the Sub-Deputy Magistrate. It was recorded, it is true as a postscript to the order of acquittal, but on the same piece of paper, and formed part of the same order. On the evidence we do not feel disposed to interfere in revision. It appears from the Magistrate's explanation that in his allegations made before this Court the present petitioner has gone outside the record of the case and stated a number of facts which are not to be found there. These facts appear to have been introduced mainly for the purpose of creating prejudice.

The main fact on which the petitioner now relies is that he went to the hospital on the day following the alleged occurrence to be treated for an injury to his finger, that is, the hurt he has complained of in the case. The ticket of the hospital no doubt shows that he went there for treatment for an injury to the finger. But the Doctor is unable to recollect that there was any such injury, and he now states in his evidence before

the Court that the appearance of the finger may be due to gout or other causes. It would seem that the petitioner took advantage of an altercation which undoubtedly took place to make out a case of assault against the accused. The order for compensation is not correct in form, in so far as it orders the complainant to undergo one month's simple imprisonment: "When and if, the amount of compensation cannot be recovered." The cases are clear that imprisonment cannot be ordered until some attempt has been made to levy the compensation in the manner provided by S. 386, Criminal P. C., for the levy of a fine: see *Priya Nath Bose* v. *Roy Basanta Kumar Singh* (1), *Suchandi Kolitani* v. *Dom Kalita* (2), *Parsi Hajra* v. *Bandhi Dhanuk* (3). With this modification we discharge the Rule.

V.B./R.K. *Rule discharged.*

1. (1901) 5 C W N 213.
2. (1901) 5 C W N 214.
3. (1901) 28 Cal 251.

A. I. R. 1918 Calcutta 437

FLETCHER AND NEWBOULD, JJ.

Shiba Prasad Roy Chowdhury—Plaintiff—Appellant.

v.

Samarendra Nath Bose and *others*—Defendants—Respondents.

Appeal No. 512 of 1915, Decided on 4th July 1917, from original decree of Sub-Judge, Khulna, D/-13th September 1915.

(a) Evidence Act (1872), S. 92—Rent claimed on basis of written correspondence varying rent payable under registered lease—Right to rectify registered lease cannot be gone into in rent suit—More rent than payable under registered lease cannot be recovered—Landlord and Tenant, Rent.

The plaintiff held a parmanent lease from the Government, which he sub-let to the defendants by a registered document. In both the lease and the under-lease there was an undertaking on the part of the tenants to re-claim the land. The reclamation not having taken place in accordance with the terms of the lease, Government served notice upon the plaintiff to quit and threatened to re-enter. On this correspondence ensued between the plaintiff and the under-lessees, defendants, with the result that the defendants agreed that if the plaintiff would obtain a fresh lease in place of the original lease, which the Government claimed to have forfeited, the rent payable by the defendants under the underlease should be enhanced by a corresponding amount to that which the plaintiffs would become liable to pay to Government; and in pursuance of that agreement the plaintiff received from the Government a fresh lease on more onerous terms than those on which the land was held originally by him. In a suit by the plaintiff to recover rent, not as provided for by the registered under-lease, but at the rate as varied by the correspondence that took place between the parties:

Held, (1) that the plaintiff could not recover more rent than what was agreed to be paid under the registered under-lease, as the terms of that document could not be contradicted or varied by subsequent correspondence which was not registered, even though by that correspondence a binding agreement may have been made between the parties for altering the rent payable under the registered sub-lease; [P 439 C 2]

(2) that any case that the plaintiff might have for altering or rectifying the terms of the original registered under-lease in a properly constituted suit, on the ground that the correspondence had given rise to a binding agreement which ought to be enforced in a Court of Equity, could not be gone into in the suit as it was an ordinary suit for rent. [P 438 C 2; P 439 C 1]

(b) Landlord and Tenant—Rent—Suit for—Parties governed by registered lease must be governed by it until varied by another registered lease or judicial decision.

In an ordinary suit for arrears of rent for particular years, the rights of the parties must be governed by the terms of the registered document creating the lease, until these terms are varied by another registered document or by a judicial decision. [P 439 C 1]

(c) Bengal Tenancy Act (1885), S. 61—Under-lessee of tenant is authorised to deposit rent.

Under-tenants who have been directed in their under-lease to keep down and pay the rent payable by their lessor to his superior landlord are persons authorised to make deposit of that rent under S. 61, Ben. Ten. Act. [P 439 C 1, 2]

Dwarka Nath Mitter and *Hit Lal Guha*—for Appellant.

Sarat Chandra Roy Choudhury, *Bhudeb Chunder Roy* and *Shib Chandra Palit*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff to recover rent in respect of certain lands in the Sunderbunds held under a lease by the defendants. The plaintiff claims as the landlord. The case made out is this: The plaintiff's predecessor obtained a lease from the Government for 99 years. That predecessor was named Mc Dougall. McDougall's interest passed to the plaintiffs father and his cosharers. Owing to certain amicable partition proceedings that took place between the members of the plaintiff's family, the Sunderbunds property had fallen to the lot of the plaintiff. The plaintiff's title is not in contest. Prior to this amicable partition, certain portion of the land which was covered by the lease from the Government to McDougall was on 31st July 1901 sub-let by the plaintiff's mother and the other cosharers belonging to the

plaintiff's family in permanent lease to Jiwan Krishna Ghose and others, the area leased out being 4,000 bighas. Then followed a resumption by the Government of a certain portion of the land and this land was settled with the plaintiff on 13th April 1903. It is not disputed that that was within the powers of the Government. Then the original defendant 1 purchased the property comprised in and demised by the under-lease of 31st July 1901 and defendant 1 entered into a direct obligation with his landlord undertaking to perform the obligation of reclaiming the land, which was a term not only contained in the lease as held from Government but also in the sub-lease as held from the plaintiff's predecessors. Then, troubles seem to have arisen with the Government on the ground that the reclamation was not taking place in accordance with the terms of the lease and the Government served certain notices and threatened to re-enter.

The plaintiff's case is that certain correspondence then ensued between him and defendants 1 and 2 and owing to certain arrangements entered into, defendants 1 and 2 agreed with the plaintiff that, if the plaintiff would approach the Government and obtain a fresh lease in place of the original lease which the Government claimed to have forfeited, the rent payable by defendants 1 and 2 under the under-lease should be enhanced to a corresponding amount to that which the plaintiff had become liable to pay to the Government, and in pursuance of that, the plaintiff says that he did, in fact, approach the Government and received from them a fresh lease on more onerous terms than those on which the land was held originally by the plaintiff. The plaintiff, therefore, sued in this suit to recover rent, not as provided for by the registered document which was granted on 31st July 1901, but at the rate as varied by the correspondence that had taken place between the plaintiff and defendants 1 and 2. Defendant 3 has puechased the interest of defendant 1 and whether he had notice of this arrangement contained in the correspondence has not been determined in this suit. No issue was raised on that point and the case must be determined solely on the materials that were before the learned Judge of the Court below. The view that the learned Judge of the Court below took was this: This was a suit for rent, an ordinary money suit to recover the money agreed to be paid under a registered deed. That being so, the learned Judge said that he was prohibited by the law from allowing the terms of the registered instru. to be contradicted or varied by any unregistered writing and this correspondence which the plaintiff wished to give in evidence was not, under the terms of the law, admissible for the purpose of contradicting or varying the terms of the registered lease on the ground that the correspondence had not heen registercd.

Stated broadly, that proposition is accurate. Dr. Mitter has attempted to escape from the view taken by the learned Subordinate Judge on the ground that those sums were provided for by the original lease. I am quite clear that they were not. This arrangement could never have been within the contemplation of the parties when they executed the lease of 31st July 1901. Moreover I am clear that the covenant contained in Cl. 3 of the kabuliat (Ex. 3) does not refer to a variation of the fixed rent but it corresponds with what in England is known as the covenant to pay the outgoings, namely, the rates, taxes, assessments, impositions and the other outgoings payable in respect of the premises and imposed by the Government or some public authority. It does not apply to a sum payable between the parties to the lease in respect of the land. That amount has already been dealt with by the covenant. If that is so, then the money is not payable under the lease, and, not being payable, this correspondence cannot be looked at in this suit for the purpose of seeing whether the plaintiff is, in fact, entitled to have the terms of the lease varied so as to entitle him to any larger sum than he has been awarded by the Judge under the registered lease. The plaintiff's vakil says that it is a hard case on the ground that, in fact, his client has performed his portion of the bargain contained in this correspondence by approaching the Government and obtaining a new lease at an increased rental and that, unless he had done so at the request of defendants 1 and 2, they would have lost their interest in the large sum of money that they had spent in clearing and improving the property.

But no such case has been set up in this suit. Any case that the plaintiff has

for altering or rectifying the terms of the original lease in a properly constituted suit on the ground that it is a binding agreement and ought to be enforced in a Court of Equity cannot be gone into in this case. There are many issues which are not to be decided in this case including, of course, the position of defendant 3, as to whether or not he had notice of this arrangement between the plaintiffs and defendants 1 and 2. Any right that the plaintiff has got to have that matter enforced, he can enforce in a properly constituted suit. All that we can say in this case is that it is an ordinary case brought to recover rent for particular years and the contract regulating the rights of the parties is in a registered document, and that registered document must bind and govern those rights until varied by another registered document or by a judicial decision. That disposes of the main point. Then, a long—I should not say long but considerable—argument has been addressed to us with reference to the learned Judge not having allowed interest in respect of the arrears of rent. The claim made in the plaint as regards this is shown in the schedule—a claim for damages. The plaintiff has not told us what damages he suffered by reason of being kept out of this rent for a comparatively short period, because he took the rent under protest, and it is difficult to see that a gentleman in the position of the plaintiff could have suffered any damages in having received the sum under protest.

He had the money in his pocket and I suppose that the only damage that he had suffered was that he had to keep that money in hard rupees so that if his protest was upheld, he would be in a position to repay that money. This is with regard to the rent of the years 1317 and 1318. With regard to the rent of the years 1319 and 1320, the money was deposited under S. 61, Ben. Ten. Act. A point has been raised as to whether the durgantidars were persons authorised to make the deposit. I am inclined to think that they were under their lease. The oral evidence in this case like other evidence in many cases in India is not very strong, but the documentary evidence such as appears seems to show that defendants 1 and 2 when they let out this property in durganti, made a direction to the durgantidars to keep down and pay the rent payable to the plaintiff and that direction apparently, according to the terms of the kabuliyats, had been acted on by the durgantidars.

There is ample evidence to show that it has been acted on, although Dr. Mitter says that the chittas do not show that payment was made on behalf of the principals of the durgantidars. One of them I think clearly does show. But, after all, this is a case for damages. No particulars of the damage have been given and the learned Judge of the Court below did not see fit to exercise his discretion to give damages. What are the grounds shown to us on which we should say that the learned Subordinate Judge was wrong in the exercise of his discretion in declining to award to the plaintiff any damages? That the plaintiff has really suffered any damage in money or value seems to me impossible. The only damage he has suffered is that the money was paid into Court by the durgantidars, who are not tenants within the meaning of S. 61, Ben. Ten. Act. Of course, the plaintiff may have his own views as to who is the person described as tenant in Ss. 61 and 62. But obviously this is not a matter that is capable of being appraised in money value. The plaintiff has given no particulars of the damage suffered by him. We have no materials on which we can set aside the exercise by the learned Subordinate Judge of the Primary Court of his discretion declining to award to the plaintiff any damage with respect to the rent due for the years 1319 and 1320. I see no reason in this case to interfere with the judgment of the learned Judge of the primary Court. Any rights that the plaintiff has, he must enforce in a proper suit to rectify the registered lease under which the present defendants 2 and 3 now hold the property. The present appeal fails and must be dismissed with costs. Defendant 3, who alone has been represented in this Court save and except the minors represented by the Deputy Registrar, will be entitled to the costs. We assess the hearing fee at one hundred rupees.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

* A. I. R. 1918 Calcutta 440

BEACHCROFT AND WALMSLEY, JJ.

Kali Nath Chakravarty and *others*—Appellants.

v.

Ambica Prashad Das and *others*—Respondents.

Appeal No. 421 of 1915, Decided on 12th March 1917, from order of Dist. Judge, 24-Parganas, D/- 25th August 1915.

*** Provincial Insolvency Act (1907), S. 37—Fraudulent preference—Transfer to creditor made for value under pressure—Transferee knowing embarrassed circumstances of debtor—There is no fraudulent preference.**

Section 37 requires four conditions for its operation; (1) the debtor must be unable to pay his debts as they become due; (2) the transfer must be in favour of a creditor; (3) the debtor must have acted with a view to, giving that creditor a preference over other creditor; (4) the debtor must be adjudged insolvent on a petition presented within three months from the date of the transfer. [P 442 C 2]

Where in the case of a transfer for a fair value the first, the second and fourth conditions stated above are present, the transfer does not become void under S. 37 merely because the transferee did not believe that it was possible for the debtor to pay off all his creditors with the money obtained by the transfer or did not see to the disposal of the money by the debtor. [P 443 C 1; P 442 C 2]

The question whether there has been fraudulent preference within S. 37 depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. [P 443 C 2]

Where a transfer in favour of a creditor has been made under pressure, it cannot be said that it was made within the view of giving preference to the creditor. [P 443 C 1, 2]

A creditor by means of pressure upon the debtor stole a march on his co-creditors and got a mortgage for a fair value executed in his favour by the debtor, in consideration of his debts and a fresh advance, shortly before the presentation of a petition for the adjudication of the debtor in insolvency, knowing fully the embarrassed circumstances of the debtor and taking steps to conceal the fact of the mortgage from the other creditors:

Held: that the object of the mortgage was not to give fraudulent preference to the creditor, and that, therefore, it was not void under S. 37. [P 443 C 2]

Dwarkanath Chakraburtty and *Girija Prosanna Roy Chowdhury*—for Appellants.

Rash Behary Bose, *Narendra Chandra Bose*, *Panchanan Ghose* and *Surendra Madhab Mullick*—for Respondents.

Beachcroft, J.—This is an appeal against a decision of the Additional District Judge of Alipur in certain insolvency proceedings, by which he refused to annul two transfers of property. One Mani Lal Saha was adjudicated an insolvent on a petition failed on 18th February 1914 by one of his creditors. In the course of the proceedings the question of annulment of three mortgages came before the Court. These were (1) in favour of one Ambica Prasad Dass for Rs. 10,000 dated 15th July 1913, (2) in favour of one Chandi Charan Saha for Rs. 10,000 dated 14th November 1913 and (3) in favour of one Pratap Chandra Ganguli for Rs. 16,000 dated 15th December 1913. The first two came up for consideration under S. 36, Prov. Insol. Act, the third under S. 37 of the Act. The Judge declared the second mortgage void against the receiver, but refused to annul the other two. The present appeal is by some of the creditors against the order refusing to annul the two mortgages. The insolvent was originally a Medical Practitioner, but started a rice business and it is his dealings in this business which have landed him in financial difficulties. The immovable properties shown in his schedule consisted of three separate properties, viz., Nos. 66, 67, and 68, Tollygunge Circular Road, the first two of which were each valued at Rs. 25,000, and the third at Rs. 3,600. His immovable properties consisted mainly of machinery and fittings for the rice business valued at Rs. 15,027; there were also furniture and domestic articles valued at Rs. 500. His assets thus amounted to Rs. 69,127, while the liabilities exceeded Rs. 90,000.

The mortgage in favour of Ambica Prasad Das covered No. 67, Tollygunge Circular Road. The bond recites that a loan of Rs. 3,000 had been taken on the 30th June from Ambica, that amount with interest was deducted from the Rs. 10,000, and the balance Rs. 6,985 was stated to be paid in cash. Particulars of the notes by which the cash was paid were given in the schedule. The evidence is to the effect that Rs. 6,985 was not paid in cash at the time of the execution of the mortgage, because Rs. 4,000 had been advanced previously on the 12th July. Ambica himself had had to borrow that money from the witness Gopal Chandra Banerjee, a pleader, as it was too late to get the money from the Bank, when wanted. The money was repaid to the pleader on the 14th. A great deal is made of the fact that this payment on

the 12th contradicts the recital in the bond itself and it is suggested that this story has been invented to meet the report of the receiver, which shows that Mani Lal had according to his own account book received Rs. 4,000 on the 12th July and paid out that amount on that and the following day.

The explanation of the whole transaction seems to me to be a perfectly simple and natural one. The pleader who drafted the mortgage-bond says that even before the hand note of 30th June for Rs. 3,000 was executed it was settled that Ambica was to advance Rs. 10,000. Search, however, had to be made in the Registration Office. A draft of the mortgage-bond had to be prepared, and as the notes given by Gopal Chandra Banerjee were entered in the consideration column and there is nothing surprising in that precaution being taken, the clause about receiving consideration was entered. There was apparently some urgency for the money on 12th and if the draft had already been prepared by them, as to which there is no evidence either way, there is nothing extraordinary in its being allowed to stay as it was. The evidence as to this is not merely oral. There is a receipt dated 12th July given by Mani Lal to Ambica, in which the numbers of the notes advanced on that date are given and the same numbers are found in the hand-note executed on 12th July by Ambica Prasad in favour of Gopal Chandra Banerjee. To find in favour of the appellants we must, therefore, not only find that Mani Lal and Ambica entered into a fraudulent arrangement to favour Ambica or benefit the insolvent at the expense of the other creditors, for which there would be no justification on the evidence, but we must also find that the pleader Banshadhar Bishnu has given false evidence and the pleader Gopal Chandra Banerjee has not only done the same but abetted a forgery as well.

Finally, Ambica says he did not know Mani Lal before this transaction and there is no evidence to the contrary. In fact the cross-examination of Ambica is not what one would except in the case of a man charged with having got a transfer otherwise than in good faith and for valuable consideration. In regard to this mortgage then I have no doubt that the learned Judge came to the right conclusion. The mortgage in favour of Protap Chandra Ganguli is beset with greater difficulties. But it will be as well at once to correct a misstatement which was made to us, doubtless unintentionally, by the learned vakil for the appellants, which to a great extent coloured his arguments. It was represented to us that this mortgage covered the whole of Mani Lal's property and it was argued that a mortgage of the entire estate raises a presumption of an intention to defeat creditors. In fact the mortgage-bond does not cover the 8½ cottah plot which was previously mortgaged to Ambica, the reference in the bond to No. 67, Tollygunge Circular Road, would appear to be a mistake if the number of the premises as given in the schedule filed by the insolvent is correct. It, however, covers the other two landed properties and apparently also all the machinery and fittings used for the rice business, so that the property mortgaged was in value rather less than two-thirds of the insolvent's property as shown in the schedule.

It has not been suggested that the amount advanced was insufficient as mortgages go, it was not even suggested to Protap himself in cross examination that he had not given fair value, though it appears Mani Lal at first wanted an advance of Rs 20,000 from him. It appears from the recitals in the bond itself that Mani Lal received Rs. 3,782 odd in cash while Rs. 12,217 odd were retained to pay off debts. There was a debt of over Rupees 3,000 due to Protap himself for paddy supplied, three mortgages amounting to about Rs 5,500, Rs. 1,500 due to a firm of engineers for an engine and boiler, on which they had a lien, and Rs. 2,000 to be paid on a hand note. All these debts were discharged. In fact Protap had to pay Rs. 413 in excess of the Rs. 16,000 as he explains in his evidence. But it is said that the receiver's report shows that Mani Lal's accounts were falsified, and that the sum advanced was not used for the purposes of his business: and it is further argued that Protap could not have believed that all creditors would be paid with the money advanced and the business re-established.

So far as the receiver's report goes, I do not think we have been quite properly treated. It was hurriedly read over to us and consisting, as it does, of a mass of figures difficult to follow, if we were to be asked to draw conclusions from the

figures I think some trouble might have been spent in pointing out exactly how they affected the question before us. The value of the report largely depends on the circumstances in which it was made. It was made in June 1914 in consequence of an order of the Court on the receiver to report how the money advanced on the mortgages had been spent. That was long before the present inquiry, which was instituted after the remand order of this Court in January 1915. The report also appears to have been based, in accordance with the order, only on the accounts of the insolvent. The receiver was not called as a witness in the present case and though the reading of the report was not objected to in this Court, the value attaching to it can only be the value which attaches to an ex parte inquiry into a case on a restricted source of information. And the value of the information to be got from the accounts themselves is further discounted by the opening passages of the report in which the receiver after setting out his order says:

"The account books of the insolvent especially for the year 1320 are not in order; there are many items which have not been entered in the khatian, nor are the khatian items all totalled. It is difficult to find what is the financial position of the insolvent in the course of the year."

In view of this state of the accounts it would hardly be of use to attempt to extract any information from them. In fact they have not been placed before us and it is impossible to follow some parts of the receiver's report without them. For instance, I may say I entirely fail to understand how the receiver came to the conclusion expressed in the following passage:

"If we exclude Rs. 1,800 taken by insolvent, the amount that was paid to him (I do not know whether this refers to the insolvent or Chuni Lall Dutt) out of Protap Babu's money was not used on account of the business of the karbar and paid to any creditor of the insolvent."

However, I shall assume for the purpose of argument that some of the money borrowed was not spent on the business, I do not see that that in any way affects the position of the lender. He is not bound to see to the disposal of the money, nor could his position be affected by the fact, even if true, but which is not proved, that the insolvent falsified his accounts except in so far as falsification of accounts might be evidence of fraudulent preference. The one would not necessarily involve the other and no serious attempt has been made to establish the connection in this case. Nor to protect himself is it necessary that the lender should believe that it is possible to pay off all the creditors with his loan. S. 37 of the Act, on which section alone appellants rely, requires four conditions for its operation: (1) the debtor must be unable to pay his debts as they become due; (2) the transfer must be in favour of a creditor; (3) the debtor must have acted with a view of giving that creditor a preference over other creditors; (4) the debtor must be adjudged insolvent on a petition presented within three months of the date of the transfer.

It is not disputed that the first, second and fourth conditions are present in this case. The crux of the case is whether the third is. The strongest point against Protap is his behaviour in what is described as stealing a march on his four co-creditors in getting the mortgage executed. He was the president of the Chatta Rice Dealer Association. At a meeting of this Association on the 15th December there was a discussion about Mani Lal's affairs, as owing to his financial difficulties rice was not being supplied to him by the rice dealers. It was apparently arranged that Protap and two others should try to arrange his affairs and see that he was supplied with rice. Attempts to manage his business for him, however, eventually fell through because as Lall Mohan Dass one of the three men, says: 'He did not behave properly." But on the very day on which this discussion was held the mortagage-bond in favour of Protap was executed. The execution took place at about 2 or 2-30 p. m. The meeting of the committee was held in the evening. It is argued that the fact that the two incidents should have occurred on the same day is suspicious, to say the least of it. The fact that the bond was registered at Behala instead of at Alipur is put forward as another circumstance of suspicion, but it is perhaps a true explanation that that is due to the fact that at the Alipur Registry Office no document is accepted for registration after 2 p. m.

To take the matter beyond the region of suspicion much reliance is placed on the letter of Mani Lal that was handed in at another meeting of the Rice Dealers Association on 22nd December. In it Mani Lal said:

"The said Gangapadhaya Mohasay (i. e., Protap) who was my principal adviser in the matter of enquiry secretly advised me to mortgage my rice mill to him, and in that case he said he would arrange matters for properly conducting the business of the mill and for payment of my debts. I have adopted this most valuable advice of his with great respect and fully acted up to it."

He then went on to complain that in spite of this mortgage his debts had not veen paid and arrangements had not been made for carrying on the business of the mill. At the same meeting Mani Lal signed a letter stating that he would not transfer or charge any of his property till he had paid the rice dealers what he owed them. He also stated that his homestead dwelling-house was unincumbered. In the Association's proceedings of the same day this letter is described as an ekrar and a month's time was given to Mani Lal to pay his debts. The charge that Protap give Mani Lal secret advice to execute the mortgage-bond in his favour rests only on this letter. Protap was not cross-examined on the point. Mani Lal himself has not been examined. In the circumstances it would be risky to accept this untested statement of Mani Lal complaining against Protap, especially when on the same day he tells the rice dealers that his dwelling-house is not under mortgage although it was covered by the mortgage in favour of Ambica and by the later mortgage in favour of Chandi Charan, which was subsequently annulled by the Court. Though it is extremely probable that Protap knew how Mani Lal stood with regard to the Chatta Rice Dealers, it does not follow that the transfer to him comes within S. 37 of the Act. There is this to be said in favour of Protap against the view that he was stealing a march on the the other creditors, that the notices for the meeting of 15th December were only circulated on the morning of the 15th whereas the negotiations for the mortgage had taken place some days before. The draft had been finally prepared three days previously.

Again the evidence shows that Protap had been pressing Mani Lal to pay his debts. He had threatened to sue him unless he paid within a week or gave security. If Protap knew of the state of Mani Lal's affairs, the story that he pressed Mani Lal to pay is the more probable. When a transfer has been made under pressure, it cannot be said it was made with the view of giving the creditor preference. As was pointed out in the case of *Nripindro Nath Sahu* v. *Ashutosh Gosh* (1), following *Sharp* v. *Jackson* (2),

"the question whether there has been fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it"

In the circumstances whatever may be felt in regard to Protap's conduct in taking steps to conceal the fact of the mortgage from his co-creditors, if indeed he did wish to conceal it, and his version is that it was prepared at Mani Lal's house as Mani Lal did not want publicity, a very natural feeling in the case of a man whose business is tottering, it cannot be said that the object of the transfer was to give preference to Protap, and I think the learned Judge is right in coming to the conclusion that it was made for the purpose of trying to escape the insolvency Court. I would therefore dismiss the appeal with costs. We assess the hearing fee at five gold mohurs in the case of each respondent.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1916) 43 Cal 640=33 I C 548.
2. (1889) A C 419=68 L J Q B 866.

A. I. R. 1918 Calcutta 443

WOODROFFE AND CUMING, JJ.

Manindra Chandra Nandi Bahadur—Defendant—Appellant.

v.

Rangalal Mondal and *others*—Plaintiff—Respondents.

Appeals Nos. 1795 and 2150 of 1913, Decided on 16th March 1917, from appellate decrees of Sub-Judge, Birbhum, D/- 10th March 1913.

(a) Bengal Chowkidari Act (1870), Ss. 50 and 51—Suit by putnidar for possession of chowkidari chakran lands—Amendment of plaint by addition of new lands—Limitation runs from date of application for amendment and not from date of order by Court.

Where the plaint filed in a suit for possession of certain plots of land was subsequently amended by the inclusion of certain other plots in the plaintiff's claim:

Held: that the case was not one of amendment of plaint but of an addition of entirely new lands and that, therefore, as regards such new lands the suit must be taken to have been filed on the date when the claim in respect thereof was made by the application for amendment, and not from the date when that application was granted by Court. [P 444 C 2]

(b) Limitation Act (1908), Art. 144—Art. 144 applies to suit by putnidar against

zamindar to recover possession of chowkidari chakran lands.

Article 144 applies to the suit of a putnidar brought against the zamindar for the recovery of possession of chowkidari chakran lands transferred to the latter under the Chowkidari Act, and to ascertain when the zamindar's possession became adverse, the Court must find when the lands were settled by the zamindar with tenants and when those tenants took possession of the lands and whether such possession was to the knowledge of the putnidar. [P 444 C 2]

Ram Charan Mitra, *Jogesh Chandra Dey*, *Hemendra Nath Sen* and *Sarat Kumar Mitra*—for Appellant.

Dwarka Nath Chakravarty and *Baranashibasi Mookherjee*—for Respondents.

Appeal No. 1795 *of* 1913.

Woodroffe, J.—This appeal arises out of a suit for possession of certain chowkidari chakran lands. The suit was filed on 3rd March 1911. The plaint set out the resumed lands in a schedule containing 9 plots of land of an area of 26 bighas said to be of the value of Rs. 305. On 16th August 1911 an application was made for what was called an amendment of this plaint and was granted on 29th August 1911. The result of this order was that the suit became one for 59 plots in lieu of 9 plots of an area of 69 bighas instead of 26 bighas and for lands of the value of Rs 705 instead of Rs. 305. The question, therefore, which first arises is whether this so-called amended plaint includes or not the lands set out in the schedule of the unamended plaint. If it does so, what are those lands? If there are such lands the plaintiff would be entitled to a decree in respect of the same. If there are no such lands then the case must be dealt with as stated later on in this judgment. I may here observe that the Subordinate Judge in his judgment says that

"the plaintiffs struck out all the plots claimed at first and put in new plots altogether of more value than that of plots claimed originally."

It is not, however, clear to me whether the Subordinate Judge by that statement meant to find or had it in his mind that none of the plots added were included in the original plaint. From an inspection of the plaint it appears that the schedule was erased and it may be that it was to this fact that the Subordinate Judge referred. It, therefore, becomes necessary, as I said, to definitely ascertain whether the so-called amended plaint includes any lands as set out in the schedule to the unamended plaint. The next point which we consider is as regards such lands as were added on 16th August 1911 and were not included in the original plaint. The question which arises as regards such lands is, when was the suit instituted as regards them. For the respondent it is contended that the suit was instituted as regards all the lands on 3rd March 1911, when the plaint was received. It might be so if this were a case of amendment proper; but this is not so, because this is not a case of amendment properly so called, but a case of an addition of entirely new lands, and, therefore, as regards such new lands the suit which is taken to have been filed will date from the date when the claim was made in respect thereof, namely, on 16th August 1911. Therefore, as regards all lands not included in the plaint at first filed, the suit must be taken to have been instituted on 16th August 1911. As regards all lands not included in the plaint at first filed there are two dates upon which it may be argued that the suit can be taken to have been instituted, namely, either on 16th August 1911 when the application was made for amendment or on 29th August 1911 when the application was granted. Something may be said on behalf of either of these dates, but we are in favour of the respondent's view of taking the earlier date, namely, 16th August 1911, seeing that this is a point which is not seriously contested. We, therefore, hold that as regards all lands not included in the plaint as first filed, the suit must be taken to have been instituted on 16th August 1911.

The next point, therefore, which arises is whether the suit is barred or not as regards those lands; and this raises the question whether Art. 142 or Art. 144, Lim. Act, applies. For the respondent it has been contended that Art. 144 applies, whereas the appellant has put forward Art. 142. It is true that para. 4 of the plaint alleges that the properties described in the schedule were held by certain chowkidars as chakran lands under the plaintiffs the se-patnidars who obtained their services and enjoyed the said lands in se-patni right. But this was a possession under another title. This is not a case in which possession was obtained under the resumption proceedings and was then lost. In my opinion, therefore, Art. 144 applies to this case. The Court must, therefore, ascertain when possession became adverse to the plain-

tiffs, and for this purpose it must find when the lands were settled by defendant 1 with the tenants and when the appellants tenants entered upon the lands and was such possession to the knowledge of the plaintiffs. Either party may adduce further evidence upon this question of possession, and such evidence may be taken either by the lower appellate Court itself or under its direction by the Court of first instance. I may draw here the attention of the lower appellate Court to para. 8 of the written statement of defendants 2 and 3. It runs as follows:

"Defendant 1, after getting the land in suit transferred to him, caused notices to be served in Goyta village and adjoining villages and proclaimed by beat of drum that he will settle the same. The plaintiffs were fully aware of these. They were also aware of the settlement of the land to these defendants. They did not make any objection at the time of the settlement of the land to these defendants. The defendants are in possession of the land for 12 years paying rent to defendant 1. The plaintiffs did not make any objection to these knowing full well all the facts. They never made any opposition to these defendants' possession of the said lands."

The judgment and decree, therefore, of the Subordinate Judge must be set aside and we must remit this case to the lower appellate Court in order that the Subordinate Judge may deal with the same in accordance with the directions contained in this judgment. Costs of this appeal will abide the result of the trial by the lower appellate Court on remand.

Cuming, J.—I agree.

Appeal No. 2150 *of* 1913.

The learned vakil for the appellant does not press this appeal. This appeal is, therefore, dismissed with costs.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 445 (1)

FLETCHER AND NEWBOULD, JJ.

Churamoni Mondal—Defendant—Appellant.

v.

Rajendra Kumar Singha and *others*—Respondents.

Appeal No. 1628 of 1915, Decided on 16th July 1917.

Transfer of Property Act. (1882), S. 6—Right to sue—Right to recover money from agent on taking accounts, is transferable—Transferee can sue in his own name.

The right to recover money, which might be found due on taking accounts from an agent, is not a mere right to sue within S. 6 but is an actionable claim which is capable of transfer; and the transferee can maintain a suit in his own name against the agent for the recovery of such amount as might be found due on taking accounts from him. [P 445 C 2]

Gunada Charan Sen—for Appellant.

Brojolal Chakravarty—for Respondents.

Fletcher, J.—This is an appeal by the defendant No. 1 against a decision of the learned Additional District Judge of the 24 Pergannahs, reversing the decision of the Munsif of Diamond Harbour. The plaintiff brought the suit to recover the amount that might be found due to him on taking an account from defendant 1. The plaintiff sued as the transferee of an actionable claim that had been transferred to him by the pro forma defendant, the pro forma defendant having been the principal and defendant 1 his agent. The case was contested in the Court below on the question as to whether the right was capable of transfer on the ground that the right to recover the money which might be found due on taking the account from the defendant 1 was a mere right to sue within the meaning of S. 6, T. P. Act, and was, therefore, not capable of transfer. The right to call for accounts is moveable property and, that being so, the transfer of an interest in that comes within S. 3, T. P. Act, as the transfer of an actionable claim. The only difficulty that has arisen in this case has been caused by the fact that the transferor is a defendant and that the defaulting agent, defendant 1, has got hold of the transferor, so that he would not allow his name to be used as a co-plaintiff along with the present plaintiff. That, however, does not matter, because I am quite clear that the transfer is not a transfer of a mere right to sue but is a transfer of an actionable claim within the meaning of the Transfer of Property Act on which the plaintiff can maintain the suit in his own name. In my opinion, the judgment of the learned Additional District Judge is correct. The present appeal, therefore, fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 445 (2)

CHATTERJEA AND NEWBOULD, JJ.

Dembeswar Sarma—Appellant.

v.

Collector of Sibsagar—Respondent.

Appeal No. 567 of 1914, Decided on 1st February 1917.

Land Acquisition Act (1894), S. 54—Order dismissing reference as time barred—Appeal does not lie.

No appeal lies to the High Court against an order of a District Judge dismissing a reference under the Act on the ground that it is barred by limitation. Under S. 54, it is only an award or part of an award against which an appeal lies to the High Court. [P 446 C 1]

Khitish Chandra Chakrabarti for *N. C. Bardelio*—for Appellant.

Ram Charan Mitter — for Respondent.

Judgment.—This appeal arises out of a reference under S. 18, Land Acquisition Act. In the Court below a preliminary objection was taken on behalf of the Collector that the application for reference was barred by limitation at the time it was made. The learned Judge below held that it was barred by limitation and accordingly dismissed the case and the applicant has appealed to this Court. As no award was made by the Judge no appeal lies to this Court, because under S. 54, Land Acquisition Act, it is only an award or part of an award against which an appeal lies to this Court. The case out of which this appeal arises was Case No. 8 of 1913 in the lower Court and was filed along with two other Cases Nos. 6 and 7 of 1913 and disposed of by the Court below by one and the same judgment; and this Court, on revision, set aside the order of the Court below in the analogous Cases Nos. 6 and 7 on 18th January 1915 in Rules Nisi Nos. 986 and 991 of 1914. Under the circumstances, the appeal must be dismissed with costs, hearing fee five gold mohurs. We may, however, treat the memorandum of appeal as an application for revision. We agree with the learned Judges, who decided Rules Nos. 986 and 991 of 1914 referred to above in the analogous Cases Nos. 6 and 7 of 1913, that the reference in the case was not barred by limitation and accordingly set aside the order of the Court below in the exercise of our powers of revision and direct the case to be remitted to the lower Court to be heard on the merits. This is, however, conditional on the appellant paying to the respondent the costs of both the Courts within one month of the arrival of this order in the Court below, failing which the order of the Court below will stand.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 446

MOOKERJEE AND WALMSLEY, JJ.

Serafat Ali—Plaintiff—Appellant.

v.

Issar Ali—Defendant—Respondent.

Appeal No. 2587 of 1914, Decided on 22nd May 1917, from appellate decree of Sub-Judge, Midnapore. D/- 4th June 1914.

(a) Contract Act (1872), Ss. 69 and 70—Payment in satisfaction of decree by person party to decree and bound thereby is payment within S. 70 though his interest is unaffected by decree.

A mortgagee sued *A*, *B* and *C* as representative-in-interest of his mortgagor and obtained a decree which was satisfied in full by *A* alone. On a suit by *A* against *B* and *C* for contribution:

Held: that though *A* had no interest in the mortgaged property, yet as he bona fide claimed an equal interest with *B* and *C* in the equity of redemption, he was entitled to maintain the suit for contribution under S. 69 or S. 70 [P 447 C 2]

A payment in satisfaction of a decree by a person who is a party to the decree and is bound thereby, is a payment made lawfully within the meaning of S. 70 even though his interest was unaffected by the decree. [P 448 C 1]

(b) Contract Act (1872), S. 69—"Interested in the payment of money"—Meaning explained.

The words "interested in the payment of money within the meaning of S. 69 are comprehensive enough to include the case of persons, who are under apprehension of any kind of loss or inconvenience and are not restricted to cases of individuals who are sure to suffer actual detriment, capable of assessment in money. [P 447 C 2]

(c) Contract Act (1872), S. 69—Suits for contribution — Whether S. 69 applies—*Quaere*.

Quaere.—Whether S 69 is applicable to suits for contribution properly so called, i. e., suits where the plaintiff admits his liability to pay a portion of the money actually paid by him and claims to recover the balance from the defendants. [P 448 C 1]

Dwarkanath Chakerbutty and *Monmothanath Roy*—for Appellant.

Ram Chandra Majumdar and *Mohendra Nath Dutt*—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for contribution. The facts material for the determination of the question of law raised before us, stripped of superfluous details, may be briefly stated. *X*, a mortgagee, sued *A*, *B* and *C* as representatives-in-interest of his mortgagor, and obtained a decree. The decree was by consent as to two of these persons and was ex parte as regards the other. *A* thereafter satisfied the judgment debtor in full. *A* now sues to recover two-thirds of the money paid by him from *B* and *C*. *B* and *C* deny that *A*

had any interest in the mortgaged property and urge that the payment made by *A* must consequently be deemed voluntary. The Court of first instance, upon the evidence, came to the conclusion that *A* had an interest in the mortgaged property and was entitled to maintain the suit for contribution against *B* and *C*. Upon appeal the Subordinate Judge has held that *A* had no interest in the property, and in this view, he has dismissed the suit. The result is that though the decree for the sale of the mortgaged properties has been satisfied with the money of *A*, though *B* and *C* have reaped the benefit of that payment, they escape all liability. The question arises, whether this position is supported by legal principle.

Section 69, Contract Act, provides that a person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by the other. There has been some divergence of judicial opinion [*Mothooranath Chuttopadhya* v. *Kristo Kumar Ghose* (1), *Futteh Ali* v. *Gunganath Roy* (2), *Nawab Mir Kamaldin Husenkhan* v. *Partap Mota* (3), *Swarnamoyee Deby* v. *Hari Das Roy* (4), *Manindra Chandra Nandy* v. *Jamahir Kumari* (5), *Jinnat Ali* v. *Fateh Ali* (6) upon the question whether this section is applicable to suits for contribution properly so called, that is suits where the plaintiff admits his liability to pay a portion of the money actually paid by him and claims to recover the balance from the defendant *Motichand* v. *Bajrang Sahai* (7), *Jog Narain Singh* v. *Badri Das* (8), *Satya Bhushan Bandopadhyaya* v. *Krishnakali Bandopadhyaya* (9), *Rajani Kanta Ghose* v. *Rama Nath Roy* (10). But whether the section is or is not applicable to suits for contribution, it has never been disputed that it applies to suits where the plaintiff is, upon the facts found entitled to recover the whole sum from the defendant on the ground that the same was in law payable by the latter. In the case before us, it has been found that the plaintiffs had no interest in the mortgaged properties, and was indeed, the contention of the defendants. In this view, the plaintiffs would be entitled, if S. 69 applies, to recover the whole sum from the defendants. They have however, claimed to recover only a portion of that amount. There can be no serious doubt that the money paid by the plaintiffs was money which the defendants were bound by law to pay. The only question in controversy is whether the plaintiffs were persons interested in the payment of that money.

The true meaning of the expression "interested in the payment of money" has formed the subject of judicial discussion in recent years, and in the case of *Pankhabati Chaudhurani* v *Nanihal Singh* (11) it was ruled that the words "interested in the payment of money which another is bound by law to pay," were comprehensive enough to include the cases of persons who were under apprehension of any kind of loss or inconvenience and were not restricted to cases of individuals who were sure to suffer actual detriment capable of assessment in money. On this principle it was ruled in the cases of *Bindubashini Dassi* v. *Harendra Lal Roy* (12) and *Radha Madhab Samonta* v. *Sasti Ram Sen* (13) that where payment is made by a person who puts forward a bona fide claim to the property in dispute, he is entitled to the protection afforded by S. 69 Contract Act, even though it ultimately transpires, as a result of litigation, that he had not, in fact or in law, the interest for the protection whereof the payment was made. In the case before us, the plaintiffs were joined as parties to the mortgage suit by the mortgagee, on the allegation that they were some of the legal representatives of the deceased mortgagor. A decree was made against the property to the equity of redemption wherein they claimed an interest. In the present suit, the Court of first instance, upon the facts, came to the conclusion that they had an interest in the equity of redemption. The Court of appeal below has however, came to a different finding upon the evidence. In these circumstances, it is impossible to maintain the view that plaintiffs were

1. (1879) 4 Cal 369.
2. (1882) 8 Cal 113.
3. (1881-82) 6 Bom 244.
4. (1902) 6 C W N 903.
5. (1905) 32 Cal 643.
6. (1911) 9 I C 219.
7. (1912) 17 I C 45.
8. (1912) 13 I C 144.
9. A I R 1915 Cal 278=24 I C 259.
10. A I R 1915 Cal 310=27 I C 56.
11. A I R 1914 Cal 338=21 I C 207.
12. (1898) 25 Cal 305.
13. (1899) 26 Cal 826.

persons in no way interested in the payment of the money which went to satisfy the decree.

That decree bound the mortgaged properties wherein the defendants in the present litigation are undoubtedly interested; and the plaintiffs also bona fide claimed an equal interest. This case is consequently clearly distinguishable from *Desai Himatsingji Joravarsingji* v. *Bhavabhai Kayabhai* (14), mentioned in the judgment of this Court in *Jinnat Ali* v. *Fateh Ali* (6). It cannot we think be reasonably maintained, by any stretch of language, that the payment was made by the plaintiffs with a view to manufacture evidence of title to the mortgaged properties when they knew that they had no claim whatsoever. It is also fairly clear that even if S. 69 were not applicable, the case would be covered by S. 70. That section provides that where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. There is no controversy that the payment was made by the plaintiffs without intention to do so gratuitously. The only question is whether this was done lawfully. Much reliance has been placed by the respondents on the cases of *Raja Baikunto Nath Dey Bahadur* v. *Udoy Chand Maiti* (15) and *Panchkori Ghosh* v. *Hari Das Jati* (16). We do not in any way depart from the exposition of the law contained in these cases, which is perfectly consistent with the view we now take, namely that a payment in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made lawfully within the meaning of S. 70.

We hold accordingly that whether S. 69 or S. 70 be applied, the plaintiffs are bound to succeed. In these circumstances, it is not necesaary for us to consider whether the plaintiffs might not have successfully invoked the aid of the doctrine of subrogation: *Parbhu Narain Singh* v. *Beni Singh* (17), *Dhakeswar Prosad Singh* v. *Harihar Prosad Narain Singh* (18), *Adusumalli Suryanarayana* v. *Valurapalli Sriramulu* (19), to support the line of reasoning that the plaintiffs are some of the joint judgment-debtors, that they have satisfied the mortgage-decree whereby they are bound, along with the defendants, and that they have accordiugly been subrogated to the rights of the mortgagee decree-holder. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the lower appellate Court.

V.B /R.K. *Appeal allowed.*

14. (1879-80) 4 Bom 643.
15. (1905) 2 C L J 311.
16. (1916) 34 I C 341.
17. (1910) 5 I C 779.
18. (1915) 27 I C 780.
19. (1913) 20 I C 825.

A. I. R. 1918 Calcutta 448

CHATTERJEA AND SMITHER, JJ.

Khetra Mohan Poddar and *others*—Plaintiffs—Appellants.

v.

Aswini Kumar Saha and *others*—Defendants—Respondents.

Appeal No. 3157 of 1915, Decided on 28th May 1917, from appellate decree of Sub-Judge, Noakhali, D/- 30th August 1915.

(a) Contract Act (9 of 1872), S. 247—Minor—Debt incurred in carrying on ancestral trade Minor is not personally liable—Liability is limited to his share in trade—Minor.

The liability of a minor in respect of a debt incurred in carrying on an ancestral family trade, in which he is a sharer, is not greater than that of a minor admitted to a partnership, as laid down by S. 247 of the Contract Act. Therefore, a minor, on whose behalf an ancestral trade is carried on, is not personally liable for the debts incurred in such trade. His liability is limited to his share in the trade. [P 449 C 2]

(b) Interest—Damages—Interest can be allowed as damages for detention of money.

It is open to a Court to award damages for wrongful detention of money after adjustment of accounts even though interest is not recoverable either under a contract or under the provision of the Interest Act. [P 449 C 2]

Gobinda Chandra De Roy—for Appellants.

Bhagirath Chandra Dass—for Respondents.

Judgment.—The main question involved in this appeal is whether a minor, on whose behalf an ancestral trade is carried on, is personally liable for debts incurred in such business. It appears that one Bhaja Krishna, the father of the defendants 1 and 2 who had a Karbar in cloth, used to purchase cloth from the plaintiff's firm. On his death the defendant 1, his elder son, for himself and his younger brother, the defendant 2, who

was and is still a minor, carried on the business and took cloth on credit from the plaintiff's firm. The plaintiff brought the suit out of which this appeal arises for the recovery of Rs. 460-10-6, which was found due from the defendants on adjustment of accounts, and also for Rs. 82-5-6 as interest on the said sum. The Court of first instance allowed the principal claimed together with damages at 1 per cent in lieu of interest against both the defendants. On appeal, the learned Subordinate Judge held that defendant 2 was not personally liable, and gave a decree against defendant 1 and the assets of the shop. He disallowed interest as no written notice was served upon the defendants that interest would be charged. The plaintiffs have appealed to this Court. We are of opinion that the Court below is right in holding that the minor is not personally liable. S. 217 of the Contract Act lays down that

"a person who is under the age of majority, according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm, but the share of such minor in the property of the firm is liable for the obligation of the firm."

That section refers to a case where a minor is admitted by contract into a out partnership business. But as pointed out in the case of *Joykisto Cowar* v. *Nittyanund Nundy* (1),:

"on principle there ought not to be any difference between the nature or liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager,"

and that the

"limit of the infant's liability which has been adopted by the legislature in the case of a minor being admitted by contract into a partnership business ought to be adopted in such a case as the present."

It was accordingly held in that case that a minor Hindu, on whose behalf a trade is carried on, is not personally liable for the debts incurred in such trade, but his share therein is alone liable: see also *Ram Partab Samrathrai* v. *Foolibai* (2) These cases were decided before it was settled by the Judicial Committee in the case of *Mohori Bibee* v. *Dharmodas Ghose* (3) that a minor cannot make any contract at all. In view of that decision a minor cannot really be a partner. It is unnecessary, however, to consider in this case whether the provisions of S. 247, Contract Act have in any way been affected by the above decision. We think that the liability of the minor in the case of an ancestral family trade is not greater than that of a minor admitted to a partnership as laid down by S. 247 of the Contract Act. We are accordingly of opinion that although his share in the assets of the shop is liable, defendant 2 is not personally liable for the debt. The next question is whether the plaintiff is entitled to interest. There was no time fixed for payment, nor was any notice given that interest would be claimed. The plaintiff, therefore is not entitled to the benefit of the Interest Act (32 of 1839). It is open, however, to the Court to award damages for wrongful detention of money, even though the claim of the plaintiff is limited to interest which is not recoverable either under a contract or under the provisions of the Interest Act: see *Mohamay Prosad* v. *Ram Khelawan Singh* (4) and the cases cited therein. The opposite view taken in *Kamalammal* v. *Peeru Meera Levvai Routhen* (5) has been dissented from in this Court see the observation of Banerji, J.. in *Surjo Narain Mukhopadhya* v. *Partap Narain Mukhopadhya* (6); see also *Saunnadanappa* v. *Shivbasawa* (7). In the present case so long as the accounts were not adjusted, the defendant did not know what amount was to be paid. But after the adjustment of accounts had been made, and the defendant signed the moblogbandi, the defendant knew the exact amount to be paid, and he did not pay it. Under the circumstances and having regard to the long time during which the plaintiff has been kept out of the money, we think some damages should be awarded for the detention of the money. In the absence of any evidence, we assess the damages at 6 per cent per annum. The decree of the lower appellate Court will accordingly be varied and the plaintiff will get damages at 6 per cent on the principal sum claimed from the date of the last moblogbandi. In other respects that decree will be affirmed.

V.B./R.K. *Decree varised.*

1. (1877-78) 3 Cal 738=2 C L R 440 (F B).
2. (1896) 20 Bom 767
3. (1903) 30 Cal 539=30 I A 114 (P C).
4. (1912) 15 I C 911.
5. (1897) 20 Mad 481.
6. (1899) 26 Cal 955.
7. (1907) 31 Bom 354.

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FLETCHER AND SMITHER, JJ.

Dooly Chand—Judgment debtor—Appellant.

v.

Rameswar Singh Bahadur—Decree-holder—Respondent.

Appeal No. 64 of 1917, Decided on 23rd March 1917, from order of Sub.-Judge, 2nd Court, 24-Parganas, D/- 24th February 1917.

T. P. Act (1882), Ss. 49 and 74—Mortgage-deed providing mortgaged property to be insured—Failure to perform agreement to keep mortgaged premises insured—Receiver in mortgage suit effecting insurance—Property destroyed by fire—Money received by receiver under insurance policy could be applied to for the benefit of all persons and not as per contract between mortgagor and mortgagee.

A mortgage-deed provided that during the continuance of the security the mortgagor should insure and keep insured the mortgaged premises, and that if he failed to do so, it would be lawful for the mortgagee to make payments necessary for the purpose and that such payments would be a charge upon the mortgaged premises The mortgage-deed also provided that all sums of money received under and by virtue of any such insurance should be applied by the mortgagee, if so required by the mortgagor, in or towards substantially rebuilding, reinstating or repairing the said premises. Neither the mortgagor nor the mortgagee insured the property, but the receiver appointed in the suit on the mortgage, under the Court's direction kept the property insured against any loss or damage by fire, for the benefit of all the parties to the suit. Before the property was brought to sale in execution of the mortgage decree it was destroyed by fire, whereupon the receiver obtained under the policy of insurance a large sum of money:

Held: (1) that the money received by the receiver was not governed by the terms of the mortgage-deed, inasmuch as the insurance was kept on foot by the Court through the receiver as a matter of protection for the benefit of all persons who were parties to the mortgage suit, and not by the mortgagor or the mortgagee in accordance with their contract in the mortgage-deed; (2) that the Court had ample discretion in directing in what manner the money so received should be laid out, and that the mortgagor could not claim that it should be laid out in restoring the premises that had been destroyed or damaged by fire.

[P 451 C 1]

B. Chuckerberty and *Shib Chunder Palit* and *Noni Lal De*—for Appellant.

B. C. Mitter and *Ambika Pada Chowdhury*—for Respondent.

Fletcher, J.—This is an appeal by a judgment-debtor against an order of the learned Subordinate Judge of the second Court at Alipore, dated 24th February 1914. The appeal arises under the following circumstances. By an indenture of mortgage made in the month of July 1911 between the judgment-debtor of the one part and the decree-holder of the other part, the judgment-debtor mortgaged to the decree-holder a certain Jute Press together with the machineries and fixtures to secure a sum of 2-1/2 lakhs of rupees with interest. In the said indenture was contained a covenant by the mortgagor that he would at all times during the continuance of the security insure and keep insured to the full value thereof and for not less than Rs. 3,30 000 the mortgaged premises from loss or damage by fire in the name of the mortgagor in some office to be approved of by the mortgagee and that he would assign, endorse and deliver to the mortgagee the policy for such insurance and the receipt for every such payment within seven days after payment and that, in *default*, it would be lawful for the mortgagee to make those payments, and such payments when made by the mortgagee would be a charge upon the mortgaged premises. The mortgage-deed also contained an agreement on the following terms:

"It is hereby agreed and declared that all sums of money received under and by virtue of any such insurance as aforesaid shall be applied by the mortgagee, if so required by the mortgagor, in or towards substantially and to the satisfaction of the mortgagee rebuilding reinstating or repairing the said premises so to be insured as aforesaid."

Eventually, the mortgagee brought a suit upon the mortgage. On 14th January 1914, a receiver was appointed by the Court in the mortgage suit. A preliminary decree was then passed on 6th April 1914 and the decree absolute was made on 23rd November 1914. On 18th January 1915, an order was made by the Court that the property should be brought to sale for the satisfaction of the amount found due on the mortgage security. Then, on 19th December 1916, there occurred a fire and the receiver received from the Insurance Company in which the premises were insured from loss or damage by fire the sum of Rs. 86,000 odd. The mortgagor then applied to the Court that the money so received by the receiver should be laid out in restoring the premises that had been destroyed or damaged by fire. The learned Judge refused that application. Against that order, the judgment-debtor has appealed to this Court. Two questions have been raised in this appeal.

First of all, that the manner in which the money received by the receiver from the Insurance Company was to be applied being provided for by the mortgage-deed and the parties having regulated their rights by contract, the contract must be given effect to by the Court; and secondly, that if that be not so the Judge did not exercise a wise discretion in declining to order the money received by the receiver to be laid out in restoring the premises that had been damaged by fire. The first point is:

"Is that money in the hands of the receiver governed by the terms of the mortgage-deed?"

In my opinion, it is not; and I state shortly why. First of all, the mortgage-deed applies, as it states in its terms, to a policy which is kept on foot by the mortgagor, although the mortgagee had the option of making the payments if he thought fit. In this case the premiums that were paid on the policy were not paid by the mortgagor and the mortgagee had never thought fit to make these payments. It is only with reference to the money received under and by virtue of "any such insurance as aforesaid" that the mortgagor has the right under the terms of the deed, to direct as to whether the money shall be laid out in restoring the premises destroyed by fire. As I have already pointed out "any such insurance as aforesaid" means an insurance effected in accordance with the terms of the mortgage-deed. The parties did not provide for what would happen in a case where the property having come in the custody of the Court, the officer of the Court under the direction of the Judge had kept the property insured against any loss or damage by fire for the benefit of all the parties to the suit. In my opinion this case is not governed by the terms of the mortgage-deed. The insurance was kept on foot by the Judge as a matter of protection for all persons who were parties to the suit. It may be that there are other parties besides the mortgagor and the mortgagee. A subsequent mortgagee may be called a party for whose benefit also the Court took the precaution of insuring the premises. If that is so, then the money having been in the custody of the Court, and it having arisen by the payments made by an officer of the Court, the Court had ample discretion in directing in what manner the money so received should be laid out. The question therefore is:

"Has the Court exercised its discretion rightly and for the benefit of all the parties to the suit?"

The judgment-debtor's case is that the premises should be rebuilt. As far as I can see, there was no evidence before the learned Judge showing that the premises could be restored to their former state for the sum received from the Insurance Company. In the absence of that evidence it would be impossible for the learned Judge to come to the conclusion that these premises could be restored as they existed before the fire. The costs of building materials and the other matters connected with the rebuilding may have and probably have substantially gone up within the last few years. Also the Judge had to consider whether it was convenient for the Court to superintend and undertake the re-erection of a large building as a Jute Press. What the nature of the building was I do not know. But having regard to the amount for which it was mortgaged apparently it was a building of considerable size and the amount of the damage done by the fire must have been considerable because the money received by the receiver amounted to the sum of Rs. 86,000 odd. In that view, I think the learned Judge having come to the conclusion that it would not be convenient to have these buildings restored, no grounds have been shown to us on which we can say that the learned Judge improperly exercised his discretion. The learned Judge clearly, in my opinion, had a discretion to decide in what manner the money received by the receiver ought to be applied, and he came to the conclusion that the most convenient and the best course for the application of the money would be to allow the mortgagee to receive it in part satisfaction of his mortgage money rather than to direct the receiver to undertake the re-construction of the building. In the result, I see no reason to differ from the conclusion arrived at by the learned Subordinate Judge of the Court below. The present appeal therefore fails and must be dismissed with costs, five gold mohurs

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 452

FLETCHER AND SMITHER, JJ.

Pramatha Bhusan Deb — Plaintiff—Appellant.

v.

Ram Chandra Mandal and *others*—Defendants—Respondents.

Appeal No. 540 of 1915, Decided on 4th April 1917, from appellate decree of Sub-Judge, Jessore, D/- 14th December 1914.

Landlord and Tenant—Under-raiyati interest is not transferable without landlord's consent—Landlord purchasing under-raiyati interest in execution of money-decree can eject previous purchaser.

An under-raiyati interest is not transferable except with the consent of the landlord. Therefore, the sale of an under-raiyati interest in execution of a money-decree to which the under-raiyat does not object, though binding upon the under-raiyat, is not binding upon the landlord. Consequently, a landlord who purchases the same under-raiyati interest at a subsequent sale under the provisions of the Civil Procedure Code without objection by the under-raiyat is entitled to eject the previous purchaser.

[P 453 C 1]

Brojo Lal Chakrabutty and *Satish Chandra Ghatak*—for Appellant.

Surendra Chandra Sen and *Surendra Nath*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Jessore, dated 14th December 1914, affirming the decision of the Munsif of Narail. The plaintiff brought the suit to recover possession of certain lands. The case is a little difficult one because it involves a question as to the transferability and liability to sale in execution of the rights of an under-raiyat. Defendant 5 in the present case was the first purchaser, the original under-raiyats being defendants 1 and 3, and defendant 5 purchased at a sale in execution of a money decree. No consent of the plaintiff landlord was obtained to that sale either before the sale in execution or subsequent thereto. The plaintiff purchased at a subsequent sale in execution of a money-decree or, at any rate it must be taken that the sale was a sale under the provisions of the Civil Procedure Code. To that sale the plaintiff naturally assented when he was selling the property and was puchasing it himself. The learned Judge at the trial in the lower appellate Court has found that subsequent to the sale to the plaintiff in execution there was a recognition of defendants 1 and 2 by the plaintiff. Defendants 1 and 2 have also apparently come to an arrangement with defendant 5. In any case defendants 1 and 2 are not liable to be ejected from the lands and the real contest is as to whom defendants 1 and 2 should pay their rent. The suit may seem to be the development of an ordinary action in ejectment. There are many cases in this Court showing a suit disposed of in the same manner.

The matter in debate in this Court has turned largely, if not wholly, on the question as to what are the rights and interests of a purchaser at a sale in execution of an under-raiyat interest when the landlord does not consent to the sale. The tenants have taken no objection and presumably, therefore, the sales in both cases are binding on defendants 1 and 2. The case is not one of first impression. That an under-raiyati interest is not transferable was distinctly raised and decided in this Court in the case of *Aminunnisa* v. *Jinnat Ali* (1). The learned Judges in the course of their judgment made reference to a decision of Garth, C. J. and Jackson, J. in the year 1878 for taking the view which the learned Judges in the case I have cited also took, namely, that an under-raiyati interest could not be transferred except with the consent of the landlord. Then it is unfortunate that the reference to that decision: see *Bonomali Bajadar* v. *Koylash Chunder Majoomdar* (2) of Garth, C. J. and Jackson, J., is not given in the report and, therefore, we have not been able to advert to it. But the learned Judges held quite clearly in the case of *Aminunnisa* v. *Jinnat Ali* (1) that an under-raiyati interest was not subject to transfer except with the consent of the landlord. Although defendant 5 has not appeared at the hearing of the present appeal. Mr. Sen, who appears for defendants 1 and 2, has very kindly placed before us in the course of the argument such cases as support the view of the learned Judge of the Court of Appeal below as regards the case of defendant 5. Then prior to that decision, D. Chatterjee and N. R. Chatterjea, JJ. in the case of *Arsadulla* v. *Munseb Ali* (3) laid down the following proposi-

1. A I R 1915 Cal 182=42 Cal 751=27 I C 271.
2. (1878) 4 Cal 135.
3. (1912) 14 I C 349.

tion as the law. I read from the top of p. 541 *of* 16 *C. L. J.* of the report. The rights of an under-raiyat

"may be sold by the landlord under the Civil Procedure Code, but the question is whether such lands can be sold under the special procedure prescribed in the Bengal Tenancy Act with the consequences attached to sales held under that procedure."

So obviously in the view of those learned Judges the landlord could bring the property to sale under the provisions of the Civil Procedure Code although I take it that, having regard to the Full Bench decision the under-raiyat could have come forward and raised an objection to the sale. But if he did not come forward, then the landlord having consented to the sale the sale would be binding both on the landlord and the tenants and, therefore, a valid transfer could be effected. In the present case there is this fact. First of all, the plaintiff is the landlord. He purchased in execution this interest which is non-transferable. The tenants, defendants 1 and 2, did not come forward and object to the sale and, therefore, the sale is binding on them. As against defendant 5, although he purchased in a prior execution, the plaintiff as the landlord never did assent to the transfer. Defendants 1 and 2 also did not come forward to object to the transfer. They not only did not do so but actually arrived at an agreement with defendant 5. In that view the plaintiff has got a valid transfer according to the authorities in this Court.

The transfer to defendant 5 is not operative as against the plaintiff and, therefore, the plaintiff is entitled on the footing of the decisions that I have cited to have what is called a decree for ejectment against defendant 5 although he is not in actual possession, the real nature of that decree being that the plaintiff will get the rent from defendants 1 and 2 who are in actual possession and defendant 5 will have nothing to do with the property at all. Having regard to the findings made by the learned Judge of the lower appellate Court, defendants 1 and 2 were recognized by the plaintiff after the purchase by him and if the rent is paid I think defendants 1 and 2 are entitled to remain in possession of the lands. As regards defendant 5 for the reasons already stated I think he obtained as against the plaintiff no interest in the lands and, therefore, he ought to be ejected in the manner I have already mentioned. The appeal as against defendants 1 and 2 will be dismissed with costs. The appeal as against defendant 5 as regards plots Nos. 1 to 7 both inclusive will be allowed with costs both here and in the Courts below, otherwise the decree appealed against will stand.

Smither, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 453

CHATTERJEA AND NEWBOULD, JJ.

Akil Chandra Saha and *others*—Defendants—Appellants.

v.

Girish Chandra Saha—Plaintiff—Respondent.

Appeal No. 568 of 1914, Decided on 25th January 1917, from original decree of Sub-Judge, 1st Court, Dacca, D/- 31st August 1914.

(a) Guardians and Wards Act (1890), S. 31—Mortgage by certificated guardian sanctioned by Court after being satisfied as to necessity for loan—Lender acting bona fide is not bound to go behind order sanctioning loan.

Where a District Judge satisfies himself as to the necessity for a loan by ex parte inquiries and sanctions a mortgage by the certificated guardian of a minor, the lender, if he acts bona fide, is not bound to go behind the order sanctioning the loan and is not bound to see to the application of the money, but is entitled to rely upon the order unless he is a party to a fraud for obtaining the sanction. [P 455 C 2]

(b) Fraud—Plea—Burden of proof—Defendant alleging fraud must produce every evidence to establish it.

A defendant who wants to defeat the claim of a plaintiff on the ground of fraud, alleging that he himself participated in the fraud, must produce very strong evidence to establish the fraud, so as to enable him to extricate himself from the difficult situation in which he is placed. [P 456 C 1]

Gopal Chandra Dass and *Sarat Chandra Basak*—for Appellants.

Satis Chandra Chowdhury—for Respondent.

Judgment.—This appeal arises out of a suit to enforce a mortgage bond. The mortgage bond was executed by defendant 1 and defendant 3 as guardian of her minor son, defendant 2, and another minor son since deceased. The execution of the bond is admitted, but it is pleaded

that no consideration passed under it. The defendants' case appears to be that on the death of Madhu Sudan, the father of Akhil, the latter and his brothers were threatened with the liability for a large amount of money on acccunt of some dealings that the deceased had with one Kishori Mohan and that in order to frighten the latter to reduce his claim, it was arranged with Hari Mohan, who was a friend of Madhu Sudan, that a bogus mortgage bond should be executed in his favour for Rs. 4.000 and that some false and satisfied bonds should be shown as due and permission be taken by defendant 3, who was the guardian of her minor sons, from the District Judge for raising the money on mortgage, that in furtherance of the design (as suggested by Hari Mohan himself) a sum of Rs. 2,000 was borrowed from one Hrishikesh Babu, and with that amount together with a sum of Rs. 1,000 raised on pledge of some ornaments of defendant 3 and some cash which they had, three currency notes for Rupees 1,000 each were purchased through the said Hari Mohan and that the said three currency notes were entered in the mortgage bond executed in favour of Hari Mohan as part of the consideration, namely, Rs. 4 000, but that as a matter of fact, no consideration passed under the mortgage. It is said that the defendants were enabled, on the strength of this mortgage bond, to have the claim of Kishori Babu settled on payment of Rs. 1,000, only. The Court below held that the plaintiff had proved that consideration of the bond was paid to the defendants. The latter have appealed to this Court.

The execution of the bond, as we have said, is admitted. It is also admitted that the defendants obtained these currency notes of Rs. 1,000 each from Hari Mohan, the mortgagee, but, as stated above, the defendants plead that the money with which the currency notes were purchased was their own. The plaintiff has examined the scribe of the deed and three witnesses to prove that three currency notes of Rs. 1,000 each and Rs. 1,000 in silver were paid to the defendants, and those witnesses have been believed by the Court below. The only evidence in support of the plea that the money with which the currency notes were purchased belonged to the defendants is that of defendant 1 himself. His statements on the point, however, are not corroborated by documentary evidence, and there does not appear to be any reason why the money was not changed to currency notes at Dacca and why Girish, the maternal uncle of defendant 1, took the money to Hari Mohan to Calcutta. It appears that the defendants borrowed Rs. 2,000 from one Hrishikesh, and it is the case of both the parties that the debt was paid off on the day of the execution of the bond with two of the currency notes of Rs. 1,000 each. The plaintiff Girish, who is the executor of the estate of the mortgagee, says that he and Janaki, defendant 2, took Rs. 2,000 (in two currency notes of Rs. 1,000 each) for payment to Hrishikesh at Dacca after the execution of the bond and the payment of the money thereunder, whereas the defendants' case is that the currency notes were with them, and that before the execution of the mortgage bond Girish, the maternal uncle of defendant 1, started for Dacca with two of the currency notes and paid the money to Hrishikesh on the 24th Ashar. There is, however, no satisfactory evidence to show that the currency notes were with the defendants before the 24th Ashar and the Court below has disbelieved the statement of defendant 2 that he did not accompany Girish to Dacca.

The evidence shows that the mortgage bond was executed at about 9 or 10 a. m. on 24th Ashar and that it takes about 13 or 14 hours to go from the village where the defendants reside to Dacca. It is contended that it was physically impossible for any person to start from the village after the execution of the bond and go to Dacca and make payment there on the same day to Hrishikesh Babu. Stress is laid upon the fact that the entry of the two currency notes appears in the account book of Hrishikesh Babu as the first entry on that day and that the notes were sold by the firm of Hrishikesh Babu to another firm on the very same day. There is positive evidence, however, that Girish arrived at Dacca at about 9 p. m. and that the firm was open for transacting business up to 11 p. m., and, if Girish started at 9 or 10 a. m. he might have arrived at Dacca at 9 or 10 p. m., if the tide and current were favourable. It was, therefore, not physically impossible for Girish to have made the payment on the 24th at Dacca even if he started after the money had been paid. There is no evidence that there was any entry earlier

than 9 or 10 p. m. on that day, and in the face of the positive evidence on the point, we are unable to attach any importance to the fact that it was the first entry on that day.

The money borrowed from Hrishikesh, according to the plaintiff, was paid to one Brojonath to whom a sum of Rs. 2,500 was due by the defendants. The defendants say that Brojonath's debt was paid off with the money which they had, and not with the money borrowed from Hrishikesh. The defendants' accounts, however, do not prove any such payment. It is pointed out that the hundis under which money was borrowed from Hrishikesh were executed more than a month after the date on which Brojonath's mortgage bond was paid off, and reliance is placed upon the endorsement on the mort gage bond and the entry in the account book of Brojonath. The account book, however, shows that only Rs. 1,225 was due on account of the mortgage bond and the Court below does not believe the endorsement upon the mortgage bond. We do not think that it has been satisfactorily proved that the mortgage bond was paid off on 14th Chaitra 1313. As already stated there is evidence of four witnesses to prove the passing of the consideration. The evidence shows that the bond was drafted and engrossed in the house of Hari Mohan and taken to the house of the defendants for signature.

It is pointed out that although there were respectable people in the locality, the attesting witnesses to the deed were only the servants of Hari Mohan or persons connected with him; and it is contended that Hari Mohan was not likely to have advanced a sum of Rs. 4,000 to the defendants—one of whom was a female and guardian of minors—without taking the precaution of having independent and respectable witnesses present at the execution of the bond and the passing of the consideration money. It is to be observed, however, that the lady herself had applied to the District Judge for sanction to raise a loan and that the draft of the mortgage was placed before the Judge. The applications for taking a certificate for guardianship and for sanction appear to have been made, and other proceedings connected with them to have been conducted, by a pleader Babu Mohini Mohan Das, who is a relation of defendant 3. Under these circumstances, Hari Mohan might not have thought it necessary to take as much care as he would otherwise have taken in dealing with a pardanashin lady. We need not discuss the evidence of the plaintiff's witnesses. They were before the learned Subordinate Judge and were believed by him. He came to the conclusion that the case set up by the defendants was not true and we do not see any sufficient reason for differing from him.

It is contended that even if Hrishikesh was paid Rs. 2,000 out of the Rs. 4,000 there is no evidence to show that there was any necessity for the balance of the loan or that the balance was applied by the lady for the benefit of the minors. The District Judge appears to have made some inquiries, which of course were ex parte. But he appears to have been satisfied as to the necessity for the loan and sanctioned the mortgage. Under these circumstances, the lender was not bound to go behind the order, and was entitled to rely upon the order of the District Judge sanctioning the loan unless he was a party to the fraud. The defendants have failed to prove that Hari Mohan was a party to the fraud, and if he acted bona fide, he is not bound to see to the application of the money. It is to be remembered that it was defendant 1 and defendant 3 who themselves represented to the Judge the necessity for the loan and the creditor appears to have acted upon such representation. Having regard to the fact that Babu Mohini Moham Das was the pleader who conducted the proceeding for sanction and acted for the defendants in the present suit in its earlier stages and is a relation of the defendants, we do not think that the transaction was fraudulent as stated by the defendants. Defendant 3 was putting up in his house when giving her deposition and she admits that Mohini Babu is a well-wisher of and knows the state of, the defendant's family. On reference to a letter, dated 22nd June 1911, written by Mohini Babu to the adopted son of Hari Mohan, it appears that Mohini Babu sent away the men who had come to Dacca to institute a suit on the mortgage bond and that he undertook to make arrangements to pay off the debts by selling certain properties of the defendants. It is impossible to hold that he was not aware of the real nature of the mortgage-bond.

If the defendants' case is true they themselves are to blame for having entangled themselves in the elaborate fraud alleged by them, and it would require far better evidence then they have produced in order to establish that fraud and to enable them to extricate themselves from the difficult situation in which they are placed. On the whole, we are unable to differ from the findings of the Court below that the consideration passed under the mortgage bond and that the mortgage bond was not a benami one. We see, however, no sufficient reason why the ordinary rule as to interest at the bond rate up to the date of grace and thereafter at six per cent. should not be followed in this case. The decree of the Court below will accordingly be varied by directing that interest at the bond rate will run up to three months from the date of the decree of the lower Court and that interest thereafter will be at the rate of six per cent. With this variation, the appeal is dismissed with costs.

V.B./P.K. *Decree varied.*

A. I. R. 1918 Calcutta 456

TEUNON AND SHAMSUL HUDA, JJ.

Natibulla Akanda and *others*—Defendants—Appellants.

v.

Badi Bepari—Plaintiff—Respondent.

Appeal No. 3310 of 1915, Decided on 15th August 1917, from appellate decree of Dist. Judge, Rungpur, D/- 23rd June 1915.

Bengal Tenancy Act (1885), S. 48—Raiyat sub-letting portion of holding—He cannot recover rent exceeding by 50 per cent amount which he himself pays for whole holding.

A raiyat who has sub-let a portion of his holding under a registered lease, cannot recover from the under-raiyat rent exceeding by 50 per cent the amount which he himself pays for the whole of the holding, [P 456 C 2]

To hold that S. 48 applies and can be applied only where the whole of a raiyat's holding is sub-let, would be to defeat the policy and intention of the legislature: 39 *Cal.* 839, *Expl.* [P 456 C 2]

Atul Chandra Gupta—for Appellants.

D. N. Bagchi—for Respondent.

Judgment.—This is an appeal by the tenants defendants in a suit for rent. It is conceded that the plaintiff-landlord is a raiyat. It is also conceded that the defendants-appellants are under-raiyats. It is further conceded that the defendants under-raiyats are holding under a registered lease. The holding it appears measures 15 bighas of land. The portion sub-let to the tenants defendants measures 7 bighas. The rent payable by the raiyat for his 15 bighas of land is Rs. 6-14-0. In respect of the 7 bighas he claims from the tenants-defendants at the rate of Rs. 27-8-0.

The appellants contend that by virtue of the provision of S. 48, Ben. Ten. Act, the utmost that the plaintiff raiyat is entitled to recover is rent at the rate of Rs. 6-14-0 plus 50 per cent., that is to say, Rs. 10-5-0. In the trial Court rent was decreed at that rate. But on appeal the District Judge on the strength of the case of *Nim Chand Shaha* v. *Joy Chandra Nath* (1) held that S. 48, Ben. Ten. Act, has no application where only a portion of the holding is sub let and he therefore decreed the suit for rent at the rate claimed. The tenants-appellants do not contend before us that they should pay at a lesser rate than the rate decreed by the Munsif, that is to say, they ask us to proceed on the assumption that the 7 bighas sub let to them is the only profit-yielding part of the holding to take the whole of the annual rent payable by the raiyat, add to it 50 per cent and determine that to be the rent payable to him.

It appears to us that in applying the case reported as *Nim Chand Shaha* v. *Joy Chandra Nath* (1) to a case such as this the learned District Judge has fallen into an error, and to hold that S. 48 applies and can be applied only where the whole of the raiyat's holding is sub let would be to defeat the policy and intention of the legislature. In the case cited as a matter of fact the rent for the whole holding was Rs. 21-4-0. The plaintiff claimed in respect of the portion sub-let a rent of Rs. 14. To have applied in that case the principle for which the appellants before us now contend would have been to decree a rent higher than the rent claimed. Here that is not so and in a case such as the present we think that the provisions of S. 48, Ben. Ten. Act can clearly be applied and that the annual rent for which the defendants-appellants contend is the maximum which the landlord is entitled to claim. Whether in fact on a strict application of S. 48 a lesser rent might not have been arrived at is a question into which we need not enter. In this view we set aside the decree of the District Judge and

1 (1912) 39 Cal 839=15 I C 256.

restore the decree of the Trial Court with proportionate costs in all Courts.

V.B./R.K. *Decree set aside.*

A. I. R. 1918 Calcutta 457

MOOKERJEE AND BEACHCROFT, JJ.

Atul Chandra Singha and *another*—Decree-holders—Appellants.

v.

Kunja Behari Singha—Judgment-debtor—Respondent.

Appeal No. 57 of 1917, Decided on 22nd August 1917, against order of Dist. Judge, Midnapore, D/- 24th August 1916.

Civil P. C. (1908), S. 144—Partition suit—Preliminary decree set aside on appeal—Final decree passed pending appeal is without force—Restitution can be ordered in respect of money levied under final decree and time begins to run from date of final decision in appeal against preliminary decree—Limitation Act, Art. 181—Civil P. C. S. 96.

When a preliminary decree for partition is set aside on appeal, no effect remains in the final decree which may have been passed pending the appeal from the preliminary decree. Consequently, a party from whom any money has been levied under the final decree so rendered inoperative, is entitled to restitution of the amount from the party who levied it on the basis of the final decree: 21 *I C* 510 and 38 *I C* 17, *Foll.* [P 457 C 2]

In such a case time begins to run against the party claiming restitution from the date when the final pronouncement is made in the proceedings instituted to test the propriety of the preliminary decree. [P 457 C 2]

Satkawripati Roy—for Appellants.

Jyoti Prosad Sarbadhikarry—for Respondent.

Judgment.—This is an appeal against an order for restitution made by the lower appellate Court in confiramation of that of the trial Court. The appellant was the plaintiff in a suit for partition of joint property brought against the respondent and another person. A preliminary decree was made on 9th September 1910. The defendant other than the respondent preferred an appeal against that decision. That appeal was ultimately allowed and the preliminary decree was set aside in its entirety on 29th November 1911. The appellant thereupon preferred a second appeal to this Court. That appeal was dismissed on 19th April 1915. Meanwhile, on 1st September 1911 the final decree had been made by the Court of first instance on the basis of the preliminary decree of 9th September 1910. The appellant was entitled to receive certain sums from the respondent under the final decree so made and on 29th April 1911 he realised these sums. On 10th April 1916 the respondent applied for restitution of those sums of money. The Court of first instance allowed the application on 17th June 1916 and that order was confirmed by the lower appellate Court on 24th August 1916.

The question in controversy is whether the order for restitution has been properly made. It is clear that the effect of the cancellation of the preliminary decree was to render inoperative the final decree. This view is supported by the decision in *Abdul Jalil* v. *Amar Chand Paul* (1), where it was ruled that when a preliminary decree for partition has been set aside on appeal, no effect remains in the final decree which may have been passed pending the appeal from the preliminary decree. We must take it, then, that the final decree is no longer operative. Consequently, the respondent is entitled to restitution of the sums levied from him by the appellant on the basis of that decree. This is clear from the decision in *Asutosh Goswami* v. *Upendra Prosad Mitra* (2). It was there pointed out that the doctrine of restitution applies, not only when the decree has been set aside directly on review or by way of appeal, but also where the decree ceases to be operative by reason of cancellation of another decree or order which forms its foundation. The respondent is thus entitled to restitution from the appellant if his claim is not barred by limitation. The appellant contends that the rule applicable to case of this character is contained in Art. 181, Sch. 1, to the Lim. Act, and that the application should have been made within three years from the date when the preliminary decree was reversed by the lower appellate Court, that is, from 29th November 1911. As explained in *Asutosh Goswami* v. *Upendra Prosad Mitra* (2), it is not necessary for us to decide whether any rule of limitation is applicable to cases of this character, because even if Art. 181 applies, time ran against the respondent from the date when the final pronouncement was made in the proceedings instituted to test the propriety of the preliminary decree. An application for restitution immediately on reversal of the preliminary decree by the first appellate Court would have been futile; the appellant, who had pre-

1. (1919) 21 I C 510.
2. (1917) 38 I C 17.

ferred a second appeal, cannot very well maintain the position that the respondent should have pressed for restitution at a time when the appellant was seriously controverting the decision of the lower appellate Court as to the correctness of the preliminary decree. If an application had been made at that stage, it would have been undoubtedly contended that no restitution should be allowed till the question of the correctness of the preliminary decree had been finally decided by the ultimate Court of Appeal where the appellant had lodged an appeal.

We are accordingly of opinion that the order of the District Judge must be affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold mohur.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 458

FLETCHER AND NEWBOULD, JJ.

Helaluddi Molla — Defendant--Petitioner.

v.

Abdul Gafur — Plaintiff — Opposite Party.

Rule Nisi No. 377 of 1917, Decided on 18th July 1917, against the order of Munsif, 2nd Court, Bagerhat.

Prov. Small Causes Courts Act (9 of 1887), Art. 35 (ii)—Suit for damages for cutting and taking away trees is excluded.

A suit for recovery of damages for trees alleged to have been forcibly cut and taken away by the defendant is excluded from the cognizance of a Small Cause Court. [P 459 C 1]

Prokash Chand Majumdar—for Petitioner.

FACTS. will appear from the following petition: In the matter of an application under S. 115, Civil P. C., and S. 25, Provincial Small Cause Courts Act, against the ex parte decree passed on 2nd February 1917 in Small Cause Court Suit No. 670 of 1916 by the Second Munsif, Bagerhat. And in the matter of Helaluddi Molla alias Elai Molla Defendant-Petitioner versus Abdul Gafur, Plaintiff, Opposite Party.

To

The Hon'ble Sir Lancelot Sanderson, Kt., C. J., and his companion Justices of the said Hon'ble Court. The humble petition of the adovenamed petitioner, most respectfully sheweth.

That the abovementioned suit was filed on 4th December 1916 by the plaintiff above named against your petitioner for recovery of Rs. 65 as damages for trees alleged to have been forcibly cut and taken away by your petitioner. That your petitioner entered appearance on 12th January 1917 and filed his defence on 15th January 1917. That the principal contentions of the defendant were that suit of the present nature was not cognizable by a Court of Small Causes, that the plaintiff had no title to or possession in the land and the suit was instituted by way of a test case with the fraudulent motive of establishing a false title at the instigation of his father with whom the petitioner and his cosharers had a long standing dispute. That on 19th January 1917 upon your petitioner's application, the Court ordered the issue of summons on his witnesses on the condition that the money should be deposited within a day, failing which the application would stand dismissed and on the same date upon the plaintiff's prayer the case was adjourned for hearing to 2nd February 1917. That on 2nd February 1917, the aforesaid date of hearing, your petitioner filed an application that the returns of the service of summons on his witnesses who were absent not having been filed in Court, he was unable to take further steps to secure their attendance and that as such adjournment of fifteen days might be granted to him for taking the necessary steps. That the learned Judge rejected the said application and called upon the plaintiff to prove his case and on hearing his witnesses decreed the suit in part for Rs. 40 with Rs. 10-3-0 costs ex parte against your petitioner on the same date, 2nd February 1917. Your petitioner being aggrieved by the aforesaid decree begs leave to move your Lordships against the same on the following amongst other

Grounds.—1. For that the Court of Small Causes had no jurisdiction to try the present suit under the provisions of the Provincial Small Cause Courts Amendment Act 6 of 1914. * * * * Your petitioner, therefore, prays that your Lordships may be pleased to issue a rule on the opposite party to show cause as to why the ex parte decree should not be set aside and the suit dismissed or re-heard and on hearing any cause shown make the rule absolute or pass such other orders as to your Lordships may seem fit and proper."

Judgment.—This rule must be made

absolute. It is quite clear from the cause of action as given in the proceedings of the Court that the suit is of a nature mentioned in Art. 35 (ii), Sch. 2, Provincial Small Cause Courts Act. A suit of that nature is excluded from the cognizance of the Small Cause Court. The rule must, therefore, be made absolute. We make no order as to costs, as the opposite party has not entered appearance.

V.B /R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 459 (1)

FLETCHER AND NEWBOULD, JJ.

Baikanta Nath Chatterjee and *others*—Plaintiffs—Appellants.

.v

Lakshan Chandra Chatterjee and *others*—Defendants—Respondents.

Appeal No. 1841 of 1916, Decided on 17th July 1917, from appellate decree of Addl. Dist. Judge, 24 Parganas, D/- 26th June 1916.

Lease— Construction — Words "istimrari mourasi mokarrari" mean permanent and heritable even in absence of words indicating heritable interest.

The words "istimrari mourasi mokarrari" in a lease always mean permanent and heritable and not merely permanent for the life of the grantee, even where no other words indicating a heritable interest, such as "the grantee, his sons and grandsons in succession should enjoy the property in perpetuity" are used in the document

[P 459 C 2]

Jogesh Chandra Roy—for Appellants.

Brajolal Chakraburtty— for Respondents.

Judgment.—This appeal, which has been preferred against a decision of the learned Additional District Judge of the 24 Parganahs reversing the decision of the Munsif at Baripur, must be dismissed. The plaintiffs who are the appellants before us brought the suit with reference to an encroachment on a road and the removal of the trees growing thereon, which they alleged to be the property in ijmali between them and the defendants and also with reference to the excavation of a khal in certain property which the plaintiffs alleged had fallen into their sole lot in a certain partition proceedings. The persons said to have encroached upon the road were defendants 1 and 2 The other defendants are said to have excavated the khal. Certain incidental and consequential reliefs were also asked for. The learned Munsif decreed the suit against all the defendants disbelieving a certain document Ex. A which was stated to be an istimrari mourasi mukarrari patta. The first two defendants appealed to the learned Additional District Judge. There the learned Additional District Judge accepted the istimrari maurasi mokarari patta as being a genuine document and, on that footing, he held that defendants 1 and 2 who were the appellants before him were justified in doing the acts complained of. Here, it has been argued in the first instance that the document is not a permanent heritable lease but is a lease for the life of the grantee, on the ground that there are no words in this lease that commonly appear in documents creating a permanent lease stating that the grantee, his sons and grandsons in succession should enjoy the property in perfect felicity so long as the moon and the stars last. Of course, it is not necessary to use all these words, that the grantee, his sons and grandsons in succession should enjoy the property in perfect felicity and that the grant is for the period so long as the moon and the stars last, in a document of this nature. It would be quite sufficient if other words indicating a heritable interest are used. The words istimrari mourasi mokarrari have always been held to mean permanent and heritable.

Another point has been urged by Mr. Roy which, if established, would have been a good point, and that is that the appeal to the lower appellate Court had been preferred by defendants 1 and 2 only but the learned Additional District Judge has set aside the whole decree made by the Munsif An examination of the record, however, shows that that is not so. The learned Judge only set aside the Munsif's decree in so far as it affected defendants 1 and 2. That is clearly right. The present appeal, therefore, fails and must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 459 (2)

FLETCHER AND CHATTERJEA, JJ.

Sita Nath Saha Bonik—Judgment-debtor—Appellant.

v.

Madan Mohon Das—Decree-holder—Respondent.

Appeal No. 538 of 1915, Decided on 10th August 1917, from order of Sub-Judge, 1st Court, Sylhet, D/- 7th September 1915.

Civil P. C. (1908), O. 34, R. 5—Method of execution of mortgage decree is provided by final decree and cannot be altered at instance of judgment debtor and to the prejudice of decree-holder.

The method in which the execution of a decree in a mortgage suit is to take place is provided for by the final decree and cannot be altered at the instance of the judgment-debtor and to the prejudice of the decree holder. The rights of the mortgagee under the decree cannot be interfered with by the Court in any way either by intercepting the rents and profits or by restraining the sale of the property by the appointment of a receiver. [P 460 C 1]

Probodh Chandra Roy—for Appellant.

Gopal Chandra Das—for Respondent.

Fletcher, J.—This is an appeal by the judgment-debtor against an order of the learned first Subordinate Judge of Sylhet, dated 7th September 1915. The appeal is a novel one. So far as I know, there is no authority to support the case. The appeal arises out of what is called an execution case in a suit to enforce a mortgage. That means that there has been an execution case in a mortgage suit with regard to the final decree and under the terms of the law in the country, the form of the decree passed in a mortgage suit is a statutory form which the Court must pass when the plaintiff succeeds in the mortgage suit. In this case, the decree provides that the property shall be brought to sale. The judgment-debtor now comes and asks that the property shall not be brought to sale, and the reason for which he says he does not want the property to be brought to sale is, that in some other suit in which several other creditors sued him, he got a receiver appointed of his properties and that he would rather that this property should be taken charge of by the same gentleman who has been appointed the receiver than that it should be brought to sale in the ordinary course by the Court. No case is shown where, at the instance of the mortgagor, the mortgagee's rights under the decree have been interfered with by the appellate Court in any way either by intercepting the rents and profits or by restraining the sale of the property.

If the judgment-debtor be in a position to pay off the amount due on the mortgage at any time prior to the actual sale, the law provides for the re-opening of the foreclosure and the acceptance of the money. If that is what the judgment-debtor has in his mind, it is perfectly simple to him either himself or through some of these other creditors who are acting with him to apply to the Court to re-open the foreclosure, notwithstanding the length of time that has elapsed, upon payment of all money that now remains due to the decree-holder. The present application is a wholly novel application and one that I think ought not to be assented to. The case of equitable execution bears no relation at all to the present case. The method in which the execution is to take place is provided for by the final decree. That cannot be altered at the instance of the judgment-debtor and to the prejudice of the decree-holder. I think the present appeal fails and must be dismissed with costs, five gold mohurs.

Chatterjea, J.—I agree.

V B /R.K. *Appeal dismissed.*

A. I R. 1918 Calcutta 460

FLETCHER AND RICHARDSON, JJ.

Rahmatulla Sheikh—Defendant—Appellant.

v.

Isabuddin Sarkar and *others*—Plaintiffs—Respondents.

Appeal No. 1625 of 1915, decided on 14th February 1917, from the Appellate decree of Dist. J., Rangpur, dated 6th May 1915.

Landlord and Tenant—Ejectment—Suit to eject under-raiyat on expiry of term of Kabuliyat—Kabuliyat providing stipulation for second settlement—Under raiyat not expressing willingness to carry out stipulation—Landlord held entitled to decree for ejectment—Tenant was not entitled to plead equitable defence to possess land—Time is not essence of contract.

In a suit brought by the plaintiff, a raiyat, to eject the defendant, an under-raiyat, on the expiry of the term of his kabuliyat which contained a condition to the effect that on the expiry of the term of the lease the tenant shall take a second settlement and unless he does so he shall have no interest in the land, the defendant pleaded that the kabuliyat was improperly obtained from him by the plaintiff and he was, therefore, not bound by the terms thereof, but he did not say that he was willing to take a fresh settlement nor did he express such willingness until after the close of the evidence and apparently when the case was being argued:

Held: that the plaintiff was entitled to a decree for ejectment when it was found that the terms of the kabuliyat were binding upon the defendant and that the defendant was not entitled to plead an equitable defence against the plaintiff's right to possess the land, as he never pleaded that he was ever ready and willing to take a second settlement and did not prove that he was ready and willing to perform his part of the contract. [P 461 C 2]

In a case of this nature, time is not of the essence of the contract unless it is made so. [P 461 C 1]

Atul Chandra Gupta—for Appellant.

Bepin Behari Ghosh—for Respondents.

Fletcher, J.—This is an appeal by the defendant from a decision of the learned District Judge of Rangpur, dated the 6th May 1915, reversing the decision of the Officiating Munsif of Gaibanda. The suit was brought by the plaintiff, a raiyat, to eject the defendant, an under-raiyat, whose term had expired. Against the plaintiff's claim, the defendant pleaded that the kabuliyat which he had executed in favour of the landlord, the plaintiff, had been obtained from him improperly and so he was not bound by the terms thereof. That point has been found against the defendant. The kabuliyat contained a condition to the following effect: "On the expiry of the term of the lease, I shall take a second settlement. Unless I do so, I shall have no interest in the land." The defendant has not taken a fresh settlement and, according to his contract, he is to have no interest in the land. He never said that he was willing to take a fresh settlement and he never expressed his willingness until after the close of the evidence and apparently until the case was being argued.

The defendant's case was that he was not bound by the terms of the document at all; and the case whether he had always been ready and willing to perform his part of the contract by taking a fresh settlement was never tried. If that case had been in issue instead of the case as to whether the defendant was or was not bound by the terms of the agreement, the plaintiff might have produced evidence to show that the defendant far from being ready and willing to perform the contract was in default and had been in repeated defaults. It is quite true, as Mr. Gupta, who appears for the defendant-appellant, says, that in a case of this nature, the time is not the essence of the contract unless it is made so. But notwithstanding that, except the statement made before the learned Judge, there is nothing to show that the defendant was ever ready and willing to perform his part of the contract; and, unless he was ready and willing to perform his part of the contract, the plaintiff was entitled to eject him. It is only when he proves that he was ready and willing that he would be able to plead an equitable defence against the plaintiff's right to possess the land. In this case, if the defendant meant to rely upon this point, he ought to have set it up in his written statement and had a distinct issue raised on it instead of pleading a false case as it turns out to be that the kabuliyat had been taken from him by improper means. Although the reasons given by the learned Judge in his judgment express somewhat too broadly the duties of the defendant under the terms of the agreement, I am satisfied that this defendant never did set up in the suit, until he was far too late, that he was willing to be bound by the obligation in the kabuliyat and that he had always been ready and willing to perform his part of the contract. That case cannot be properly decided without having the point raised in proper time and without having an issue properly framed on the point and evidence taken on both sides as to whether the defendant's statement is or is not true. I think, on the whole, that the result arrived at by the learned District Judge decreeing the plaintiff's suit is correct. The present appeal, therefore, fails and must be dismissed with costs.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 461

CHITTY AND SMITHER, JJ.

Jagadish Chandra Deo Dhalel Deb—Defendant—Appellant.

v.

Sridam Mahata and *others*—Plaintiff and Defenants—Respondents.

Appeal No. 577 of 1915, Decided on 27th November 1917, from appellate decree of Addl. Dist. Judge, Midnapore, in T. A. No. 530 of 1913.

Landlord and Tenant—Right of tenant—Transfer of jote by original tenant—Landlord aware of transfer although name of transferee not registered—Landlord obtaining collusive decree against heirs of original tenant—Transferee's right to jote held not extinguished by sale in execution of decree—Transfer of Property Act (1882), S. 26.

A mourasi mokurari jote was held by P., who bequeathed it to the plaintiff. The plaintiff's name not having been registered in the landlord's books, the landlord, though aware of the bequest in plaintiff's favour, sued the heirs of P. for rent, got a collusive decree and in execution thereof sold away the jote:

Held: that the plaintiff's right to the jote was not extinguished by the sale in execution of the landlord's decree for rent against the heirs of P. [P 462 C 2]

Rash Behari Ghose, *Bepin Behari Ghose*, *II* and *Siresh Chandra Das*—for Appellant.

Siba Prasanna Bhattachariya and *Pasupati Nath Sastri*—for Respondents.

Judgment.—In this case the plaintiff Sridam Mahata sued to recover possession of 137 bighas odd in Mouza Dakhina, on the ground that he had a mourasi mokurari jote mondali right under defendant 1. The plaintiff pleaded dispossession on 29th July 1898 and he filed his suit on 22nd June 1910, just within 12 years. The point of limitation was taken both in Courts below and in this Court but has not been seriously pressed before us, as it appears that the suit of the plaintiff which was first filed in the 4th Munsif's Court was presented by him in that Court with due diligence and was only returned to be presented before the higher Court when it was found that the value of the land exceeded the amount of the Munsif's jurisdiction. The point of law relied upon by defendant 1, who is the appellant in this Court, is that the title of the plaintiff was extinguished by the sale by the landlord, defendant 1, in pursuance of the decree in the suit of 1894 which the predecessor of the defendant 1, Ishwar Chandra Deb, brought against Gangadhar Mahata, defendant 4, one of the heirs of Pahal Singh—the original owner of the property. It was argued that defendant 1 had the right to ignore the present plaintiff as he was not registered as the tenant of this property. It is not disputed that the land in question originally belonged to Pahal Singh—the father-in-law of the present plaintiff —who by his will dated 13th December 1880 left it to the plaintiff. That will was duly proved in 1883 after the death of Pahal Singh, and it appears that the plaintiff was in possession from 1883 to 1887 and again from the date of his decree at the end of 1894 until he was dispossessed in 1898.

The Subordinate Judge in the Trial Court has found that the suit brought by Iswar Chandra against Gangadhar in 1894 was collusive and in fraud of the plaintiff. The plaintiff had during the pendency of that suit been suing the heirs of Pahal Singh and also Iswar Chandra. That suit was decreed against the heirs of Pahal Singh and the plaintiff's right to this property was duly decreed. The suit was dismissed formally against Iswar Chandra, because he was not a party to the dispossession of the plaintiff at that time. But the decree was passed in his presence and it is clear that he knew perfectly well that the plaintiff Sridam Mahata was the transferee of the property and that defendant 4, against whom he brought the suit for rent, had no right whatever to it. Reliance was placed by the defendant on the Full Bench ruling in the case of *Sham Chand Koondoo* v. *Brojonath Pal Choudhry* (1). In that case it was held that it was intended that the zamindar should be at liberty to treat as the holder of the tenure, and as the person whom he might sue for the arrears of rent, the person who was registered in his books as the owner, unless any one could show that there had been a transfer, and that there was sufficient cause for its non-registration. That exception is very important in this case, because undoubtedly here there was a transfer in favour of the present plaintiff and equally without doubt defendant 1 knew all about it, having been a party to that suit. Instead of doing as he ought to have done under S. 26, T. P. Act, namely, admitting the plaintiff's transfer to registry, he brought the fraudulent and collusive suit against defendant 4, carried that decree to execution and brought about what was an equally fraudulent and improper sale of the property with the express view of ousting the present plaintiff. It appears to us that that creates an exception in this case from the general rule and that it would be impossible for the Court to give relief on the bare statement of the law to a man who has thus behaved.

Another point was intimated by the learned pleader for the appellant which affects the respondent more materially than the defendant-appellant, and that is, that the decree in the case is incapable of execution inasmuch as, while the Courts have declared that the plaintiff is entitled to khas possession of the 137 bighas odd in Mouza Dakhina, they have not specified to which 13 bighas they refer. We think, for the further security of the plaintiff-respondent, that the learned District Judge should be asked to specify by boundaries, after such inquiry as he may

1. (1874) 21 W R 94=12 B L R 484.

find necessary, the 137 bighas 7 cottahs 9 chataks, in respect of which the decree was passed. On his reporting to this Court, the decree in this appeal will be drawn up. The learned Disrtict Judge should be asked to correct the decree in this particular within a month from the receipt of the record by him. The plaintiff-respondent must have his costs of this appeal from the defendant appellant. Let the record be sent down without delay.

V.B./R.K. *Record sent down.*

A. I. R. 1918 Calcutta 463

FLETCHER AND RICHARDSON, JJ.

Satish Chandra Neogi — Defendant—Appellant.

v.

Sarat Sundari Debya—Plaintiff—Respondent.

Appeal No. 2167 of 1915, Decided on 30th January 1917, from appellate decree of Sub-Judge, Bogra D/- 2nd August 1915.

(a) Will—Construction— Clause providing that if wife lived permanently is his place of abode or family dwelling-house she should get Rs. 50 for maintenance—Further clause stating that testator had no family dwelling-house but he intended to build one and that upon his failure executors may build it--No house built—Widow living elsewhere than in her father's house but not in testator's abode is entitled to annuity

Where a testator by his will granted an annuity to his wife by a clause in the will, which provided that on her living permanetly in his place of abode or family dwelling-house she would get for her maintenance Rs. 50 per month out of the estate up to the end of her life, and there was a further clause in the will in which the testator stated that he had no family dwelling-house but he intended to build one, and if he did not do so his executors should build a family dwelling-house if they thought necessary :

Held : (on the construction of the clauses, that as no family dwelling-house was built by the testator or by the executors, the widow was entitled to the annuity if she lived eslewbere than in her father's house but not in the abode of the testator. [P 464 C 1]

(b) Hindu Law — Joint family dwelling-house.

A family dwelling-house in a Hindu family is a place that has a separate and distinct meaning which is recognized by every Hindu. [P 464 C 1]

Sasadhar Roy (Jr)—for Appellant.

Broja Lal Chakrabarty and *Ramakanta Bhattacharjee*—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned Subordinate Judge of Bogra, dated 2nd August 1915, affirming a decision of the Munsif of the same place. The first appeal is by the defendant. The step-mother of the defendant, who appears to be a young widow, brought the suit to recover the arrears of annuity given to her under the will of her late husband, the father of the plaintiff. The defence was that the annuity was not payable under the terms of the will. Both the lower Courts, after considering the will, have come to the conclusion that the annuity is payable. The annuity was given to the plaintiff by Cl. 6 of her late husband's will. We have not got an official translation of the will but the translation given to us by the learned vakil who has conducted the case for the appellant may be taken as correct. It runs in these terms :

"My second wife, Srimutti Sarat Sundari Debi living permanently in my place of abode or family dwelling-house will get for her maintenance Rs. 50 per month out of my estate up to the end of her life. But she shall not get the said maintenance if she does not live a religious life and bear a good character and also if she lives in her father's house."

The last clause of the will was a statement by the deceased that at present he had no family dwelling-house but he intended to build one, and if he did not do so he gave a discretion to his executors to build a family dwelling-house if they thought necessary. It is common ground that the deceased had no family dwelling-house at the date of his death or at the date of the will and the executors have never created a dwelling-house pursuant to the discretion vested in them by the last clause of the will. The plaintiff is now living in the town of Bogra. It is said therefore that this young lady is not entitled to any maintenance at all. The case set up in the lower Courts was that under the terms of the will, the plaintiff had to live in Benares. That case has been properly abandoned in this Court. The young lady is a Bengali lady and it is impossible that the testator should have in view that his youthful widow should go out of Bengal altogether and reside alone in the United Provinces, far away from all her relations. The slightest knowledge of the customs obtaining in this country would at once tell any one that such a provision would not have been contemplated by the testator.

The next suggestion was that the plaintiff was bound to live in a house at Adamdighi. The Judge has found that that is not a family dwelling-house. That in my view is quite sufficient to dispose of the question as to whether she has to live in the house at Adamdighi. But the

facts as proved on the evidence are quite inconsistent with the house at Adamdighi being the class of dwelling-house that is contemplated by Cl. 14 of the will. In Adamdighi there is a thakurbari and attached to it there is a cutchery containing two rooms. That obviously at the date of the will of the testator could not have been a family dwelling-house in which the testator contemplated that his youthful wife should reside after his demise. It is said and apparently that has been found that the house at Adamdighi has been enlarged by the defendant and that it would be possible for the lady, if she so wishes to go and reside there with the defendant. But that does not answer the description of the family dwelling-house contemplated by Cl. 14 of the will The family dwelling-house contemplated there was a dwelling-house erected by the testator or erected by his executors after his death, if they thought it necessary. Nothing is said in the will as to any family dwelling-house being erected by the defendant. The will when properly construed does not mean that, and we are not entitled to read into the condition words so as to make the condition wider than stated by the testator.

Another question arises on para. 6 of the will—that is, a forfeiture clause. It is with reference to the wife's residing in his father's house. If she resides in her father's house the gift is forfeited. It may well be said that the failure to observe the condition as to residing in the family dwelling-house does not give rise to a forfeiture in the event of her residing elsewhere than the father's house but not in the abode of the testator. The real fact is that the condition that the testator contemplated in this case, namely, the subsequent erection either during his lifetime or after his death by his executors of what is known as the family dwelling-house, which in a Hindu family is a place that has a seperate and a distinct meaning and which is recognized by every Hindu, never did arise. The lady therefore had no family dwelling-house where she is bound to seclude hereself during her widowhood. She was not bound to go to the enlarged cutchey house because the defendant wished her to do so. It may be that the defendant, having regard to his position, and perhaps rightly so, feels that his dead father's widow ought not to live away from the family. That of course is a matter which we have nothing to do with. We have to abjudicate upon the rights of the widow as set out in the will without any reference as to where she ought to live and whether her living where she at present lives is or is not proper according to the Hindu social customs. All that we have to see is whether under the circumstances appearing in the case, the plaintiff is entitled to receive the annuity of Rs. 50 per month given to her by the will of her late husband. In that view of the case the present appeal fails and must be dismissed with costs.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 464

FLETCHER AND NEWBOULD, JJ.

Bhupendra Kumar Sarkar and *others* —Plaintiffs—Appellants.

v.

Kissori Dasi — Defendant — Respondent.

Appeal No. 3585 of 1914, Decided on 1st March 1917, from appellate decree of Dist. Judge, Berhampore, D/- 19th August 1914.

(a) Bengal Tenancy Act (1885), S. 68—Tender proper—Interest on arrears of rent can be disallowed.

In decreeing a suit for arrears of rent a Court is entitled under S. 68 (1) to disallow interest to the landlord-plaintiff, if it finds that a proper tender had been made by the tenant-defendant of the rents due before proceedings were instituted for their realisation. [P 465 C 1]

(b) Bengal Regulation (8 of 1819),—Application for recovery of rent in arrears—Collector has quasi-judicial capacity to determine actual rent due and to make order as to costs in proceedings before him.

Under the provisions of Regn. 8 of 1819 the Collector has power, when an application is made under the regulation for the purpose of realising the rent in arrears, to determine the actual rent due and has a quasi-judicial capacity, and therefore has jurisdiction to direct in what manner the costs of the proceedings before him ought to be borne. [P 465 C 2]

(c) Practice—Costs—Tender of rent due under S. 38, Contract Act, before institution of suit by tenant—Landlord can be directed to pay tenant's costs of suit.

Ordinarily a litigant, who succeeds on his claim although he may be deprived of his costs for some reason, cannot be ordered to pay the costs of the other side. But in a case where the tenant defendant having tendered the rent due made an offer of performance under S. 38, Contract Act, before a suit was instituted for its recovery, the Court which decrees the suit has jurisdiction to direct that the plaintiff should pay to the defendant his costs in the suit. [P 465 C 2]

Karunamoy Bose—for Appellants.

Ram Chandra Majumdar—for Respondent.

Fletcher, J.—This is an appeal by the plaintiffs against the judgment of the learned District Judge of Berhampore, dated 19th August 1914, affirming the decision of the Munsif of the same place. The plaintiffs brought the suit to recover the rent in arrear, they being the zamindars and the defendant being the patnidar under them. The plaintiffs put in before the Collector an application under Regn. 8 of 1819, for the purpose of realising the rent in arrears. They claimed a sum in excess of what was admitted by the defendant. The result was that the Collector having adjudicated under S. 14 of the Regulation on this matter found the rent to be as stated by the defendant and awarded a sum of Rs. 32 to the defendant as her costs in the proceedings before him. The plaintiffs did not accept this and brought the present suit for recovering the rent in arrears. The suit failed in both the lower Courts and the grounds on which it failed are these:—First of all the Courts found that a proper tender had been made by the defendant of the rent due before the proceedings were instituted and that, therefore no interest ought to be awarded to the plaintiffs under S. 68 (1), Ben. Ten. Act. The second finding was that the defendant was entitled to set off the sum of Rs. 32 awarded to her as costs by the Collector and the third finding was that the defendant was entitled to get damages under the provisions of S. 68 (2), Ben. Ten. Act. At the hearing of the appeal before us, another point was made, namely, that there was a clear admission in the written statement that a sum of Rs. 75-8 6 was due to the plaintiffs and that the Courts ought not to have gone behind that admission. But this last point is not raised in the grounds of appeal before us and apparently it was not raised in the grounds of appeal before the lower appellate Court. It is too late now to consider this point, that was not made until the case was actually argued before us.

Now, as to the first point, namely the disallowance of interest, the learned Judge was clearly entitled to disallow interest under S. 68 (1), Ben. Ten. Act, he having found that the defendant had made an offer of performance within the meaning of S. 38, Contract Act. Once he has made that finding, then the defendant is not responsible for the non-performance; that means that she is not liable to pay interest on the amount due. The second point was that the Collector had no jurisdiction under the provisions of Regn. 8 of 1819 to award to the defendant any costs of the proceedings before him. Mr. Majumdar, who has conducted the appeal on behalf of the defendant respondent, has given us an interesting historical statement as to the position of the Collector under that Act and as to how he came to supersede the civil Court as originally provided in the regulation. I think the case rested on a broader basis than that. The Collector had power to determine the actual rent and had a quasi-judicial capacity and therefore had jurisdiction to direct in what manner the costs of the proceedings before him ought to be borne. I think the learned Judge was right in coming to the conclusion that the costs before the Collector awarded in favour of the defendant should be set off as against the amount sued for. The next point was as regards the claim under S. 68 (2), Ben. Ten. Act. The learned Judge has found that the suit was instituted without reasonable and probable cause and in that view, sub-S. (2), S. 68 clearly gave the Court jurisdiction to award damages under that section.

Finally the learned Judge directed the plaintiffs to pay the costs of the suit. Ordinarily of course, a litigant who succeeds on his claim, although he may be deprived of his costs, cannot be ordered to pay them. But in a case that comes under S. 38, Contract Act, the defendant is not responsible for non-performance and if he is not responsible for non-performance, if he is not awarded the costs of the suit, it may be said that he is made responsible for the non-performance of the contract. I think, therefore, that the Judge had jurisdiction to direct that the plaintiff should pay to the defendant her costs in the suit although not twice over, as was apparently ordered by the Munsif. In the lower appellate Court, apparently the order for costs was not made twice over and the order, though made in that form in the Court of first instance, may perhaps be varied by simply altering the decree of the Munsif from one dismissing the suit with costs to a simple dismissal of the suit without any order as to costs, the defendant having already been given

credit for the amount awarded to her by the Court for the costs of the suit. Subject to this slight alteration in the decree of the Court of first instance, the present appeal fails amd must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 466

FLETCHER AND RICHARDSON, JJ.

Abdul Aziz Mandal and *others*—Defendants—Appellants.

v.

Behari Lal Biswas and *others*—Plaintiffs—Respondents.

Appeal No. 2328 of 1915, Decided on 22nd June 1917.

Putni Regulation (1819), S. 13 (4)—Tenure-holder put in possession is landlord for time-being and limitation to recover arrears of rent by him is regulated by Ben. Ten. Act (1885), Sch. 3, Art. 2.

A tenure-holder or dur-patnidar who on deposit of the putni rent is put into possession of a putni under the provisions of S. 13, sub-S. 4, Regn. 8, of 1819, occupies the position of a mortgagee put into possession of the mortgaged property under an English mortgage, and is a landlord for the time being of the defaulting putnidar's tenants within the meaning of the Ben. Ten. Act. Therefore, he has a right to recover the unrealized rent that accrued due before he was put into possession and the period of limitation for his suit to recover the arrears of rent is that provided for in the Ben. Ten. Act, and not that under the Limitation Act. [P 466 C 2, P 467 C 1]

Jogendra Nath Mukherjee—for Appellants.

Tarakeswar Pal Chowdhury—for Respondents.

Fletcher, J.—This is an appeal by the defendants against a judgment of the learned Subordinate Judge of Nadia, dated 2nd June 1915, affirming the decision of the Munsif of Ranaghat. The suit was brought for rent of four holdings. The plaintiff sued as the person entitled to a lien, he being put in possession of the property under the provisions of S. 13, sub-S. (4), Regn. 8 of 1819. The suit was brought for the years 1316 and 1317. A portion of the rent of 1316 had accrued due prior to the date the mortgagee, the plaintiff, was put into possession. Out of the points that were raised in the lower Courts, only two points have been argued in this Court. The first point is whether the plaintiff can recover as a landlord within the meaning of the Ben. Ten. Act, the kist of rent for1316, which accrued due before he was put into possession under the provisions of S.13, sub-S. (4), Regn. 8 of 1819; and the second point is,

"does the period of limitation for recovery of rent provided for in the Ben. Ten. Act apply to this case or is the plaintiff's claim governed by the period provided for by the Limitation Act?"

These are the only two points that are open on the present appeal. The other question as to whether the lien of the plaintiff had been satisfied or not, which has been attempted to be argued with some force, is a matter which was not urged in the lower Courts and is not purely a question of law and partly depends on a consideration of other facts which have not been gone into. The first point for consideration is,

"what is the position of the person, tenure-holder or the dur-putnidar, who pays the rent in order to save the putni from being brought to sale under the provisions of S. 13, sub-S. (4), Regn. 8 of 1819?"

The sub-section says that he should be considered to have a lien and that that lien is to be in the same manner as if the loan had been made on a mortgage. That is the first provision. The second provision is that he is entitled to obtain immediate possession of the tenure of the defaulter in order to recover the amount so advanced from any profits belonging thereto. The position is the same as that of a mortgagee put into possession under an English mortgage, namely, where the mortgagee can enter into possession by virtue of his mortgage, collect and receive rents and grant receipts for the same. He is not treated as a simple mortgagee who has only the right to have the property brought to sale by a Court of Law for the satisfaction of his claim, but he is given the express right of a mortgagee in possession and he has the right also to recover the amount so advanced from any profits belonging to the property. According to the Ben. Ten. Act, a tenant has got to hold under the landlord. The question is, whether the tenant holds under the mortgagee in possession under S. 13, sub-S. (4), Regn. 8 of 1819, that is, whether the mortgagee in possession is a landlord. I think clearly he is a landlord. He is the only person who having been put into possession can give the tenants receipts for rent. No other person, having regard to the terms of the section, can give the tenants a discharge and, therefore, I think, the person put into possession under sub-S. (4), S. 13, Regn. 8 of 1819, is a landlord

within the meaning of the Ben. Ten. Act. Then the question is,

"does the sub-section vest in the person put into possession under the terms of it a right to recover the rent in arrears that has not been paid or realized?"

I think it clearly does. The words used are that the person making the payment is to be put into possession in order to recover the amount from any profits belonging thereto. Rents due and unrealized must be profits belonging thereto and being such they pass by virtue of the sub-section to the plaintiff. The next point is, as I have already stated, "Is the mortgagee in possession a landlord"? I have remarked above that there seems to be no doubt that he is. If he is a landlord, the provisions of the Ben. Ten. Act, the land being agricultural land, apply and the landlord is entitled to the period of limitation mentioned in the Ben. Ten. Act and not to the period mentioned in the Limitation Act. It is quite clear in this case that the learned Judge of the lower appellate Court on the points urged before him arrived at a correct conclusion. The present appeal, therefore, fails and must be dismisseed with costs.

Richardson, J.—I agree in the conclusion which has been arrived at by my learned brother and also in the reasons which he has assigned for that conclusion. I will only add that in Regular Appeal No. 66, of 1917, decided on 14th June 1917, it was held by Nalini Ranjan Chatterjea, J. and myself that a Receiver stood in the position of a landlord and a proprietor for the purpose of bringing a suit in ejectment against a tenure holder under S. 66, Ben. Ten. Act. The point decided in that case resembles the point that arises in the present case. The contention, that the person who sued in the one case for ejectment and in the other for the rent was not entitled to sue in the capacity of proprietor or landlord, cannot, in my opinion, be supported. I agree that the appeal must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 467

SANDERSON, C. J. AND MOOKERJEE, J.

Premsuk Das Assaram—Appellant.

v.

Udairam Gungabux—Respondent.

Civil Suit No. 397 of 1916 and Civil Appeal No. 77 of 1916, Decided on 28th March 1917, from judgment of Fletcher, J., D/- 22nd May 1916.

(a) Civil P. C. (1908), O. 12, R. 6—Portion of claim admitted—Judgment can be passed in respect of that portion—Suit can proceed in respect of remainder of claim.

A Court has jurisdiction under O. 12, R. 6, to enter judgment for the plaintiff in respect of a portion of the claim admitted by the defendant, with liberty to the plaintiff to proceed with the suit in the ordinary way as to remainder of the claim. [P 468 C 2]

(b) Civil P. C. (1908), O. 12, R. 6—Judgment on admission is in discretion of Court—Discretion must be exercised judicially.

Per *Mookerjee, J.*—A judgment on admission by the defendant under O. 12, R. 6, is not a matter of right; it is in the discretion of the Court; so that if a case involves questions which cannot be conveniently disposed of on a motion under the rule, the Court may, in the exercise of its discretion, refuse the motion. The discretion is judicial and an erroneous exercise thereof may be open to correction by a Court of appeal which, however, on well-established principles, will be slow to interfere, unless either of the parties has been manifestly and unfairly prejudiced. [P 470 C 1]

(c) Civil P. C. (1908), O. 12, R. 6 — Scope of, indicated.

Order 12, R. 6, cannot be restricted in its operation to cases where the plaintiff accepts the admission of the defendant in its entirety or where the claim is severable into distinct portions and the defendant admits his liability in respect of one such fragment of the claim. [P 471 C 1]

(d) Interpretation of Statutes—Indian Act based on English Act—English decisions are binding on Indian Courts in construing Indian Act—Precedents.

In considering the construction of a section in an Indian Act which is professedly based on and in fact reproduces the language of an English enactment the Courts in India are, in practice, if not in theory, bound by the decisions of the English Court of appeal. [P 470 C 2]

S. R. Dass and *P. N. Chatterjee*—for Appellant.

N. Sircar and *S. Ghose*—for Respondent.

Sanderson, C. J.—This is an appeal by the defendant against the judgment of Fletcher, J., whereby he directed that judgment should be entered for the plaintiffs for Rs. 4,500 with interest and costs and that the plaintiffs were to be at liberty to prove their claim in respect of the balance of the claim in suit in the ordinary way. This judgment was given upon a motion made by the plaintiff firm under O. 12, R. 6. The suit was for Rs. 6,813-1-0 and if necessary for an account of the dealings and transactions between the parties and for an order of the defendant firm to pay to the plaintiff firm what on the taking of such accounts might be found due by the defendant firm to the plaintiff firm. It was alleged in the statement of claim that the plaintiff firm had been acting as commission agents in

Calcutta for the defendants on terms set out therein. That on the last adjustment of accounts, viz., on 25th March 1915, a sum of Rs. 9,329-5-6 was found to be due from the defendants to the plaintiffs. That the business continued until 15th October 1915, at which time the accounts showed a balance of Rs. 6,038-5-6 due to the plaintiffs and that with the interest thereon up to 4th April 1916 amounting to Rs. 774-11-6, the total due at the time of institution of the suit was Rs 6,813-1-0.

The material points of the defence are paras. 3, 4 and 5. In para. 3 the defendant alleged that he denied that

"there was any adjustment on the 9th day of Chayet 1972, corresponding with the 25th day of March 1915, or that Rs. 9,329-5-6 was found due by the defendant firm to the plaintiff firm, the fact being that the last adjustment took place some time in March or April 1914 in respect of dealings between the parties for the Sumbat year 1970 and since then there was no other adjustment. Shortly prior to the said adjustment the plaintiffs had sent certain goods of the value of Rs. 4,500 or thereabouts to the defendants which had not been ordered by the defendants. Then he proceeded to say that shortly thereafter the plaintiff firm sent their accounts of the dealings for the Sumbat year 1970 and Badri Dass Jalooka, gomastha of the plaintiff firm, came to adjust the accounts for the Sumbat year 1970. The defendant Assaram Agarwalla told the said Badri Dass Jalooka to take back the unordered goods. Whereupon Badri Dass Jallaka asked Assaram to sell those goods, and in the next accounts between the parties the plaintiff firm would not charge any interest on the price of the unordered goods and would also pay to the defendant firm all lossess to be incurred by them in the sale of those goods.

In para. 4 the defendant said, "with reference to Ex. A annexed to the plaint, the defen dant firm states that the item of Rs. 9,329-5-6 on the debit side of the said Exhibit," is not correct, the fact being that a much smaller sum was due to the plaintiff firm at the end of the Sumbat year 1971, inasmuch as the same will be reduced by the interest charged by the plaintiff firm on the said sum of Rs. 4,500 and by the losses incurred by the defendant firm on the sale of the unordered goods aforementioned. Then in para. 5 he said: "With reference to 7th and 8th paragraphs the defendant firm states that on an account being taken of the dealings between the parties during the years 1970, 1971 and 1972 it will be found that the sum of Rs. 4,500 or thereabouts is due to the plaintiff firm from the defendant firm besides interest on the sum."

On these pleadings the application was made by the plaintiffs for leave to enter judgment for Rs. 4,500 with interest on the ground of the admissions contained in the statement of defence. It was not denied by the defendants at the hearing of the application that the plaintiffs were entitled to judgment for Rs. 4,500 and interest, but the defendants alleged that if such judgment were obtained, the plaintiffs should not be allowed to proceed with the suit as to the remainder of their claim.

FLETCHER, J. decided that the plaintiffs were entitled to judgment for Rupees 4,500 and interest and further that they should be at liberty to prove their claim to the balance, and consequently this appeal was lodged by the defendants.

The learned Judge in this judgment said:

"In this case there is no doubt that the defendant admits that Rs. 4,500 is due to the plaintiff. I asked the learned counsel appearing for the defendant whether he still admitted that Rs. 4,500 was due to the plaintiff, and he said de did so. The admissions need not necessarily be made in pleadings; they can be made otherwise; and under O. 12, R. 6 a verbal admission is sufficient to enter up judgment provided the Court is satisfied that the admission was in fact made; that being so, there cannot be any doubt that in this case there was a clear admission that Rs. 4,500 was due."

Now O. 12, R. 6, provides as follows:

"Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties; and the Court may upon such application make such order or give such judgment, as the Court may think just."

I assume from the abovementioned extract from the judgment that the learned Judge satisfied himself that there was a clear and unambiguous admission by the defendants that in any event Rs 4,500 was due from them to the plaintiffs. Assuming that to be so, I am of opinion that the learned Judge had jurisdiction to enter judgment for that amount, and it was in his discretion, having regard to the nature of the case and the allegations contained in the pleadings and the admission made in Court, whether he would allow the plaintiffs to proceed to prove the remainder of their claim.

I do not think that the case of *United Telephone Co.* v. *Danohoe* (1) covers the point raised in this case. The abovementioned case was an action for infringement of a patent and the defendant admitted ten instances of infringement, but denied he had committed any others: the plaintiffs thereupon moved for judgment upon the admissions in the pleadings: in the Court of first instance the Vice-Chancellor granted an injunction against infringement by the defendant of the plaintiff's patent. but he

1. (1886) 31 Ch. D. 399=55 L J Ch 480.

refused an inquiry as to damages. The Court of Appeal held that the plaintiffs were entitled to an inquiry as to damages, but that it must be limited to the instances of infringement admitted; and that the judgment having been obtained upon a motion for judgment upon the pleadings, the plaintiffs were bound to take the negative as well as the affirmative allegations therein. The question whether the Judge, who in the first instance heard the application, would have had jurisdiction to give judgment on the admissions and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringements, if such an application had been made, was not before the Court. The case of *Andrews* v. *Patent Assurance Co: of Ireland* (2) does not decide that the Judge hearing the application had no jurisdiction to make the order asked for in that case; it amounts to a decision merely that having regard to the circumstances of that case and the form of the pleadings, the Judge was entitled to exercise his discretion and to decide that the plaintiff ought not to have judgment for the £62 and yet proceed to trial of the remainder of the case. This being a matter of discretion, we ought not to interfere unless it is clear that the discretion was wrongly exercised. In this case I cannot say that it is clear that the discretion of the learned Judge has been wrongly exercised.

The main question which remains to be tried is, whether the arrangement alleged by the defendants in their defence to have been made with respect to the unordered goods was in fact made, and, if so, how much must be deducted in respect thereof from the plaintiffs' total claim. This seems to be an issue independent of the other part of the claim, and even if it were decided in favour of the defendants, it would not, having regard to the abovementioned admission made by the defendants in Court, reduce the plaintiffs' claim below Rs. 4,500. With regard to the question of costs, I think that the plaintiffs should not at present be given the costs of the suit but that these costs should be reserved until the trial, when they will be in the discretion of the Judge who tries the matters which remain for decisions. The plaintiffs are entitled to the cost of the application for judgment. For these reasons in my judgment the appeal should be dismissed on the main point raised therein, but that the decree as to costs should be varied in the manner above mentioned. There will be liberty to apply with respect to the question of costs to the learned Judge on the original side in the event of the parties not proceeding to the trial of the remainder of the plaintiffs' claim. I think that the parties should bear their own costs of this appeal.

Mookerjee, J.—This is an appeal by the defendant from a judgment on an application by the plaintiff under O. 12, R. 6, Civil P. C., 1908. The plaintiff firm instituted this suit for the recovery of a sum of money from the defendant firm in respect of a commission agency. The plaintiff firm alleges that accounts had been adjusted between them on 25th March 1915, when a sum of Rs. 9,329-5-6 was found due from the defendant firm; that thereafter business was continued on the same terms and conditions as before down to 15th October 1915, and that on 4th April 1916, when the suit was instituted, an aggregate sum of Rupees 6,813-1-0 inclusive of interest was recoverable from the defendant. The written statement of the defendant firm denied the alleged adjustment of accounts, mentioned a transaction on terms other than those previously arranged and contained an admission that if an account were taken of the dealings between the parties and credit allowed from all payments made, the sum of Rs. 4,500 or thereabouts would be found due to the plaintiff firm besides interest on such sum. Thereupon on 19th May 1916, the plaintiff firm applied to the Court under O. 12, R. 6, for judgment for Rs. 4,500 with interest thereon according to the admission of the defendant firm. Fletcher, J., heard the application on the 22nd May. In answer to a question put by the Court to counsel for the defendant whether he still admitted that Rs. 4,500 was due to the plaintiff, an answer was given in the affirmative. The Court thereupon proceeded to give judgment for the plaintiff for Rs. 4,500 with liberty to the plaintiff to prove in the ordinary way the claim for the difference. The plaintiff was also awarded the costs of the application and the costs of the suit. The defendant has appealed to this Court on the ground

2. 18 Ir L R 115.

that the Court could not or, at any rate, should not have given judgment to the plaintiff under O. 12, R. 6. It is consequently necessary to examine the terms of the rule and determine its exact scope. O. 12, R. 6, which reproduces O. 32, R. 6, of the English rules is as follows:

"Any party may at any stage of a suit where admissions of fact have been made either on the pleadings or otherwise apply to the Court for such judgment or order as upon such admissions he may be entitled to without writing for determination of any other question between the parties: and the Court may upon such application make such order or give such judgment as the Court may think just."

The rule, it will be observed, is expressed in comprehensive terms and the only requisite for a judgment under the rule in favour of the plaintiff is that admission of facts should have been made by the defendant either on the pleadings or otherwise. It would be obviously improper for the Court to read into the rule qualifications which may restrict its application. But a judgment on admission is not a matter of right, it is in the discretion of the Court so that if a case involves questions which cannot be conveniently disposed of on a motion under the rule, the Court may in the exercise of its discretion refuse the motion. The discretion is judicial and an erroneous exercise thereof may be open to correction by a Court of appeal which, however, on well established principles will be slow to interfer, unless either of the parties has been manifestly and unfairly prejudiced: See the observation of Jessel, M. R. in *Mellor* v. *Sidebottom* (3). Subject to these observations I cannot hold that any crystallised rules can be formulated to regulate the exercise of the discretion vested in the trial Court. It has been urged, however, that such rules are deducible from cases in the reports and references has specially been made to the decision in *United Telephone Co.* v. *Danohoe* (1), which arose under Rules of Supreme Court O. 32, R. 6, and *Andrews* v. *Patent Assuranee Co. of Ireland* (2), which turned upon the construction of Rules of Supreme Court (Irish) O. 32, R. 6. It may be observed that the Irish rule is identical in terms with the English rule. These cases, though not binding upon us as authorities, are valuable guides in the interpretation of the rule in our Code for, as observed by White, C. J., in *Messrs. Lovelock and Lewes* v. *Malabar Timber and Saw Mills Ltd.* (4), in considering the construction of a section in an Indian Act which is professedly based on an English enactment which in fact reproduces the language of the English enactment, we are in practice, if not in theory, bound by the decision of the English Court of Appeal. The cases mentioned, however, do not assist the appellants.

In the first case the defendant in an action for infringement of a patent admitted certain instances of infringement but denied that he had committed any others. The plaintiffs thereupon moved for judgment upon the admission in the pleadings. Bacon, V. C., granted a perpetual injunction but refused an inquiry as to the damages. The plaintiffs appealed and contended that a direction might be added for an inquiry as to the damages sustained by them by reason of the infringement mentioned in the pleadings. The Court of appeal ruled that they were entitled to an inquiry as to the instances of infringement admitted in the pleadings, but as to no others. This decision is not an authority for the proposition that the plaintiff might not have joined issue and set down the action for trial as regards the infringements not admitted by the defendant. The decision in *Andrews* v. *Patent Assurance Co. of Ireland* (2) seems at first sight more favourable to the contention of the appellant but upon closer examination turns out to be an authority only for the proposition that the Court has a discretion to exercise in relation to applications for judgment on admissions and may impose terms if relief be given. The case is not an authority for an inflexible rule that the plaintiff who applies for judgment upon an admission must always take the admission as a whole or must ignore the admission and proceed to trial. In my opinion, it would be lamentable if the discretion which for the best of reasons has been left free and untrammelled by the Legislature were to be crystallised by judicial decisions, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Jndges in the exercise of the discretion which must be applied with due regard to the varying circumstances of each particular case. I

3. (1877) 5 Ch D 342=46 L J Ch 398.

4. (1913) 18 I C 997.

must consequently decline to interpret O. 12, R. 6, so as to restrict its operation to cases where the plaintiff accepts the admission of the defendant in its entirety or where the claim is severable into distinct portions and the defendant admits his liability in respect of one such fragment of the claim. I do not also feel pressed by the argument that if a decree is made first on admission in respect of one portion of the claim and then on investigation as to the remainder, there may ultimately be two decrees in the same suit. I see nothing objectionable in principle to such a result, specially in view of the provisions of O. 24 which treats of payments into Court. In my opinion the case before us falls within the scope of O. 12, R. 6, and sufficient grounds have not been assigned to induce us to hold that the order made by Fletcher, J., was unjust to the defendant. The direction for costs was, however, inappropriate and I agree that subject to modification in that respect as indicated in the judgment of the learned Chief Justice the order should be affirmed.

V.B./R.K. *Order affirmed.*

A. I. R. 1918 Calcutta 471 (1)

TEUNON AND CHAUDHURI, JJ.

Emperor

v.

Fazal Shaik and *others*—Accused.

Criminal Ref. No. 32 of 1917, Decided on 28th February 1917, made by S. Judge, Faridpur, D/- 3rd February 1917.

Criminal P. C. (1898), Ss. 233, 536—Persons separately executing false Kabuliyats to defraud—Complainant cannot be tried jointly.

Four persons were convicted in a joint trial under S. 193, I. P. C., two of them for having falsely executed one kabuliyat and the other two for having falsely executed another kabuliyat for the purpose of defrauding the complainant:

Held: that there was a misjoinder of charges, that is to say, there ought to have been at least two trials, one in respect of each kabuliyat.

[P 471 C 1]

Jyotish Chandra Hazra — for the Crown.

A. K. Fazlul Huq and *Atindra Nath Mukerjee*—for Accused.

Judgment.—We have read the letter of reference in this case. It is abundantly clear from the facts set out by the learned Sessions Judge that there was a misjoinder of charges, that is to say, there ought to have been at least two trials, one in respect of one kabuliyat and one in respect of the other. On that ground alone we must accept this reference and set aside the conviction and and the sentence imposed upon the accused. The question then remains whether this is a case in which we ought to direct a re-trial. Having regard to the facts set out in the letter of reference submitted to us by the learned Sessions Judge and also to the explanation of the trial Magistrate, we are of opinion that this is not a case in which it would be proper for us to direct a re-trial. We desire to say further that we are satisfied from the explanation of the Honorary Magistrate that he gave the parties a fair trial and there is no reason whatsoever for the suggestion that he has in any way wilfully disregarded any decision of this Court. In the result, the conviction of and sentence upon the accused persons are set aside and we direct that they be released, or if they be on bail, that their bail bonds be discharged.

V.B./R.K. *Convictions set aside.*

A. I. R. 1918 Calcutta 471 (2)

BEACHCROFT AND WALMSLEY, JJ.

Shamiruddin Mandal—Plaintiff—Appellants.

v.

Abdur Bari Mandal and *others*—Defendants—Respondents.

Appeal No. 1153 of 1914, Decided on 5th January 1917, from Appellate decree of Dist. Judge, 24 Parganas, D/- 5th February 1914.

Limitation Act. (1908), Art. 127—Art. 127 does not apply to Mahomedans.

Article 127, Limitation Act, does not apply to a case in which the parties are Mahomedans: 22 *Cal* 954; and 7 *C W N* 155, *Foll.* [P 472 C 1]

Sitaram Banerjee—for Appellants.

Gunda Charan Sen and *Manmatha Roy*—for Respondents.

Beachcroft, J.—This is an appeal by the plaintiff. He brought a suit to recover possession of certain property which had come down from his ancestor Dhonai Mandal on the ground that he had been dispossessed by other members of the family. Dhonai had two sons. Tar Mamud and Jaker Mandal. The plaintiff was the son of Tar Mamud. The suit relates to property which descended to Jaker Mandal. The Munsif dismissed the suit on the ground of limitation as well as on the merits. On appeal, the District Judge without going into the merits, dismissed the suit on the ground of limitation.

It is now argued that the learned Judge was wrong in the view that he took of the question of limitation. The only point argued here is that under Art. 127, Limitation Act, the onus was wrongly thrown on the plaintiff by the learned Judge. In my opinion, Art. 127 does not apply to this case in which the parties are Mahomedans. It was held in the case of *Mahomed Akram Shaha* v. *Anarbi Chowdhrani* (1), that this Article did not apply to the case of Mahomedans and that decision was followed in the case of *Poyran Bibi* v. *Lakhu Khan Bepari* (2), in which, Maclean, C. J., referring to certain other decided cases, expressed the opinion that the view taken by this Court in the case of *Mahomed Akram Shaha* v. *Anarbi Chowdhrani* (1), was the correct one. I may at once say that I agree with these two decisions. The learned pleader for the appellant admits that no other point arises in the appeal. I consider that the appeal ought to be dismissed with costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1 (1895) 22 Cal 954.
2. (1903) 7 C W N 155.

A. I. R. 1918 Calcutta 472 (1)

CHITTY AND RICHARDSON, JJ.

Gagan Chand Naskar—Petitioner.

v.

Peary Mohan Naskar and *others*—Opposite parties.

Criminal Revn. No. 791 of 1917, Decided on 10th August 1917.

Criminal P. C. (1898), S. 145—Order declaring possession of more lands than claimed—Defect is not question of jurisdiction—Magistrate can correct error in order.

In a proceeding under S. 145, eight out of eleven persons forming the second party filed written statements claiming possession of a portion of the lands in dispute, but the Magistrate in his final order declared the possession of the whole of the lands to be with the second party:

Held: that the defect in the Magistrate's order was not a question of jurisdiction, but that the case should go back to the Magistrate to see whether in fact any error had been committed and that, if so committed, it was for him to correct it. [P 472 C 1,2]

Manmatha Nath Mukerjee and *Manmohun Banerjee*—for Petitioner.

Amarendra Nath Bose and *Pankaj Kumar Ganguly*—for Opposite Parties.

Judgment.—In this case no question of jurisdiction arises but it would appear that the Magistrate has made a slip in declaring the possession of the whole 237½ bighas, i.e., three chaks, to be withthe second party. The second party consisted of 11 persons, 8 of whom filed written statements. From those written statements it would appear that they claimed 172 bighas 6 kanals 2 chattaks between them, each tenant giving the boundaries of the area which he held. It also appears from the learned Magistrate's order that, although the proceedings commenced with regard to the whole 237½ bighas, Gaganchand Naskar had won over some of the old tenants to his side and they had executed new kabuliyats in his favour. As to the precise area covered by those kabuliyats there is nothing before us to show, but it would appear that the second party were in possession not of the whole 237½ bighas, but of 172 odd bighas as shown in their various written statements. We think that the case should go back to the learned Magistrate to see if this error was, in fact, made; and if made it was for him to correct it. Let the record be sent down without delay.

V.B./R.K. *Case sent back.*

A. I. R. 1918 Calcutta 472 (2)

FLETCHER AND SMITHER, JJ.

Piran Bibi and *others*—Defendants—Appellants.

v.

Jitendra Mohan Mookerjee and *another*—Plaintiffs—Respondents.

Appeal No. 19 of 1915, Decided on 19th March 1917, from appellate decree of Dist. Judge, Murshidabad, D/- 18th May 1914.

(a) Civil P. C. (5 of 1908), O. 21, R. 2—Payment of amount awarded by preliminary mortgage decree out of Court cannot be recognised without certification.

On an application made for a decree absolute in a suit to enforce a mortgage security by way of sale, the Court cannot take cognizance of the payment to the mortgagee out of Court of the amount awarded by the preliminary decree, which has not been certified to the Court under the provisions of O. 21, R. 2, Civil P. C. [P 473 C 2]

(b) Civil P. C. (5 of 1908), O. 34—Scheme for payment under decree for foreclosure, sale or redemption noted.

The procedure under the provisions of O. 34, is essentially different from the procedure in a mortgage suit under the terms of the repealed sections of the Transfer of Property Act and the method of payment to the mortgagee as authorised by the Transfer of Property Act has been abolished. [P 473 C 2]

The scheme stated under the terms of O 34. for the payment of mortgage money under a decree for foreclosure, sale or redemption noted [P 473 C 1]

Anilendra Nath Roy Chowdhury—for Appellants.

Jogesh Chandra Roy and *Khetra Mohan Ghose* for *Kali Das Sircar*—for Respondents.

Fletcher, J.—This is an appeal by the defendants against a judgment of the learned District Judge of Murshidabad, dated 18th May 1914, reversing the decision of the Munsif at Barhampore. The appeal is preferred in the main against a decree absolute made in a suit to enforce a mortgage security by way of sale. The defendants are now in the shoes of the mortgagors who were their predecessors-in-title. The plaintiffs are the sons of the original mortgagee. The suit was brought by the plaintiffs to enforce the mortgage and, on 10th August 1908, a preliminary decree for Rs. 130 was made by the first Court. An application was then made on 8th April 1911 for a decree absolute and the decree was made absolute ex parte on 6th May 1911. Subsequently, that ex parte decree was set aside and the case was brought on for re-hearing. The case set up by the defendants who are now the mortgagors was that more than three years ago they had paid the whole of the amount awarded by the preliminary decree out of Court to the plaintiffs. The learned Judge of the lower appellate Court held that, as the payment had not been certified to the Court, under the provisions of O. 21, R. 2, the Court could not recognize it. Against that the present appeal has been brought. Under the terms of O. 34, Civil P. C., the scheme stated generally is that, in a suit to enforce mortgage, the money payable to the mortgagee under a decree for foreclosure or sale or redemption should, in the first instance, be paid into Court and the method of payment to the mortgagee, as is authorised by the Transfer of Property Act, has been abolished. In a suit for sale, as appears from O. 34, R. 5, when on the day fixed the defendant pays the amount into Court, the Court shall pass a decree as mentioned in that rule; but when such payment is not made into Court on or before the day fixed, the Court shall, on an application made by the plaintiff, pass a decree that the mortgaged property or a sufficient part thereof be sold. Therefore, in passing the final decree, the Court has no discretion except to follow the statutory form of the decree when no payment has been made into Court as mentioned in O. 34, R. 5, and the only other matter, that there can be is that the Court may hold that the suit has been adjusted under O. 21, R. 2, Civil P. C. It is said that any other Court not being an executing Court can recognize an uncertified payment made out of Court. I am not prepared to agree with that. It seems to me that the whole of the provisions of the law providing a certification either by the decree-holder or by the judgment-debtor within the period within which the certification is to be made would be rendered nugatory, if a defendant, in a suit years after, when the evidence would neither be fresh nor perhaps available, is allowed to come forward and say that he has satisfied this preliminary decree out of Court three years ago by paying the money to the plaintiff. It seems to me that it will be opposed both to the terms of the Civil Procedure Code and also to the provisions of the Limitation Act.

The view that the learned Judge of the lower appellate Court took was, I think, correct. I am not prepared to disagree with the reasons that have been given and are to be found in a judgment of my own in another case. That was a case under the Transfer of Property Act and the procedure under the provisions of O. 34 is essentially different from the procedure in a mortgage suit under the terms of the repealed sections of the Transfer of Property Act. I think the learned District Judge was clearly right in the conclusion he arrived at, that the Court could not recognize this payment which is said to have been made out of Court. The appeal, therefore, in my opinion, fails and must be dismissed with costs.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 473

FLETCHER AND NEWBOULD, JJ.

Padma Lochan Chakravartty—Plaintiff—Petitioner.

v.

Rustom Khan and *another*—Defendents—Opposite Parties.

Rule Nisi No. 258 of 1917, Decided on 3rd August 1917, against order of Sub-Judge, 2nd Court, Sylhet.

P. N. Das
Advocate High Court
Jammu & Kashmir

Contract Act (1872), S. 74—High interest—Law does not prevent parties from contracting high rate of interest—Court should not reduce as penal rate deliberately arrived at by parties.

There is nothing in law to prevent parties to a loan from contracting that a high rate of interest should be paid if the money is not re-paid within a certain time. The rate of interest, deliberately arrived at by the parties to contract, should not be reduced by a Court on the ground that being high it is a penal rate. [P 471 C 1]

Gopal Chunder Das—for Petitioner.

Judgment.—This is a rule obtained by the plaintiff calling upon the opposite party to show cause why so much of the decree of the learned Small Cause Court Judge, dated 14th December 1916, as disallowed interest at the contractual rate should not be set aside. The plaintiff brought the suit on a contract in writing to recover the principal and interest due on such contract. No formal defence was put in by the defendants. The defendants appeared before the Court and made an appeal that the decree should be drawn up in such a form that they might be permitted to pay the amount in instalments. They also complained that the rate of interest as claimed by the plaintiff and which is provided for in the contract was penal. The learned Judge has found that this rate of interest is penal. That cannot be suggested for one moment It may be a high rate. There is nothing in law to prevent parties from contracting that a high rate of interest should bepaid if the money is not paid within a certain time. Various matters arise for consideration as to the rate of interest, one of the principal being the solvency of the borrower. There cannot be an universal rate of interest applicable to all borrowers. It has got to be adjusted having regard to the circumstances of the case. There is nothing to show in this case why the rate that the parties deliberately arrived at should not be adhered to. The rule is accordingly made absolute and the case is remitted to the Court below for the learned Judge to calculate the interest on the principal sum decreed at the rate provided for in the contract and not at the rate which has been found by the learned Judge to be equitable between the parties, namely, 12 per cent. Petitioner will get costs of the rule, one gold mohur.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 474

CHATTERJEA AND NEWBOULD, JJ.

Girindra Kishore Bhowmik — Petitioner.

v.

Nanda Lal Singh Roy—Opposite Party.

Rule Nisi No. 68 of 1916, Decided on 2nd January 1917, against order of Dist. Judge, Mymensingh, in Misc. Appeal No. 58 of 1916.,

Civil P. C. (1908), O. 21, R. 90, and O. 43 R. 1 (j)—Order dismissing application under O. 21, R. 90, for non-appearance of applicant is appealable.

An order dismissing an application under O. 21, R. 90, Civil P. C. for non-appearance of the applicant amounts to an order under O. 21, R. 92, Civil P. C. and is therefore, appealable under O. 43, R 1, (j), Civil P. C.: 5 *I C* 493: *Foll*, 27 *I C* 492 *Dist.* [P 474 C 2]

Birendra Kumar De—for Petitioner.

Jatindra Mohan Chowdhury—for Opposite and Party.

Judgment.—The question raised in this case is whether an appeal lies against an order dismissing an application under O. 21, R. 90, Civil P. C., for non appearance of the applicant. If the order is one refusing to set aside a sale under O. 21, R. 92, Civil P. C., then an appeal would lie under O. 43, R. 1 (j). We think that the order under consideration is an order of that description. A similar view was taken under the old Code in the case of *Brojo Sundar Roy* v. *Moti Lal Mojumdar* (1). It is true that in that case the order expressly confirmed the sale while dismissing the application for default. In the present case, the sale had already been confirmed; and the Court by this order refused the application to set aside the sale and thereby confirmed its previous order. We think that it amounts to an order under O. 21, R. 92, Civil P. C. We have been referred to the case of *Charu Chandra Ghosh* v. *Chandi Charan Roy* (2) and certain other cases in support of the contention that no appeal lies. But in those cases there was an application to set aside the sale which was dismissed for non-appearance, and a subsequent application to revive the application to set aside the sale; and it was held that no appeal lay against the order rejecting the application for revival. Those cases, therefore, do not govern the present case. The rule is accordingly made absolute. The order of the Court below is set aside and

1. (1910) 5 I C 493.
2. (1915) 27 I C 492.

the case sent back to that Court for a trial of the appeal on the merits. Costs will abide the result. We assess the hearing fee at one gold mohur.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 475

MOOKERJEE AND BEACHCROFT, JJ.

Bharat Ramanuj Das Mahanta — Plaintiff—Appellant.

v.

Ishan Chandra Haldar and *others*— Defendants—Respondents.

Appeal No. 2172 of 1915, Decided on 24th August 1917, from appellate decree of Dist. Judge, Bankura, D/- 4th June 1915.

Transfer of Property Act (1882), S. 99 — Mortgagee is competent to purchase equity of redemption brought to sale at instance of stranger decree-holder.

A mortgagee is competent to purchase the equity of redemption brought to sale at the instance of a stranger decree-holder, although the position is different where the mortgagee himself acquires the equity of redemption at an execution sale held at his instance in contravention of the rule enunciated in S. 99. (Case law discussed).

[P 476 C 1]

Ram Chandra Mazumdar, *Mohini Mohan Chatterjee*, and *Fanendra Nath Dutt*—for Appellant.

Mohendra Nath Roy and *Monmotha Nath Roy*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for redemption of an usufructuary mortgage, dated 11th July 1881. On 28th August 1884, the equity of redemption was sold in execution of a money-decree against the mortgagor, and was purchased by the mortgagee. On 11th May 1907, the plaintiff took a conveyance of the equity of redemption from the heirs of the mortgagor, and on 19th May 1913, instituted this suit for recovery of possession upon redemption. The Courts below have dismissed the suit, on the ground that the plaintiff, by his purchase, has not acquired title to the equity of redemption and cannot claim to redeem the mortgage The plaintiff appellant has controverted this view and has argued that the mortgagee, by his purchase of the equity of redemption on 20th August 1884, did not acquire an irredeemable title but became a trustee for the benefit of the mortgagor and might be called upon to submit to redemption. In support of this view, reliance has been placed upon the decisions in *Erasappa Mudaliar Commercial and Land Mortgage Bank* (1) and *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (2).

The first of these cases apparently assists the contention of the appellant but we are unable to accept as well founded the rule of law enunicated therein. We cannot affirm the proposition that whenever a mortgagee purchases the equity of redemption at a sale held in execution of a money-decree obtained by a stranger against the mortgagor, the mortgagee holds the equity of redemption as trustee for the mortgagor and for his benefit. Neither principle nor authority supports this comprehensive proposition, which has, indeed, been expressly repudiated in the case of *Sesha Ayyar* v. *Krishna Ayyangar* (3), *Kuttan Nayar* v. *Krishnan Mussad* (4) and *Ikkotha* v. *Chakkiamma* (5). We are further of opinion that the broad rule formulated on behalf of the appellant is contrary to the decision of the Judicial Committee in *Raja Kishendatt Dutt Ram* v. *Mumtaz Ali Khan* (6), where the judgment of Knight Bruce, L. J., in *Shaw* v. *Bunny* (7) was quoted with approval. The question raised before the Judicial Committee was whether, when a landed estate has been twice mortgaged by the owner, so that there are several distinct mortgages not connected with each other, one first, the other second, and the first mortgagee having a power of sale duly exercises it, the second mortgagee becoming the purchaser, such a state of things prevents him from acquiring by means of the purchase that absolute and irredeemable title against the mortgagor which a stranger making the purchase would have acquired. The question thus formulated was answered in favour of the purchaser, and it was ruled that, in the absence of special circumstances to show that the second mortgagee had availed himself of the position as a mortgagee to procure some facility or advantage leading to the purchase or connected with it, he is precisely in the same position as a stranger purchaser: see also *Kirkwood* v. *Thompson* (8). This view is in accord also with the decision of the Judicial Committee in *Khiarajmal*

1. (1900) 23 Mad 377.
2. (1910) 6 I C 47.
3. (1901) 24 Mad 96.
4. (1902) 12 M L J 390.
5. (1904) 27 Mad 428.
6. (1880) 5 Cal 198=6 I A 145 (PC).
7. (1865) 33 Beav. 494=2 De G J & S. 468.
8. (1865) 2 H & M 392=44 L J Ch 305.

v. *Daim* (9). That case is not an authority for the proposition that a mortgagee is under a disability to purchase the equity of redemption brought to sale at the instance of a stranger decree-holder, although the position might be different if the mortgagee himself acquired the equity of redemption at an execution sale held at his instance in contravention of the rule enunciated in S 99, T. P. Act.

As regards the judgment in *Pancham Lal Chowdhury* v. *Krishan Pershad Misser* (2), we are not unmindful of the dictum it contains, namely, that as an established proposition of law, the purchase of the equity of redemption constitutes the mortgagee the trustee for the mortgagor. This observation however must be limited to the circumstances of the particular case then before the Court, namely, the case of a purchase by the mortgagee in contravention of the provisions of S. 99, T. P. Act. We are clearly of opinion that the suit has been rightly dismissed by the Courts below, as at the date of its institution the plaintiff had no interest in the equity of redemption, which had finally vested in the mortgagee on 20th August 1884.

The result is, that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V B./R.K. *Appeal dismissed.*

9. (1905) 32 Cal 296=32 I A 23 (P C).

A. I. R. 1918 Calcutta 476 (1)

FLETCHER AND NEWBOULD, JJ.

Broja Krishna Ghose Sardar—Plaintiff—Appellant.

v.

Benimadhab Ghose Sardar and *others*—Defendants—Respondents.

Appeal No. 2294 of 1915, Decided on 18th June 1917, from appellate decree of Dist. Judge, 24-Parganahs, D/- 12th July 1915.

Guardians and Wardst Ac (1890), S. 10 (1) (3)—Application for appointment of guardian stating age of minor—Subsequent suit—Evidence in is not admissible to prove age of minor.

The proceedings for the appointment of a guardian of a minor and the cause title of such proceedings stating the age of the minor at the date of the proceedings are not admissible in evidence for the purpose of showing what the age of the minor was at that time. [P 476 C 2]

Sarat Chander Basak and *Heramba Chander Guha*—for Appellant.

Ram Chander Mojumdar and *Provash Chander Chatterji*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against a decision of the learned District Judge of the 24 Pergannahs, reversing the decision of the Munsif at Basirhat. The suit was brought by the plaintiff to set aside certain alienations made by his guardian appointed under the provisions of the Guardians and Wards Act. It is common ground in this case that a suit of this nature must be brought by the plaintiff within three years of attaining majority. The question is whether the present suit was brought within that period. The plaintiff wanted to give in evidence the proceedings in which the guardian was appointed and the cause title of which apparently stated the age of the plaintiff on that date. The learned Judge rejected that evidence, as far as I can see, on these grounds: First of all, that that statement in the cause title in the matter of the Guardians and Wards Act must have been founded upon a statement made by the proposed guardian; the proposed guardian ought to have been called if he was alive and, if not, the statement made by the guardian to the Court asking for the appointment of the guardian ought to have been put in and if that could not be produced, then the document now wished to be relied on might have been used for the purpose of showing what the age of the plaintiff was. One cannot by this short cut, get rid of the formalities prescribed by the Evidence Act. No doubt in a large number of cases, the manner in which the evidence is let in is extremely loose; but in the case of an objection, the provisions of the law must be strictly observed and they should be as strictly observed in the mofussil Courts as in any other Court. I think on the whole, that the learned District Judge, in the circumstances of the case, rightly rejected this document. The present appeal, therefore, fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 476 (2)

CHATTERJEA AND SMITHER, JJ.

Gangaram Bhojraj—Plaintiff—Petitioner.

v.

Dhanman Sirdar and *others*—Defendants—Opposite Parties.

Rule Nisi No. 161 of 1917, Decided on 14th May 1917.

Provincial Small Cause Courts Act (1887), —S. 25—Suit on hand-note—Defendant admitting claim—Court cannot dismiss suit.

In a suit on a hand-note the defendant put in a petition admitting the plaintiff's claim and prayed that he might be allowed to pay the money in two instalments. The Small Cause Court Judge dismissed the suit on the ground that there was no consideration for the hand-note:

Held: that the Court ought to have decreed the suit when the defendant admitted the claim.

[P 477 C 1]

Tarakeswar Pal Chowdhury—for Petitioner.

Judgment.—The application upon which this rule was issued, arises out of a suit to recover Rs. 120 on a hand-note executed by the deceased father of the defendant on account of arrears of interest due to the plaintiff firm on previous hand-notes. It appears that the defendant put in a petition admitting the claim of the plaintiff and prayed that he might be allowed to pay the money in two instalments. The learned Small Cause Court Judge sook evidence in the matter and dismissed the suit on the ground that there was no consideration for the hand-note; because it was executed in consideration of interest due on previous hand-notes. We think that the Court below ought to have decreed the suit when the defendant admitted the claim. The defendant has not appeared in this Court. The plaintiff agrees to receive the money in two instalments out of the estate of the deceased. We accordingly direct that a decree be passed in favour of the plaintiff for the amount claimed, to be paid by the defendant one-half within a month of the arrival of the order in the Court below and the balance within another month from the payment of the first instalment. The amount will be realised from the assets left by the deceased father of the defendant.

V.B./R.K. *Application allowed.*

A. I. R. 1918 Calcutta 477

MOOKERJI AND BEACHCROFT, JJ.

Charu Chandra Bhattacharjee and *another*—Plaintiffs—Petitioners.

v.

Karan Buxa Sikdar—Defendant—Opposite Party.

Rule Nisi No. 468 of 1917, Decided on 13th August 1917, from order of Munsif, Kalna.

Limitation Act (1908), S. 20—"As such", meaning explained—Payment towards interest—Circumstances must exist from which inference is irresistible that payment was made towards interest.

The expression "as such" in S. 20, Lim. Act implies that something more than mere payment of interest must be established to entitle the creditor to the benefit of that section. The payment must be such that from it the promise to pay can be inferred in fact and not merely implied in law: in other words, the payment must be of an unambiguous character. If the payment is of an ambiguous character and it is open to the creditor to make an appropriation according to his choice, the payment cannot be treated as a payment of interest as such. To bring a case within S. 20, Lim. Act, it is not essential that the debtor should, on the occasion of every payment, state specifically that the payment is made on account of interest as such is it; sufficient if circumstances exist which make the conclusion irresistible that the payment must have been made on account of interest. Where therefore a bond provided that whenever any payment would be made to the creditor, the debtor would get an entry made on the back of the bond, of payment against the interest, and, after the interest had been satisfied, of payment against the principal to the extent of the surplus, and it appeared that the amount due on account of interest on a certain date was considerably in excess of the sum paid by the debtor on that date:

Held: that although nothing was expressly stated by either of the parties at the time of payment, the inference was irresistible that the payment was made on account of interest as such; 9 *Bom. L. R.* 1329 and 31 *All.* 285, *Foll.*

[P 479 C 1]

Kali Kinkar Chukerbutty for *Gopal Chandra Chuckerbutty*—for Petitioners.

Bankim Chandra Mookerjee—for Opposite Party.

Judgment.—This rule has been granted in connection with a suit for recovery of money due on a bond. On 28th June 1911, the defendant borrowed from the plaintiffs a sum of Rs. 80 which was to carry interest at two per cent. per mensem with annual rests. The bond provided that

"Whenever any sum might be paid by the debtor to the creditor, the debtor would get an entry made on the back of the bond, of payment against the interest, and, after the interest had been satisfied, of payment against the principal to the extent of the surplus."

On 11th May 1912, the debtor paid Rs. 14-6-0 and an entry to this effect was made on the back of the bond. There were two similar payments subsequently, namely, Rs. 16 on 2nd February 1914, and Rs. 18 on 11th May 1915. This suit was instituted on 2nd January 1917 for recovery of Rs. 55 as then due on the bond. The defendant pleaded that the claim had been satisfied in full and in the alternative that if anything was due, the claim was barred by limitation. The Small Cause Court Judge has found against the defendant on the first point, and in

his favour on the second point. The period of limitation applicable is three years under Art. 67, Sch. 2, Lim. Act, and the question in controversy is, whether, within three years antecedent to the institution of the suit, interest has been paid as such within the meaning of S. 20, Lim. Act. S. 20 provides that where interest on a debt is, before the expiration of the prescribed period, paid as such by the person who is liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made. It is plain that some force must be attributed to the expression 'as such' and that, consequently, something more than mere payment of interest must be established to entitle the creditor to the benefit of S. 20. The debtor has contended that there must be proof that, at the time the interest was paid, the debtor expressly stated that the payment was on account of interest, and that as, in the present case, the Small Cause Court Judge has found that nothing was said by either party when the payments were made, S. 20 is of no avail to the creditor.

In support of this view, reliance has been placed upon the decisions in *Hanmantmal Motichand* v. *Rama Bai* (1) and *Mohammad Abdullah Khan* v. *Bank Instalment Co.* (2). These cases affirm the proposition that the meaning of the section is that there must be either an express intimation by the debtor, or proof of the existence of circumstances, which show that the payment was on account of interest on the debt sued upon, in other words, if payments are made in reduction of a general balance of account without intimation by the debtor that they are to be appropriated in satisfaction of interest, such payments are not payments of interest as such within the meaning of the section. This view is also supported by the observation in *Surju Prasad Singh* v. *Khwalish Ali* (3) and *Nilkanth* v. *Dattatraya* (4). All the cases mentioned are, however, clearly distinguishable. In the case before us [which in this respect differs from *Biswanath Bhattacharjee* v. *Sameswar Sarma* (5)] there was an express provision in the bond that whenever any payment should be made by the debtor to the creditor, the debtor would obtain an entry made on the back of the bond to the effect that the payment had been made on account of interest, and that it was only in the event of a payment exceeding the amount then due as interest that the surplus would be applied in reduction of the principal. If now, we confine our attention to the payment made on 2nd February 1916, we find that at that time, a sum considerably in excess of Rs. 16 was due on account of interest. Consequently, pursuant to the agreement between the parties, the only payment which the debtor could make would be a payment as against the interest first. Though nothing was expressly stated by either of the parties at the time, the inference is irresistible that the payment of Rs. 16 on 2nd February 1914 was a payment on account of interest as such. This view is supported by the observation in *Ranchordas* v. *Pestonji* (6):

"The section requires something more than the English law does, namely, that interest must be paid as interest, that is, it must be distinctly stated at the time of payment that it is paid on account of interest, or else there must be evidence from which the payment as interest may be distinctly inferred, and if so, the mere proof of payment is sufficient"

To the same effect is the decision in *Gopi Nath Singh* v. *Hardeo Singh* (7). The principle applicable to cases of this character was widely stated by Blackburn, J., in *Morgan* v. *Rowlands* (8). The principle is that any such payment is an acknowledgment of the existing debt, from which it implies a promise to pay the residue or the principal as the case may be, the payment must, however, be such that from it the promise to pay can be inferred in fact and not merely implied in law; in other words, the payment must be of an unambiguous character. If the payment is of an ambiguous character and it is merely open to the creditor to make an appropriation according to his choice, the payment cannot be treated as a payment of interest as such. No doubt, a different view was indicated by Knight Bruce, L. J., in the case of *Nash* v. *Hodgson* (9), in which he held apparently that where no appropriation is made by a debtor the creditor has a right

1. (1878-79) 3 Bom 193.
2. (1909) 31 All 495=2 I C 379.
3. (1882) 4 All 512.
4. (1879-80) 4 Bom 103.
5. (1917) 41 I C 348.
6. (1907) 9 Bom L R 1329
7. (1909) 31 All 285=1 I C 137.
8. (1872) 7 Q B 493=41 L J Q B 187.
9. (1885) 6 Deg M & G 474=25 L J Ch 186.

to make such an appropriation as will save limitation. The correctness of this view, however, has been doubted by Starling, L, J., in *Friend* v. *Young* (10). But whatever the law in England may be, the terms of S. 20, Lim. Act, are, in our opinion, perfectly plain. We hold that in order to bring a case within the section, it is not essential that the debtor should, on the occasion of every payment state explicity that the payment is made on account of interest as such; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest; and the case before us is precisely of that description. The result is that this Rule is made absolute, the decree of dismissal made by the Small Cause Court Judge set aside and the suit decreed with costs. The petitioners are also entitled to their costs of this rule. We assess the hearing fee at one gold mohur.

V.B./R.K. *Rule made absolute.*

10. (1897) 2 Ch 421=66 L J Ch 737.

A. I. R. 1918 Calcutta 479 (1)

MOOKERJEE AND BEACHCROFT, JJ.

Atul Chandra Guha—Petitioner, *In re.*

Civil Appellate Jurisdiction, Decided on 4th April 1917.

Bengal, N. W. P. and Assam Civil Courts Act (1887), S. 33—Order under S. 33 by District Judge is not revisable by High Court.

An order under S. 33, Bengal, N. W. P. and Assam Civil Courts Act, made by a District Judge is not an order which can be set aside by the High Court under S. 107, Government of India Act, 1915. [P 479 C 2]

A District Judge, exercising the powers vested in him under S. 33, Bengal, N. W. P. and Assam Civil Courts Act, acts in his administrative capacity and is not a Court subject to the appellate jurisdiction of the High Court. [P 479 C 2]

Probodhkumar Das—for Applicant.

Judgment.— This is an applicatiod of a novel character which invites us to set aside in exercise of the powers of superintendence conferred upon this Court by S. 107, Government of India Act, 1915, an order under S. 33, Bengal Civil Courts Act, 1887. The petitioner was Naib Nazir of the Court of the Munsif of Habiganj, and was dismissed by the District Judge of Sylhet on the ground that he had accepted a bribe. He appealed to the Chief Commissioner of Assam who declined to interfere. He now comes up to this Court and invites us to interfere on the ground that the order of the District Judge was made without any opportunity afforded to him to prove his innocence. We are of opinion that an order under S. 33, Bengal Civil Courts Act, is not an order which can be set aside by this Court under S. 107, Government of India Act, 1915. That section confers on each of the High Courts superintendence over all Courts for the time being subject to its appellate jurisdiction.

The question, consequently, arises, whether the District Judge, when he exercises the power vested in him under S. 33, Bengal Civil Court Act, in a Court subject to the appellate jurisdiction of this Court. In our opinion, the answer must be in the negative, as the order is made by the District Judge in his administrative capacity. Under S. 30 he has authority to appoint ministerial officers in his Court and to remove or suspend them. Under S. 31 he has also authority to take similar action in respect of officers in subordinate Courts. S. 33 then provides that the District Judge, subject only to the control of the Local Government, may, by order, suspend or remove any ministerial officers to whom S. 31 or 32 applies, and may, on appeal or otherwise, reverse, or modify any order made under either of those sections by any Court under his administrative control. It is manifest from the very phraseology used by the Legislature in S. 33, that the order is made by the District Judge in his administrative capacity. An order so made is not clothed with a judicial character, merely because it is based on evidence taken by the Judge. It is also clear that the order is subject only to the control of the Local Government. In our opinion, this application cannot be entertained by this Court and must be refused on that ground.

V.B./R.K. *Application rejected.*

A. I. R. 1918 Calcutta 479 (2)

FLETCHER AND RICHARDSON, JJ.

Prosunna Deb Raikat—Plaintiff—Appellant.

v.

Panchkowri Majumdar and *another*—Defendants—Respondents.

Appeal No. 1450 of 1915, Decided on 14th February 1917 from the Appellate Decree of Dist. Judge, Dinajpur, D/- 19th March 1915.

Landlord and Tenant—Tenancy—Subdivision of old tenancy into several tenancies.

with apportioned rents does create new tenancies.

The mere sub-division of an old tenancy into several tenancies with apportioned rents is not sufficient to create new tenancies. The answer to the question whether new tenancies have been created by the sub-division depends upon the intention of the parties. No inflexible rule apart from intention can be laid down. 3 *I C* 306, *Foll.* [P 180 C 1, 2]

Dwarkanath Chuckerbutty and *Upendra Lall Roy*—for Appellant.

Brojo Lall Chuckerbutty and *Bhupendra Chandra Guha*—for Respondents.

Fletcher, J.—This is an appeal from a decision dated 19th March 1915 of the learned District Judge of Dinajpur sitting as a Special Judge appointed under the provisions of the Bengal Tenancy Act, reversing the decision of the Assistant Settlement Officer of Jalpaiguri. The proceeding which was before the learned Judge was a proceeding on an application made for assessment of rent. The defence was that the rent was not liable to enhancement. It has been found that originally the tenancy was created before the date of the Permanent Settlement. The evidence showed and it was the common case that in the year 1868 the tenancy was sub divided and that, on that sub-division, the original tenancy came to be held at an apportioned rent. The Assistant Settlement Officer, having regard to the decision of this Court in existence on the date of the hearing of the application, namely, a decision of Sharfuddin, J. and Coxe, J. came to the conclusion that a mere ub-division was sufficient to create a new tenancy. That case, after the date of the decision of the learned Assistant Settlement Officer, received judicial comment in the case of *Bisseswar Ray Chowdhry* v. *Rajendra Kumar Singha* (1), and the learned Special Judge applying that case has reversed the decision of the Assistant Settlement Officer.

In my opinion, the learned Special Judge in reversing the decision of the learned Assistant Settlement Officer failed to make a material finding. The true rule is laid down, I think, in the case of *Muluk Chand Das* v. *Satish Chandra Das* (2), and the rule that is laid down there is this: that when lands of tenancy have been sub-divided, if a question arises whether new tenancies have been created, the answer must depend upon the intention of the parties. No inflexible rule apart from intention can be laid down. It was, therefore, essential for the learned District Judge to come to a finding whether the parties intended that, when this tenancy was sub-divided in 1868, the old tenancy should exist with the rent apportioned or whether what was done amounted to the creation of four new tenancies. The learned District Judge having failed to come to any finding on that part of the case, his decree must be set aside and the case must go back to him to re-hear the appeal and make a proper finding as to what was the intention of the parties when the tenancy was sub-divided and then to make a proper decree according to law. Costs will abide the result of the re-hearing before the learned District Judge.

Richardson, J.—I agree.

V.B./R.K. *Case sent back.*

1. A I R 1914 Cal 851=25 I C 228
2. (1909) 3 I C 306.

A. I. R. 1918 Calcutta 480

FLETCHER AND SMITHER, JJ.

Basiruddi Sheikh—Plaintiff — Appellant.

v.

Mobarak Munshi—Defendant — Respondent.

Appeal No. 1528 of 1915, Decided on 3rd April 1917, from appellate decree of Addl. Sub-Judge, Khulna, D/- 24th March 1915.

(a) Adverse possession—Jus tertii—Plea of, would be of no avail to trespasser.

One of two brothers, who had an undivided 8 annas share in a holding, assuming to himself the sole ownership of the holding leased it to the plaintiff intending to exclude his cosharer, who had disappeared and was considered as dead or having abandoned the property. The plaintiff, having been outsted by the defendant (a trespasser), brought a suit for his ejectment:

Held: that as the title of the plaintiff's lessor had become adverse to his cosharer, the plaintiff obtained title to the whole by adverse possession and that therefore he was entitled to recover the whole property from the defendant whose plea of jus tertii could not be of any avail. [P 481 C 2]

(b) Cosharer—Cosharer in possession of whole property dispossessed by trespasser—If, can eject trespasser.

Quaere.—Whether an undivided cosharer who is in exclusive possession of the whole property is entitled to recover the whole from a trespasser who dispossessed him or is liable to be put in joint possession with the trespasser. [P 481 C 2]

Jadunath Kanjilal and *Karunamoy Ghose*—for Appellant.

Purna Chandra Roy—for Respondent.

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Khulna, modifying the decision of the Munsif of the same place The suit was brought by the plaintiff to recover possession of certain property of which he had a lease. The first Court decreed the suit. The second Court modified the decree, giving the plaintiff possession of one-half. The plaintiff's case was that one Abdul was the original owner of the property who sold it to Meajan, who leased it out to the plaintiff as owner of the property in 1899. The plaintiff was in exclusive possession of the property until ousted by the defendant. The defendant alleged that Abdul had a brother named Gafur and Abdul granted a lease to the defendant's mother Pati Bewa. The Court held that the existence of Gafur and his interest in the property was not proved. The first Court held that the alleged lease to the defendant's mother had not been proved. The Court of first instance found that the plaintiff was in exclusive possession. The lower appellate Court found that Gafur had an eight annas share and that Gafur had obtained his interest in the holding. On that the plaintiff obtained possession of eight annas share along with the defendant. The present appeal is preferred against that decision. First of all, it is quite clear that the plaintiff has been found to be an eight annas cosharer of an undivided share in the property and he is entitled to each and every part of it, and the defendant who is found to be a mere trespasser is obviously not entitled to be in joint possession along with the plaintiff in the eight annas share.

It might be that the suit being a suit for ejectment, the defendant's possession cannot be disturbed. It is quite clear that the plaintiff was put in possession and his possession will be the possession of Gafur or his heir, unless some act is done to exclude Gafur. The finding that has been made as to the possession of the plaintiff's lessor Abdul is not in very clear terms in the judgment of the lower appellate Court. But it is quite clear that what the Judge means to find is that Abdul had been in exclusive possession from the time that Gafur went away and that Gafur had left the village for many years and had not been heard of. It is argued on that basis that the possession of Abdul would not be adverse to Gafur, unless there is some act to exclude Gafur. The act seems to be inconsistent with anything else except that the lessor of the plaintiff did mean to exclude his cosharer and brother Gafur, who disappeared. There cannot be any doubt as regards the fact that Gafur was considered as dead or that he abandoned or left this small property and the plaintiff's lessor assumed to himself the sole ownership of the property and dealt with it without any reference to Gafur. I think, on the whole, that the facts warrant the finding that the title of Abdul had become adverse as against Gafur.

If that is so, the case does not present any difficulty; because the plaintiff had his eight annas plus the eight annas of Gafur which he intended to have as his own and, as regards that, the plaintiff as representing Abdul is entitled to recover possession of the whole of the property. A case has been pointed out as regards the wider view involved and continually arising in this Court as to the value of the possessory title in a suit for ejectment where the plaintiff is unable to prove that he has got a title to the property. The case that has been pointed out in the judgment in *Manik Borai* v. *Bani Charan Mandal* (1) is a matter of considerable difficulty. That difficulty is not lessened by the fact that a contrary rule has been observed in this Court for a considerable number of years. It may be that in some cases, e. g , in *Shama Charan Roy* v. *Surja Kanta* (2), on the facts Jenkins, C. J. came to the conclusion that the suit was, in fact, a suit for confirmation of possession. I doubt whether the present suit could, in any view, be treated as a suit for confirmation of possession. I think that the evidence in the case is sufficient to show that the plaintiff obtained a title by adverse possession against Gafur. That gets rid of the plea of jus tertii set up by the defendant by showing that the interest of Gafur had ceased to exist by virtue of the Statute of Limitation. In that view, I set aside the judgment of the learned Subordinate Judge and restore that of the Munsif.

Smither, J.—I agree.

V.B./R.K. *Appeal accepted.*

1. (1911) 10 I C 469.
2. (1910) 6 I C 806.

✻ A. I. R. 1918 Calcutta 482

CHITTY AND BEACHCROFT, JJ,

Muhfoozul Huq and *others* — Decree-holder—Appellants.

v.

Mazhorul Huq and *others*—Judgment-debtors—Original decree-holders—Respondents.

Appeal No. 579 of 1914, Decided on 2nd July 1917, from appellate order of Dist.-Judge., Mymensingh, D/- 4th September 1914.

✻ **Civil P. C. (1908), O. 3, R. 4—Pleader acting on vakalatnama not containing his name—Execution petition presented by pleader is valid—Omission to insert name is merely clerical error and can be amended.**

On the last day of the period of limitation an application for execution of a decree was filed by a pleader on the authority of a vakalatnama executed by the decree-holder and accepted by the pleader, though the latter's name did not appear in the body of the vakalatnama. Notice having been issued upon the judgment-debtors, they appeared and obtained time to file objections, and eventually they objected to the execution on the ground that the pleader who filed the application having no authority to act, the application for execution was invalid:

Held: that in the absence of any evidence that the pleader was not in fact engaged by the decree-holder and of objection by the judgment-debtors that the pleader had never in fact been authorised to make the application, it should be presumed that the decree-holder engaged the pleader to make the application, so that the omission of his name from the body of the vakalatnama was merely a clerical error, which might be rectified by the decree-holder being allowed to amend the vakalatnama by insertion of the pleader's name along with the pleaders therein named. [P 482 C 2]

Basanta Kumar Bose and *Bipin Chandra Bose*—for Appellants.

Nuruddin Ahmed and *A. K. Fazul-ul-Huq* and *Biraj Mohan Mozumdar*—for Respondents.

Judgment.—This is an appeal by the decree-holders, whose application for execution has been rejected by both the lower Courts on the ground that the application, which was filed on the last day of the period of limitation, was filed by a pleader who had no authority to do so. The application for execution was filed on 24th April 1914 by Babu Shish Chandra Guha, representing himself as pleader for the decree-holders. On that application notices were ordered to issue and the judgment-debtors appeared on 27th May and took time to file their objections. That time was extended and eventually on 9th June 1914 the judgment-debtors objected that the pleader for the decree-holders had no authority to act. On the very next day the decree-holders filed another vakalatnama in favour of the pleader. When the matter came before the Subordinate Judge, as appears from the order of 17th June 1914, Babu Srish Chandra Guha, the pleader for the decree-holders, admitted that the petition for execution of the decree was filed by him without authority and that the case should be dismissed. The case was accordingly dismissed. From that order the decree-holders filed an appeal to the learned District Judge, who held that the vakalatnama was not a sufficient authority to the pleader and that, therefore, the application for execution was not duly presented. He accordingly dismissed the appeal. The learned District Judge was referred to the case of *Chhayunnessa Bibi* v. *Basirar Rahman* (1), but he distinguished that case on the ground that the authority there was a mukhtearnama whereas in this case it was a vakalatnama. Having regard to the facts in the two cases, there does not appear to us to be any substantial distnction between the two, and this was very properly conceded by the learned pleader for the respondent.

In that case the mukhtear was empowered by a mukhtearnama which did not contain his name and the same is the case with regard to the pleader before us. It would appear from the vakalatnama that it was merely a clerical error. The vakalatname, as is so often the case, is written out in the names of five pleaders but the name of Srish Chandra Guha does not appear among them. Overlooking this he appears to have accepted the vakalatnama as if his name was contained in it, and he has written his acceptance on the back. He is the only pleader who has accepted it and he acted as if he was the only pleader engaged. We think we may safely presume that he was engaged by the decree-holders in this matter. There is certainly no evidence to the contrary; nor did the respondents take the objection before the lower Court that he had never been in fact authorized to make the application. The learned pleader for the respondents had cited the case *Mohammad Ali Khan* v. *Jasram* (2), in which no doubt a contrary opinion was arrived at. But we think we ought to follow the case decided in our own Court if that is,

1. (1910) 37 Cal 399=5 I C 532.
2. A I R 1914 All 536=23 I C 464=36 All 46.

as we think, indistinguishable from the present. We think the simplest course will be to allow this appeal, set aside the orders of both the Courts below, and allow the amendment of the vakalatnama by the insertion of the name of Babu Srish Chandra Guha along with the pleaders therein named. Under the circumstances, we make no order as to costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 483 (1)

CHITTY AND BEACHCROFT, JJ.

Giridutta Sarma — Principal Defendant—Appellant.

v.

Durga Dutta Sarma and *others*—Plaintiffs—Respondents.

Appeal No. 1016 of 1915, Decided on 17th July 1917, from appellate decree of Sub-Judge, Assam, D/- 17th December 1914.

Civil P. C (5 of 1908), S. 92 — Suit relating to temple land does not fall under S. 92.

Section 92 is an enabling section and has not taken away the general power of suit. It is only when a suit is for one or more of the reliefs mentioned in S. 92(1) that it must necessarily be brought under that section; but there is no reason why a suit which does not fall within the limitations provided by that section should not lie independently of it provided the suit is in other respects maintainable. [P 484 C 2]

A suit by all the worshippers of a temple for a declaration that certain land is temple land and for an injunction restraining the defendant from alienating the same or treating it as his personal property does not fall within the scope of S. 92. [P 483 C 2]

Dwarkanath Chukerbutty and *Gopal Chunder Chukerbutty*—for Appellant.

Prakash Chunder Mouzumdar — for Respondents.

Judgment.—This is an appeal by defendant 1, Giri Dutta Sarma, against a decree of the Subordinate Judge of the Assam Valley Districts confirming the decree of the Munsif of Gauhati. The suit was brought by several persons as Bardeories of the Janardan temple against defendant 1, for a declaration that the land in dispute was Janardan temple land and for a permanent injunction against defendant 1 restraining him from alienating the same or treating it as his personal property. 31 Bardeories joined in bringing the suit and 7 others were added as pro forma defendants. Later on 23 more Bardeories were added as parties defendants, thus bringing on the record, as the Courts have found, all the Bardeories who are connected with this temple. The only question of law which has been argued before us is that the suit was not maintainable except under the provisions of S. 92, Civil P. C. It was argued that if this decree was allowed to be passed, the appellant might be subjected to a number of suits at the instance of other people. We agree with the learned Subordinate Judge when he says that S. 92 is an enabling section. The proviso to S. 92 enacts that

"no suit claiming any of the relief specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to, except in conformity with the provisions of that subsection"

From that we infer that only suits for one or more of the reliefs in sub S. (1) must necessarily be brought under S. 92. The general power of suit is not taken away, and, if it does not fall within the limitations provided by that section there is no reason why such a suit should not lie, provided that it is in other respects maintainable. It is clear that in this case the relief granted does not fall within any one of the specified reliefs in S. 92, sub S. (1). We think therefore that the suit as framed does lie, and that it was not necessary for the plaintiffs to sue under the provisions of S. 92. The second point which has been put before us is as to the adverse possession of defendant 1 of the land in suit. Both the Courts have found against him in this respect that the land in in suit has always been held as temple land and that he has acquired no title by adverse possession. This is a question which is concluded by the findings of fact of the lower appellate Court. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 483 (2)

MOOKERJEE AND BEACHCROFT, JJ.

Iswar Chandra Bera—Plaintiff— Appellant.

v.

Kali Charan Santra and *others*—Defendants—Respondents.

Appeal No. 1995 of 1914, Decided on 24th July 1917, against decree of Sub-Judge, Second Court, Midnapore, D/- 16th April 1914.

Bengal Land Registration Act (1876), Ss. 78 and 81—Transferee of usufructuary mortgage from proprietor who had previously granted patni lease to defendant suing for arrears of rent—He is not entitled to bene-

fit of S. 81—Rent and malikana distinguished.

The plaintiff, who was the transferee of a usufructuary mortgage from the proprietor who had previously granted a putni lease to the tenant-defendant, sued to recover arrears of rent. The tenant objected that under S. 78 the plaintiff could not recover rent in excess of the share for which he had registered his name:

Held: (1) that S. 78 applied, for although the sum recoverable was described in the lease as "malikana" it was in essence "rent," as by the terms of the lease the sum was recoverable by the summary procedure prescribed in Putni Regulation 8 of 1819; [P 484 C 2]

(2) that the plaintiff was a mortgagee within the meaning of S. 78, but he was not entitled to the benefit of S. 81 as there was no written contract between him and the tenant. The written contract mentioned in S. 81 refers to a contract between the person who claims rent as proprietor and the person who is bound to pay rent to him under S. 78 of the Act.

[P 484 C 2]

Mohini Nath Bose—for Appellant.

Saroda Charan Maity—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The trial Court decreed the claim in full; the lower appellate Court has reduced the amount by one half. The plaintiff seeks to recover arrears of rent as transferee of a usufructuary mortgage from the proprietor, who had previously granted a patni lease to defendant. The tenant resists the claim on the ground that under S. 78, Land Registration Act, the plaintiff is not entitled to rent in excess of the share for which he has registered his name in the Collectorate. This raises three questions: first, is the amount claimed "rent" within the meaning of S. 78; secondly, is the plaintiff "mortgagee" within the meaning of that section: and thirdly, is the plaintiff entitled to the benefit of S. 81? As regards the first point, the plaintiff contends that the amount he seeks to recover is described as "malikana" in the putni lease, and cannot consequently be regarded as "rent" within the meaning of S. 78 on the authority of the decision in *Syed Shah Najamuddin Hyder* v. *Syed Zahid Hussein* (1). That decision is of no assistance to the plaintiff. It was there ruled that S. 78, Land Registration Act, is no bar to the recovery of "malikana," which is not 'rent.' The malikana claimed in that suit fell within the description given by Sir Barnes Peacock, C. J., in the case of *Bhuli Singh* v. *Mt. Nimu Behu* (2), namely, the amount of profits of an estate payable to the proprietor who has been deprived of possession by the Government by reason of his neglect or failure to come in and take settlement. Here the sum recoverable by the plaintiff is, no doubt, described in the putni lease as "malikana," but the lease shows that it was in essence rent and was made expressly recoverable by the summary procedure prescribed in the Putni Regulation of 1819. The first question must accordingly be answered against the appellant.

As regards the second point, there is no room for controversy that the plaintiff is a mortgagee. The proprietor executed a usufructuary mortgage in favour of the vendor of the plaintiff and the conveyance which is the foundation of his title shows that he has purchased the interest of the usufructuary mortgagee. The second question also must be decided against the appellant. As regards the third point, the plaintiff relies upon S. 81, Land Registration Act, which is in these terms:

"Nothing contained in the three last preceding sections shall be held to interfere with the conditions of any written contract or to prevent any person deeming himself entitled to any sum of money, from recovering such sum by due process of law from any other person who has received the same."

Now the "written contract" mentioned in S. 81 refers obviously to a contract between the person who claims rent as proprietor and the person who is bound to pay the rent to him under S. 78: *Bhugwan Das* v. *Raghunath Sahai* (3). In the case before us, there is no written contract of tenancy between the defendant and the plaintiff. There is no doubt a written contract between the defendant and the proprietor from whom the plaintiff claims to have derived title as usufructuary mortgagee. A case of this description does not, in our opinion, fall within S. 81, which is consequently of no avail to the plaintiff. The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. (1908) 8 C L J 300.

2. (1870) 4 B L R A C 29=12 W R 498.

3. (1910) 6 I C 563.

A. I. R. 1918 Calcutta 485

TEUNON AND SHAMSUL HUDA, JJ.

Umesh Chandra Roy—Complainant—Petitioner.

v.

Satis Chandra Roy and *others*—Accused—Opposite Parties.

Criminal Revn. No. 662 of 1917, Decided on 29th June 1917, against an order of Sub-divl. Magistrate, Uluberia, D/- 16th May 1917.

Criminal P. C. (5 of 1898), S. 494—Duty of Court—Reasons for withholding or according consent must be given in the order.

In withholding or according consent to the withdrawal of a prosecution under S. 494, the Court acts in a judicial capacity and for its order as for every order judicially made, it ought to give and record its reasons. [P 485 C 2]

B. N. Sasmal and *Sisir Kumar Ghoshal*—for Petitioner.

P. N. Datt and *Hit Lal Guha*—for Opposite Parties.

Judgment—This Rule is directed against an order made by the Subdivisional Officer of Uluberia under the provisions of S. 494 (a), Criminal P. C. It appears that on the application of the Court Sub-Inspector acting as Public Prosecutor the Magistrate accorded his consent to the withdrawal by the Public Prosecutor from the prosecution of three persons, who under the provisions of S. 170 of the Code had been sent up fro trial on charges of rape and murder. For this order according his sanction to the withdrawal from the prosecution and to the subsequent or consequential order discharging the accused, the Magistrate gave no reasons. As from the petition presented by the complainant it appeared that one of the persons put on their trial had made a confession implicating himself and the others, we were of opinion that these orders should be examined by this Court. The learned counsel who has appeared to oppose this Rule on behalf of the accused persons has contended that the consent given by the Court under the provisions of S. 494, Criminal P. C., is to be regarded as a mere ministerial or executive act for which it is not necessary that the Magistrate should set out any reason; and in support of this view he refers us to a case decided by two learned Judges of the Madras High Court and reported as *Sadayan, In re* (1). With all deference to the opinion there expressed by these learned Judges we are unable to assent to the view there taken, or to the view now urged upon us by the learned counsel appearing in the present case. The only prosecutor who may under the provisions of the Code of Criminal Procedure withdraw from a prosecution without obtaining the consent of the Court and without giving reasons is the Advocate-General. No other Public Prosecutor is placed in that privileged position; and if the consent of the Court is to be regarded as a ministerial act or merely an executive act, we do not understand why it should have been necessary for the legislature to insert such a provision in the section of the Code with which we are now dealing.

It is clear to our minds that in either withholding consent or in according consent the Court is acting in a judicial capacity, and for its orders as for every order judicially made it ought to give and record its reasons. We are fortified in this view by a consideration of the provisions of Ss. 435 and 437, Criminal P. C. If the consent has been improperly accorded, it is clear that the consequential discharge must also be looked upon as improper. For these reasons we are of opinion that when a Court acting under S. 494 of the Code gives its consent to a withdrawal from a prosecution, it should record its reasons in order that this Court may be in a position to say whether the discretion vested in the Court has been properly exercised. In the present case the Magistrate has now submitted to this Court in his explanation the reasons which led him to make the order under consideration. We are not satisfied that the first reason in which he refers to the action of the Superintendent of Police is a good or sufficient reason. We are not certain that the discretion vested in the investigating officer by the provisions of S. 170, Criminal P. C., can be controlled in the way suggested by the Superintendent of Police; or so controlled after the discretion has been exercised. But the other reasons that have been given by the Magistrate appear to us to be of a more substantial character. We have examined for ourselves what was put forward to us as a confession implicating the confessing accused and his co-accused; and when we read it we find that he, the confessing accused, does not in fact implicate himself. In the course of the argument before us, reference has been made to a confession

1. (1909) 4 I C 1126.

said to have been made by the same accused in his village in the presence of a number of villagers. But it would appear that that confession was made while the accused was in the presence and practically in the custody of police officers, so that also becomes inadmissible. Having now considered the reasons which led the Magistrate to consent to the withdrawal from the present prosecution, we are of opinion that in the present case we ought not to interfere. But we desire to point out that after all the ultimate order is one only of discharge, and that if and when evidence becomes available it will still be open to the Crown or to the Court to re-open this prosecution.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 486

WALMSLEY AND GREAVES, JJ.

Chairman, Bally Municipality—Defendants—Appellants.

v.

Pramatha Nath Mokherjee and *others*—Plaintiffs and Defendants — Respondents.

Appeal No. 3093 of 1913, Decided on 6th July 1917, from appellate decree of Sub-Judge, Hooghly, D/- 6th June 1913.

Limitation Act (1908), Art. 144—Defendant in possession of land, getting conveyance from Hindu widow on payment of consideration—Widow executrix under will of husband—Probate taken — On widow's death, daughter suing for possession of setting aside conveyance—Limitation does not begin to run prior to date of conveyance—Grandsons of widow having notice of sale and not objecting are not estopped from challenging its legality — Alienation being restricted by will S. 90, Probate and Administration Act, is bar to alienation—Consideration cannot be refunded to defendant in absence of proof that it was spent for benefit of estate—Hindu Law—Alienation—Widow—Evidence Act, S. 115—Probate and Administration Act, S. 90.

The defendants who were in possession of certain land got a conveyance executed by a Hindu widow in respect of that land which belonged to her husband's estate, on paying a consideration for it. The widow was an executrix under the will of her husband of which she had taken probate. On her death her daughter instituted a suit for the recovery of possession of the land on setting aside the conveyance and on the latter's death her sons, who were the reversionary heirs, continued the suit:

Held: (1) that limitation in favour of the defendants did not begin to run prior to the date of the conveyance as their previous possession could not have been adverse, inasmuch as by the payment of consideration to the widow for the conveyance executed by her, they recognized that she had some title to the land; (2) that the fact that the grandsons of the widow were aware of the sale and raised no objection could not estop them from challenging the legality of the sale, because at that time they had no right to the property, as their mother was still alive; (3) that as the power of alienation of the widow was restricted by the will, S. 90, Probate and Administration Act, was a bar to the alienation by the widow of the property in suit; (4) that in the absence of any proof that the consideration received for the conveyance was spent for the benefit of the estate no order could be made in favour of the defendants for a refund of the same. [P 486 C 2; P 487 C 1]

Satis Chandra Ghose and *Lalit Mohan Banerjee*—for Appellants.

Dwarka Nath Mitter and *Manmatha Nath Ganguly*—for Respondents.

Walmsley, J.—This appeal is preferred by the Chairman of the Bally Municipality. The subject-matter of the suit is one cotta of land. A widow of the name of Kamini Debi executed a conveyance in respect of this land on 27th October 1904. She died on 5th August 1909 and her daughter instituted the present suit for setting aside the document, and on her death the suit has been carried on by her sons. The property originally belonged to Rai Bahadur Kedar Nath Chatterjee, husband of Kamini Debya. He left a will of which probate was taken by his widow on 23rd August 1901. The suit was brought by the daughter of Kamini Debi for setting aside the document on the ground that Kamini Debi had no power to alienate the property. The main defences were that the suit was barred by limitation, that the sale benefited the estate and that the present plaintiffs, the grandsons of Kamini Debi, acquiesced in the sale. The suit was dismissed by the first Court but decreed by the Court of appeal. The defendant has, therefore, preferred this second appeal. Three points have been urged by the learned vakil on behalf of the appellant. The first is that the suit is barred by limitation. It is suggested that the Municipality was in possession of the property from some date prior to 1904 and that limitation began from that prior date. It seems to me, however, that possession of the Municipality cannot have been adverse before 1904, when by the payment of Rs. 40 to the widow the Municipality recognized that she had some title to the land.

The second point is that the grandsons of Kamini Debi were aware of the transaction and raised no opposition. It is said that on that account they are now

estopped from challenging the legality of the sale. But it must be remembered that at that time they had no right to the property because their mother was still alive. For that reason I think that they are not estopped. The third point taken is that the learned Subordinate Judge is wrong in holding that S. 90, Probate and Administration Act, prevented the widow from exercising the powers of alienation. In support of this argument reference has been made to the decision *In the goods of Narsing Chunder Bysack* (1). The present case appears to us to differ from the case cited. In that case Sale, J., remarked that all the debts and legacies had been paid. In the present case we have no information on that subject and we do not know whether the administration is at an end. It appears to me, therefore, that the section, which is very definite in its restrictions on the power of an executor, was a bar to the alienation by the widow of the property in suit, and I think that the lower Court was right in the view it took as to the applicability of S. 90. The last point raised is in respect of the sum of Rs. 40 paid by the Municipality. It is said that an order should be made for a refund of this sum. It has not been proved, however, that this sum was used by Kamini Debi for the benefit of the estate. That being so an order cannot now be made in favour of the appellant for a refund of this sum of Rs. 40. The appeal should, therefore, be dismissed with costs.

Greaves, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1899) 3 C W N 635.

A. I. R. 1918 Calcutta 487

FLETCHER AND NEWBOULD, JJ.

Sharuddin Sheikh and *another*—Plaintiffs—Appellants.

v.

Jijaraddin Sheikh Ostagar—Defendant—Respondent.

Appeal No. 1942 of 1916, Decided on 19th July 1917, from appellate decree of Sub-Judge, Nadia, D/- 24th May 1916.

Civil P. C. (1908), O. 1, R. 8 and O. 7, R. 4—Few stray persons coming forward with representative suit without proper representation of community—Court cannot adjudicate upon public right.

A Court has no jurisdiction to adjudicate upon a public right when a few stray plaintiffs come forward with a representative suit without any proper representation of the community whom they profess to represent. [P 487 C 2 P 488 C 1]

The plaintiffs sued in a representative capacity as representing the Mahomedan inhabitants of a particular village, for a declaration that a plot of land in the village belonged to the local mosque where the Mahomedan community were accustomed to worship, and although they paid to the Court the appropriate sum for service of notice under O. 1, R. 8, the Munsif tried the suit before the notices were served and decreed it. The Court of first appeal dismissed the suit holding that it was not properly before the Court and that even if it were properly before the Court, the evidence did not establish the right of the Mahomedan community:

Held: that as the suit was not a properly representative suit, the Court of appeal ought not to have adjudicated upon the public right claimed on behalf of the Mahomedan community. [P 488 C 1]

D. N. Bagchi—for Appellants.

Hari Kumar Ganguly—for Respondent.

Fletcher, J.—This is an appeal by the plaintiffs against a judgment of the learned Subordinate Judge of Nadia, dated the 24th May 1916, reversing the decision of the Munsif at Krishnagar. The plaintiffs sued in a representative capacity as representing the Mahomedan inhabitants of a particular village, for a declaration that a small plot of land in the village formed a portion of the property belonging to the local mosque where the Mahomedan community were accustomed to worship. The Court of first instance decreed the suit. The learned Judge of the lower appellate Court held that the suit was not properly before the Court, on the ground that the suit being a representative suit and the plaintiffs having claimed no personal interest in the subject-matter of the dispute at all, the notice contemplated by the law had not been issued and therefore the plaintiffs were not entitled to sue on behalf of the Mahomedan community of the village. The learned Judge having disposed of the case in that manner further held that, even if it was a proper suit and had been properly before the Court, he would, on consideration of the evidence, hold that the Mahomedan community of the village, who were said to be represented by the plaintiffs but in the view of the learned Judge were not so, were not entitled to this property. It is clear that the learned Judge, when the Mahomedan community were not property represented, had no right to adjudicate on the rights of that community. It requires a proper representative suit before the Court can adjudi-

cate on public rights of this nature. It would never do to hold, where some stray plaintiffs come forward without any proper representation of the community, but profess to represent them, that the Court would have jurisdiction at their instance to pronounce on a public right. In the present instance the case was a hard one because the plaintiffs on their part had done all things necessary under the terms of the law to have the proper notices issued so that the suit might be properly constituted. They paid to the Court the appropriate sum for the service of such notices and one does not understand why when the appropriate sum was paid, the machine of Court operated so slowly that the notices were not served as required by the law. However, the notices were not served and the fault is that of the Court. It is obvious that the case has not been properly tried. The learned Judge ought to have tried the case so as to come to a final decision once for all as to whether this land did form a portion of the property belonging to the mosque in that locality or not. It won't do to say that even if that community had been properly represented before him, he would have decided the case against them. We therefore set aside the decision appealed from and remit the case to the primary Court with directions to the learned Judge there to rehear the case de novo after proper notices have been duly served. Both parties wll be allowed to adduce fresh evidence. Costs will abide the result of the re-hearing before the learned Judge of the Court of first instance.

Newbould, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 488

CHITTY AND SMITHER, JJ.

Ajitulla Sarkar—Decree-holder—Appellant.

v.

Nandoor Mahammad and *others* — Judgment debtors—Respondents.

Appeal No. 537 of 1915, Decided on 20th November 1917, from order of Dist. Judge, Rangpore, D/- 28th August 1915.

Civil P. C. (1908), S. 145—Surety bond given in execution proceedings—Liability of surety is not affected by dismissal of execution case.

Where the claimants were allowed to remove certain crops attached as the property of the judgment-debtor, on an express undertaking given by a duly executed surety bond that if the claim was not allowed the sureties would pay the decree-holder a certain sum, the mere fact that the execution case against the judgment-debtor was dismissed after the claim was disallowed does not affect the liability of the sureties under the bond; 14 *Cal* 757, *Dist.*

[P 488 C 2, P 489 C 1]

Jitendra Nath Roy—for Appellant.

Atul Chandra Gupta — for Respondents.

Chitty, J.—This is an appeal arising out of certain execution proceedings, and the question is between the decree-holder on the one side and the sureties Bharat Chandra Datta and Nandoor Mahammad, on the other. The judgment-debtor has no further interest in the proceedings. Some standing crops were attached as the property of the judgment-debtor. To those crops a claim was put in by certain persons and for them the present respondents stood sureties. The surety bond provided that the present respondents would, if the claim to the crops were not allowed, pay a sum of Rs. 50 to the decree-holder and that, if they did not pay amicably, the decree-holder was to be entitled to realize the amount by attachment and sale of their moveable and immovable properties. On this bond being passed the claimants were allowed to cut the crops. When the claimant's case came on, the claim was dismissed and the execution case against the judgment-debtor was also struck out. In execution against the present respondents the Munsif allowed the decree-holder's application, but on appeal the learned District Judge reversed that decision. He relied on two cases, *Lalji Sahoy* v. *Odoya Sunderi Mitra* (1) and *Nirus Narayan* v. *Peari Dai Debi* (2). The bonds in those cases however were different from the bond before us. Those were cases of an undertaking by the sureties to produce the judgment-debtor in the course of certain execution proceedings. It was held that when those execution proceedings came to an end there was no further obligation under the bond to produce the judgment-debtor, there being no proceeding in which he could be brought before the Court. That is not the case here.

The claimants were allowed to remove the crops on the express undertaking that in case their claim was found to be baseless the sureties would pay the decree-

1. (1887) 14 Cal 757.
2 (1913) 21 I C 612.

holder Rs. 50. The mere fact that the execution case against the judgment-debtor was dismissed after the claim was dismissed does not, in my opinion, affect the question of the liability under the bond. Had there been a suit under the bond there is no doubt that the sureties could have been made liable. The present Code however provides for realization of the amount due under the bond by execution. I would therefore decree the appeal, reverse the order of the learned District Judge and restore that of the Munsif with costs in this Court and in the lower appellate Court. I assess the hearing fee at one gold mohur.

Smither, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 489 (1)

BEACHCROFT AND WALMSLEY, JJ.

Kanai Lal Mullick—Decree-holder—Petitioner.

v.

Ahed Bux Mondul and *another*—Judgment-debtors—Opposite Parties.

Rule Nisi No. 905 of 1916, Decided on 19th February 1917, against order of Munsif, Boraset, in Case No. 31 of 1916.

Civil P. C. (1908), O. 21, R. 54—Attachment is not complete until procedure in R. 54 is followed.

An attachment does not date from the date on which the order is passed for the issue of attachment and it is not complete until the procedure provided by O. 21, R. 54, has been followed, [P 489 C 2]

Probodh Kumar Das—for Petitioner.

Haradhone Chatterjee—for Opposite Party.

Beachcroft, J.—The petitioner in this Rule is the decree holder. He had certain property of the judgment debtor attached. A claim was put in by the present opposite party on the ground that he had purchased from the judgment-debtor at a private sale. The Munsif upheld the claim finding that the claimant had proved his purchase, his khas possession, and possession through tenant before the attachment. It is now urged on behalf of the petitioner that the Munsif was wrong in stating that the purchase by the opposite party was before the attachment. That purchase was on 27th March 1916. It is urged that the attachment took place on 22nd March 1916. What happened on 22nd March was that the Court passed an order for attachment. It appears in fact that processes were not issued till 4th April. It is further argued on behalf of the decree-holder that the attachment dates from the date that the order is passed by the Court for the issue of attachment. I cannot accede to that proposition.

Order 21, R. 54 of the Code, provides the mode of attachment of immovable property. In my opinion, until the procedure provided by that order has been followed, the attachment is not complete; in other words, the attachment had not been made at the date of the purchase by the opposite party. In this view, I consider that the Rule ought to be discharged with costs, two gold mohurs.

Walmsley, J.—I agree.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 489 (2)

FLETCHER AND NEWBOULD, JJ.

Midnapore Zamindari Co. Ltd.—Defendants—Appellants.

v.

Jogendra Kumar Bhaumick and *others*—Plaintiffs—Respondents.

Appeal No. 2880 of 1915, Decided on 15th June 1917, from appellate decree of Sub-Judge, Nadia, D/- 7th June 1915.

Civil P. C. (1908), S. 11—Rent suit—Decision as to jama payable operates as res judicata.

The case of res judicata may arise in a rent suit just as much as in any other suit. [P 489 C 2]

Where in a rent suit the question as to what is the jama payable is raised and adjudicated upon, the decision operates as res judicata on that question in a subsequent suit for rent. [P 490 C 1]

U. N. Sen Gupta and *Probodh Coomar Das*—for Appellant.

Ram Chandra Mozumdar and *Phanindra Kumar Guha*—for Respondents.

Fletcher, J.—This apppeal must be dismissed. The very satisfactory judgment given by the learned Judge of the lower appellate Court is quite clear and I think the reasons are unanswerable. For the idea that is said to have been got from the books that no case of res judicata arises in a rent suit, there is no authority at all. The case of res judicata may arise in a rent suit just as much as in any other suit. The case need not rest only on the questions of constructive res judicata as found by the learned Judge of the lower appellate Court, but also on actual case of res judicata. There was an issue as to what was the jama payable, and the answer which the learned Judge

gave was that the rent must be assessed on the land at 15½ annas per bigha according to the compromise decree. There was an express adjudication on that point that the rent was payable at the rate of 15½ annas per bigha and, therefore, the case is really a much stronger one than set out in the judgment of the learned Subordinate Judge. At the same time, I think that the judgment pronounced by the learned Judge of the lower appellate Court is quite sufficient to dispose of the appeal preferred by the defendant. The present appeal, therefore, fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 490

FLETCHER AND NEWBOULD, JJ.

Harendra Nath Banerjee -- Decree-holder—Petitioner.

v.

Hari Charan Dutt—Judgment-debtor—Opposite Party.

Rule Nisi No. 256 of 1917, Decided on 4th July 1917, against order of Munsif, First Court, Sealdah, in Exen. Case No. 807 of 1916.

Civil P. C. (1908), O. 21, R. 66—Court can issue sale proclamation before objections are judicially disposed of.

There are no words in R. 66, O. 21, limiting the power of the Court so as to preclude it from issuing a sale proclamation before objections filed by the judgment-debtor have been judicially disposed of, though it may be that the property cannot be sold until the objections put forth are disposed of, [P P]

Satcowripaty Roy—for Petitioner.

Pramathanath Banerjee and *Phanindralal Maitra*—for Opposite Party.

Judgment.—This is a Rule calling on the opposite party to show cause why the execution proceedings mentioned in the petition should not be stayed until the security bond is inquired into and final order is passed thereon and secondly, why the sale proclamation should not be cancelled and a fresh proclamation issued after the matters to be proclaimed are settled by the Court. The first portion of the Rule was obtained on a misstatement of facts. The record clearly shows that the Nazir reported that the security bond should be rejected on the ground that the pleader who had identified the surety said that the security bond need not be furnished as it was not required, and having taken that statement the learned Munsif rightly rejected the security bond on the ground that the pleader who identified the surety said that it need not be taken as it was not required. There is nothing in that point. The second point is a point that has been urged with some force and that is this, that the Court has no jurisdiction to issue a sale proclamation under the terms of O. 21, R. 66, Civil P. C., whenever any objection, however frivolous and however inaccurate, has been filed before the Judge and the Judge has not judicially disposed of that objection. I can see nothing in the words of the section to limit the power of the Judge. It may be that a property cannot be sold until the objections put forth are disposed of. I do not know whether it can or cannot be.

But what we are asked to do in this case is to cancel the sale proclamation—whether we have the power to do that or not, I do not know—on the ground that there were certain objections which the learned Judge has fixed the time for hearing and the time had not arrived before the applicant moved this Court and owing to the action of the applicant had not been disposed of. I do not know any reason why the learned Judge being satisfied about this sale proclamation should not issue it because he has got an objection of some sort before him filed by the judgment-debtor. It may be that he is bound to dispose of that before the property is sold within thirty days, which is not an insufficient time to dispose of the objection. No authority has been shown to us saying that the Court cannot issue the sale proclamation in such a case. The case of *Lachman Pershad Singh* v. *Ganga Pershad Singh* (1), although the observations of the learned Judges in that case, having regard to the fact that they said that the appeal was infructuous, must be taken as obiter, certainly does not establish the view set up that the Court is precluded in all cases form issuing the sale proclamation whenever the judgment-debtor files an objection, however, frivolous and however unfounded the same may be. Whether the Court can sell or not without disposing of these objections is another matter. But as to the issue of the sale proclamation there seems to be no ground why it cannot be issued. The length of time that is taken by execution cases in this country is already very great and to give the judg-

1. (1910) 6 I C 180.

ment-debtor under the terms of O. 21, R. 66, a new right and privilege to further delay the execution of the decree by providing that any objection which he may like to take as to the form of the sale proclamation must be adjudicated before the proclamation is issued is one which we ought not to encourage. There are no words in the rule suggesting that the proclamation cannot be issued until after the objections have been disposed of. I think that is the correct view of the Rule. The present Rule must, therefore, be discharged with costs, one gold mohur.

Newbould J.—I agree.

V.B./R.K. *Rule discharged.*

A.I.R. 1918 Calcutta 491

FLETCHER AND NEWBOULD, JJ.

Bhupendra Narain Dutt and *others*—Defendants—Appellants.

v.

Manmotha Nath Mitter and *others*—Plaintiffs—Respondents.

Appeal No. 1454 of 1915, Decided on 5th July 1917, from appellate decree of Addl. Dist. Judge, 24-Pergannahs, D/- 8th March 1915.

Bengal Tenancy Act (1885), S. 60—Rent—Suit for—Cosharer landlord duly registered under Land Registration Act can maintain separate suit for his share of rent—Bengal Land Registration Act (6 of 1876).

A cosharer landlord who has been duly registered under the provisions of the Land Registration Act, is entitled to maintain a separate suit for his share of the rent, as under the provisions of S. 60, Ben. Ten. Act, the tenant is prohibited from setting up the title of a third party to receive the rent sued for. [P 493 C 2]

Dwarkanath Mitter and *Bijoy Coomar Chatterjee*—for Appellants.

Mohendra Nath Roy—for Respondents.

Fletcher, J.—This is an appeal by defendants 1 and 3 against a judgment of the learned District Judge of the 24-Pergannahs reversing the decision of the learned Additional Subordinate Judge of the same place. The suit was a suit for the recovery of certain rent in arrears and it was brought by the plaintiff as a cosharer of a tenure of 900 bighas of land held out of lot No. 41 in Touzi No. 1466 in the Sunderbunds. Two points have been raised in this appeal. The first point is that there was no evidence on which the learned District Judge could find that it was a separate tenure of 900 bighas held out of lot No. 41 at an annual rent of Rs. 420. We have been taken through a considerable amount of documentary evidence which had been read before us. The question in a case like this is not whether we should arrive at the same conclusion as the learned Judge but the question is whether the learned Judge had before him evidence which entitled him to arrive at the conclusion that there was a separate tenure of 900 bighas held out of lot No. 41 at a rent of Rs. 420 per annum. It is quite clear that there was a considerable body of evidence before the learned Judge and amongst that evidence there were admissions in writing made by the appellants before us. The learned Judge acting on that evidence made a clear finding that there was the separate tenure of 900 bighas held out of lot No. 41 at a rent of Rs. 420. There is nothing to say on that. I cannot see any reason on which the finding of the learned Judge can be disturbed. Dr. Mitter says that there are some reasons why this should not be treated as a separate holding but ought to be treated as one holding with the original holding of 1,302 bighas. Those considerations cannot weigh with us.

The other point that has been raised is on the finding of the learned District Judge that the plaintiffs as a cosharer is entitled to maintain a separate suit for his share of the rent on the ground that he having been registered under the provisions of the Land Registration Act, the provisions of S. 60, Ben. Ten. Act do not permit, in a suit by a landlord to recover rent, the entry in the register to be challenged by the tenant. Dr. Mitter has put forward the case that his clients the tenants are also cosharer landlords and the case may involve a considerable hardship on the ground that the decisions in this case may amount to res judicata. Clearly it will not amount to res judicata. If the statute prohibits this matter to be enquired into in a rent suit, it cannot be judicially determined as between the plaintiffs and Dr. Mitter's clients, and cannot be determined except in a proper suit. It seems to me that the view that the learned District Judge has taken is clearly right. Under the sections of the Land Registration Act, apparently registration is not conclusive so as to prohibit the tenant from setting up the right of a third party in a rent suit and the reports of the cases in this Court

show that the tenants have restored to that right. But it was intended by the legislature in the Bengal Tenancy Act, that in a rent suit where the only point can be as to the tenant's acquittance for the rent, registration should be taken as conclusive and that the tenant should not in a rent suit be entitled to set up that the rent is due to a third party. S. 60, Ben. Ten. Act says that in clear and unmistakable terms. If the statute says this we ought to give full effect to the words of the statute. It is said that the decision of this Court in the case of *Durga Das Hazra* v. *Samash Akon* (1) is the other way. That was a decision of Morris, J., and Gordon, J., and what they decided in that case was that the facts found by the learned Judges took the case out of S. 60, Ben. Ten. Act. It is quite clear that that case is not an authority for stating that, in a suit for rent, the tenant can challenge the title of the landlord duly registered under the provisions of the Land Registration Act. In this case, any rights that the appellants have as cosharers as against the plaintiff of course they will be able to enforce such rights in a properly constituted suit; but in a suit for rent, it seems to me quite clear under the provisions of S. 60, Ben. Ten. Act that the tenant is prohibited from setting up the title of a third party to receive the rent sued for. I agree in the conclusion arrived at by the learned District Judge. The present appeal therefore fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1900) 4 C W N 606.

A. I. R. 1918 Calcutta 492 (1)

WALMSLEY AND GREAVES, JJ.

Ishan Chandra Banerjee—Plaintiff—Appellant.

v.

Hrishikesh Biswas and *others*—Defendants—Respondents.

Appeal No. 2051 of 1913, Decided on 12th July 1917, from appellate decree of Dist.-Judge, Bankura, D/-9th September 1912,.

Civil P. C. (5 of 1908), O. 41, R. 23—Suit for possession by purchaser in mortgage decree—Rights of defendants claiming as lessees ought to be decided—Practice, procedure.

A purchaser in execution of a mortgage decree sued for khas possession of the property purchased by him. The suit was decreed but the Court declined to give a decision as to the tenancy rights set up by some of the defendants as a bar to the plaintiff's claim to obtain khas possession:

Held: that the Court was wrong in declining to decide the question of tenancy rights set up by the defendants. [P 492 C 2]

Karunamoney Bose—for Appellant.

Greaves, J.—The only question that really arises in this appeal is whether the lower appellate Court was wrong in declining to come to a decision as to whether defendants 10 and 15 to 17 acquired any rights in the land in suit disentitling the plaintiff to khas possession of the land as against them. The lower appellate Court has referred the plaintiff to fresh suits against these persons so that the rights should be decided in those suits and he has declined to decide that matter in the present suit. We think that the learned Judge was wrong in his view and he ought to have decided this question in the present suit. The decree of the Court below should, therefore, be set aside and the case sent back to decide this issue, namely, whether defendants 10 and 15 to 17 have acquired any rights in the land in suit disentitling the plaintiff to obtain khas possession of the land in suit. Uuder the provisions of O. 41, R. 23, we accordingly send this case back to the lower appellate Court with a direction to re-admit the suit in its original number in the register of civil suits and proceed to determine the issue above stated. The plaintiff will be allowed mesne profits to be assessed by the Court who tries the issue after the decision of the issue mentioned above.

Walmsley, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 492 (2)

CHATTERJEA AND RICHARDSON, JJ.

Shyam Charan Bhattacharjee—Plaintiff—Appellant.

v.

Mustafizar Rahaman and *others*—Defendants—Respondents.

Appeal No. 2586 of 1914, Decided on 12th July 1917, from appellate decree of Sub-Judge, Chittagong, D/- 19th May 1914.

Bengal Tenancy Act (1885), S. 60—Rent suit—Landlord registered as 16-annas proprietor—Tenant cannot plead that entire rent is not payable to him but part is payable to third person as cosharer—Land Registration Act (1876).

Under the provisions of S. 60, Ben. Ten. Act, it is not open to a tenant to plead in defence

to a suit for rent by a landlord, who has been registered, under the Land Registration Act, as the 16-annas proprietor of the land, that the entire rent claimed is not payable to plaintiff, but part of it is due to a third person as a co-sharer of the plaintiff. [P 493 C 1]

Khitish ChandraSen—for Appellant.

Judgment.—This appeal arises out of a suit for rent. The plaintiff claims the entire rent of the tanure from the defendant on the ground that he is the person registered under the Land Registration Act as proprietor of the entire 16 annas of the superior interest. The Court of first instance gave him a decree for the entire rent, but the learned Subordinate Judge, on appeal, has reversed that decree and dismissed the suit. It appears that the proprietary interest belonged to two persons Ram Kant and Pran Krishna in equal shares. Ram Kant's interest devolved on his three sons, two of whom executed a conveyance in respect of 8-annas share to the plaintiff. The two sons of Ram Kant have been made parties to the suit as pro forma defendants. The third son is alleged to be insane. However that may be, the plaintiff got his name registered with respect to the 8-annas share of Ram Kant. The 8-annas which belonged to Pran Krishna, was purchased in the name of the plaintiff's son Naba Chandra. The latter died leaving a son; but the plaintiff got his name registered as the heir of Naba Chandra. In fact the plaintiff has got his name registered as the proprietor of 16-annas under the Land Registration Act and this is found by both the Courts below. The learned Subordinate Judge however has dismissed the suit on the ground that the plaintiff was not entitled to get his name registered as heir of Naba Chandra, nor in respect of the share of the third son of Ram Kant. S. 60, Ben. Ten. Act, lays down that:

"Where rent is due to the proprietor, manager or mortgagee of an estate, the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate, or of his agent authorised in that behalf, shall be a sufficient discharge for the rent; and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person."

Under the express words of the section therefore it was not open to the defendant to plead in defence that any portion of the rent was due to any third person. The rights of such third person are provided for in the section itself. It says:

"But nothing in this section shall affect any remedy which any such third person may have against the registered proprietor, manager or mortgagee."

We are accordingly of opinion that the Court below is wrong in holding that the plaintiff is not entitled to the rent claimed. The decree of the lower appellate Court is therefore set aside and that of the Court of first instance restored with costs of this Court and the lower appellate Court.

V.B./R.K. *Decree set aside.*

A. I. R. 1918 Calcutta 493

TEUNON AND NEWBOULD, JJ.

Bepin Behary Chakrabutty and *others*—Defendants—Appellants.

v.

Sib Charan Chakrabarty—Plaintiff—Respondent.

Appeal No. 52 of 1915, Decided on 30th November 1917, against the decree of Sub-Judge, Jessore, D/- 11th January 1915.

Bengal Tenancy Act (1885), S. 155—Sufficiency of notice—Misuse incapable of remedy—Notice though not requiring tenant to remedy misuse is sufficient.

If the misuse complained of in a notice under S. 155, is in fact incapable of remedy, the notice is sufficient although it does not require the tenant to remedy the misuse, and a suit based on such a notice will not fail for want of a proper notice. [P 493 C 2; P 494 C 2]

Brojo Lal Chakrabarty, for *Mohini Mohan Chakrabraty*—for Appellants.

Sarat Chandra Khan for *Hirendra Nath Gunguly*—for Respondent.

Judgment.—This is an appeal against an order of remand made by the Subordinate Judge of Jessore. The suit, it appears, was one brought under the provision of S. 155, Ben. Ten. Act. It was dismissed by the trial Court on the ground that the notice served under that section was defective. The defect alleged was that the notice did not require the tenant to remedy the misuse complained of. The decision of the Munsiff proceeded on the ground that in the notice itself there was an admission that the misuse was in fact capable of remedy. On appeal the learned Subordinate Judge took the view that in fact in the notice there was no such admission and that the plaintiff in giving his notice proceeded on the view that the misuse was in fact incapable of remedy. We agree with the learned Subordinate Judge in the view he has taken of the notice, and that being so, it is clear that the notice was

sufficient and that the Subordinate Judge's order in remanding the case for trial on the merits was a proper one. This appeal is accordingly dismissed. Costs will abide the result. We assess the hearing fee at to gold mohurs.

V.B. R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 494 (1)

TEUNON AND CHAUDHURI, JJ.

Ramratan Sukul—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 155 of 1917, Decided on 28th February 1917, against order of Sess. Judge, Chittagong, D/ 15th January 1917.

Criminal P. C. (1898), S. 239 — Person charged under S. 411, Penal Code, for receiving stolen property from another who was either thief or first receiver cannot be jointly tried with latter—Penal Code (1860), S. 411.

A person charged with an offence under S. 411, I. P. C., for having received a portion of stolen property from another, who was either the thief or the first receiver of the stolen property, cannot be jointly tried with the latter, as the first receipt or retention of the property by the latter and the act by which he handed over a portion of the stolen goods to the former can in no sense be looked upon as forming part of the same transaction. [P 494 C 2]

Manamatha Nath Mukerjee and *Chandra Shekhar Sen*—for Petitioner.

Judgment.—In this case the petitioner Ramratan Sukul has been convicted under S. 411, I. P. C., and sentenced to rigorous imprisonment for the period of two years. It appears that on the night of 14th October there occurred a theft in the house of a Marwari banking firm in Chittagong, and that in the course of this theft notes, cash and ornaments to the value of some Rs. 30,000 were stolen. On 15th October two currency notes, each of the value of Rs. 100, was found with Ramratan, the petitioner. He was placed on his trial jointly with one Loke Nath Singh. Loke Nath like Ramratan, has also been convicted under S. 411, I. P. C. The learned Sessions Judge says that this joint trial was not improper, because there was but one transaction in which the two appellants were jointly concerned. But on the facts, so far as we have been able to ascertain them from the judgment, this cannot be. The case for the prosecution apparently was that Loke Nath was himself the thief and he handed over Rs. 200 as part of his booty to Ramratan. But as a matter of fact the Deputy Magistrate has convicted Loke Nath also under S. 411 and not under S. 379, I. P. C. It would seem, therefore, that he looked upon Loke Nath as the first receiver and that he, having secured a certain amount of booty, subsequently handed over a portion of his ill-gotten gains to the present petitioner Ramratan. The first receipt or retention by Loke Nath and the act by which Loke Nath handed over a portion of the stolen goods, which he had himself received, to Ramratan can in no sense be looked upon as forming part of one transaction. It is also not clear to us that the petitioner was not prejudiced by the acceptance in evidence of the statements said to have been made by Loke Nath.

Under these circumstances we set aside the conviction and the sentence imposed on the petitioner and direct that he be retried. At the retrial it will be open to either party to examine Loke Nath as a witness. We further direct that the retrial be held by some Magistrate of competent jurisdiction other than the Magistrate before whom the conviction was had, such Magistrate to be appointed by the District Magistrate. In these terms the Rule is made absolute.

V.B./R.K. *Rule made absolute.*

A. I. R 1918 Calcutta 494 (2)

TEUNON AND NEWBOULD, JJ.

Byamkesh Chuckerbutty—Decree-holder—Appellant.

v.

Uday Chand Pauri and *another*—Judgment—debtors—Respondents.

Appeal No. 337 of 1914, Decided on 10th December 1917, from appellate order of Sub-Judge, Jessore, dated 7th April 1914.

Bengal Tenancy Act (1885), as amended by Act 1 of 1907, Sch. 3, Part 3, Art. 6)—Applicability.

The three years' rule of limitation set out in Sch. 3, Part 3, Art. 6, is applicable to the execution of a decree obtained by a cosharer-landlord for a sum not exceeding Rs. 500. [P 495 C 1]

Amarendranath Bose and *Surendra Madhub Mullick*—for Appellant.

Judgment.—This appeal is against an order made by the Subordinate Judge of Jessore by which he held that a certain decree was barred by the three years' rule of limitation to be found in Sch. 3, Part 3, Art. 6, Ben. Ten Act. The decree was one for a sum not exceeding Rs. 500 and was obtained by a

cosharer-landlord against a tenant in 1907 after the passing of Bengal Act 1 of that year. The question for our determination is whether the 3 years' rule set out in the Article to which we have referred, or the 12 years' rule of limitation, that is, the general rule, is applicable. In 3 cases it has been held that the 3 years' rule applies, those 3 cases being *Thakomoni Dasi* v. *Mohendra Nath Dey Sarkar* (1), *Mrityunjoy Bhola Nath Datta* (2) and an unreported case, Misc. Appeal No. 562 of 1912. We agree in the view taken in those cases and that being so, we dismiss this appeal. No one appearing for the respondents we make no order as to costs.

V.B./R.K. *Appeal dismissed.*

1. (1909) 3 I C 389.
2. (1913) 20 I C 833.

A. I. R. 1918 Calcutta 495 (1)

WOODROFFE AND SHAMSUL HUDA, JJ.

Gunabala Chowdhurani—Defendant—Appellant.

v.

Hem Nalini Chowdhurani — Plaintiff —Respondent.

Appeal No. 63 of 1917, Decided on 20th August 1917, from order of Sub-Judge, 1st Court, Tipperah, D/- 9th December 1916.

Civil P. C. (1908), O. 39, R. 1—Temporary injunction should not be refused if object of suit be defeated.

In a suit for a permanent injunction a temporary injunction ought not to be refused where the refusal would defeat the object of the suit and amount to a denial of justice. [P 495 C 1]

Jogesh Chandra Roy and *Sasadhar Roy*—for Appellant.

Sarat Chandra Basak and *Bipin Chandra Bose*—for Respondent.

Judgment.—This suit was one for declaring a compromise decree void on the ground of fraud and for a permanent injunction to restrain the defendant from executing the same and also for other reliefs.

The plaintiff is a pardanashin Hindu widow and she sues on the ground that the decree is void on account of fraud and claims a permanent injunction. Two Subordinate Judges have held that a temporary injunction should be issued. It was pointed out that having regard to the fact that the suit was for a permanent injunction the denial of a temporary injunction would be to defeat the object of this suit. It has been said that the learned Judge has not considered the question as to whether or not the plaintiff had any chance of success and it has been contended before us that on the basis of the proceedings there are no merits at all. On the contrary the learned Judge has found that if a temporary injunction be refused, then "it will have," to use his own words, "the unfortunate effect of a denial of justice to a helpless widow." The appeal therefore must be dismissed with costs, hearing fee being assessed at two gold mohurs. Let the record be sent down to the Court below without delay.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 495 (2)

TEUNON AND CHAUDHURI, JJ.

Rajeswar Bagchi — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 1105 and 1107 of 1916, Decided on 16th January 1917, against the order of Dy. Magistrate Rangpur, D/- 24th July 1916.

(a) Stamp Act (1899), S. 62 (b)—Application in prescribed form for loan recommended by bank is not agreement requiring stamp.

An application was made to a Bank for a loan on a prescribed form, which contained columns intended to show the signature of the person recommending the loan or undertaking any responsibility on behalf of the applicant. A person recommended the loan by saying "I guarantee the payment." The accused, who was the Manager of the Bank, approved the proposal by saying in the last column of the form that the application for the loan should be granted. No stamp was affixed to the form:

Held: (1) that the words "I guarantee the payment" signed by the person who recommended the loan did not represent a completely executed security bond, so that the manager by his signature in the last column of the form could not be held to have appended his signature to that security bond by way of acceptance thereof. Therefore the conviction of the Manager under S 62 (b), Stamp Act, could not be supported; [P 496 C 2]

(2) that the Secretary of the Bank, who advanced the loan to the applicant on his executing that bond, could not be convicted under S. 68 (c), Stamp Act, as his duties in connexion with the transaction were purely ministerial and he did not, in fact, accept the proposal for the loan. [P 497 C 1]

(b) Stamp Act (1899), S, 68 (c)—Ingredients necessary for offence under S. 68 (c) stated.

The essential question in a case under S 68 (c) is whether the act complained of is a device intended to defraud the Government of duty payable in respect of a document. [P 497 C 1]

Dasarathi Sanyal and *Mritunjoy Chatterjee*—for Petitioner.

Camel—for the Crown.

Criminal Revision No 1105 *of* 1916.

Judgment.—This Rule is directed against the order of the Deputy Magistrate of Rangpur convicting the petitioner of an offence under S. 62 (b), Stamp Act 2 of 1899, and sentencing him to pay a fine of Rs. 20 It appears that on 11th Agrahyan 1319, one Arajulla Sheikh applied to an institution, known as the Gaibandha Bank, Limited, for a loan of Rs. 50. The application was made on a prescribed form, which contains columns intended to show the signature of the person recommending the loan or undertaking any responsibility on behalf of the applicant. In that form one Sadat Ali stated that the applicant was a middle class man and gave certain other particulars with regard to him and recommended that he should be granted the loan on a bond. He then added the words in Bengali, "ami adai karia diba," that is to say. I will make the payment or see that the payment is made; in other words, he said "I guarantee the payment." The present petitioner was at that time and we are informed that he is still the manager of the Bank, and in the last column of this form he approves the proposal made by Arajulla and says that this application for a loan of Rs. 50 to carry interest at the rate of Rs. 2-11-0 monthly should be granted, and to this approval he appends his signature. The Magistrate in convicting the petitioner has taken the view that the words "I guarantee the payment" signed by Sadat Ali represents a completely executed security bond, and that the signature of the manager found in the last column of the proposal is to be taken as the signature to that security bond appended by way of acceptance thereof.

We are unable to take this view, and we are also unable to take the view which has been put forward before us by the learned counsel for the Crown. That view is to the effect that the proposal and the approval of the proposal to be found in Col. 9 represent a completely executed agreement between the principal borrower and the manager and that it should, therefore, have borne 8-annas stamp. We are unable to take that view for this reason: that the statements in the proposal made by applicant himself and by the manager do not represent a completed agreement, more particularly with regard to the rate of interest. Neither the proposed surety nor the applicant said anything regarding interest and there is nothing in the form itself to show that the borrower or the surety agreed to the proposed rate. Thus at most the proposal with the statements made in its various columns represent merely negotiations which were intended to lead up to the execution of a bond and the payment thereon of the sum of Rs. 50. In that view the conviction cannot be supported and we accordingly set aside the order complained of and direct that the fine, if paid, be refunded.

Criminal Revision No. 1107 *of* 1916.

This Rule is directed against the order of the Deputy Magistrate of Rangpur convicting the petitioner under S. 68 (c), Stamp Act 2 of 1899, and sentencing him to pay a fine of Rs. 15. It appears that on 11th Agrahayan 1319, one Arajulla applied to an institution called the Gaibande Bank Limited for a loan of Rs. 50. Applications or proposals for loans made to that Bank have apparently to be made on a certain form prescribed by the institution, and one of the columns of this form requires the signature of the person recommending the loan or taking upon himself responsibility in connexion therewith. In this particular case after a recommendation to the effect that the loan applied for should be granted on a bond, a person of the name of Sadat Ali writes certain words translated as follows: "I guarantee payment." It next appears that on this application the Manager or the Managing Committee of the Bank, a person of the name of Rajeswar Bagchi, approved the application and decided that a loan of Rs. 50, carrying interest at the rate of Rs. 2-11-0 monthly, should be granted to the applicant. The bond was thereupon, it appears, executed by the applicant Arajulla and on the execution of this bond the present petitioner who was the Secretary of the Bank made to him a loan of Rs. 50. The surety did not, in fact, sign the bond. Arajulla having failed to make the payment a suit was brought by the Bank against the borrower Arajulla on his bond and apparently on the strength of the entry already referred to in the proposal form against Sadat

also as his surety. The matter thus came to the notice of the authorities and a prosecution having been instituted, the petitioner who was at the time the Secretary of the Bank has been prosecuted and convicted, as already stated, on the ground that Sadat Ali's offer to make the payment, accepted by the Manager of the Bank with a qualification as to interest, is to be looked upon either as a security bond or as an agreement or at least as a device intended to void the necessity of a properly executed security bond or agreement, and thus implying on the part of all concerned in it an intention to defraud the Government of duty. Whether, as it stands, having regard more particularly to the added qualification as to interest, there is on this proposal a complete agreement or security bond we need not in fact decide. The essential question is whether it is a device intended to defraud the Government of duty, and if so, whether the present petitioner who was at the time the Secretary of the Bank, shared in that intention. On this point it is to be observed that the Secretary was in fact not the person who accepted the proposal. His duties in connexion with the transaction were, it may be said, purely ministerial. Apart from that it is to be pointed out that the proposal and the recommendation of Sadat Ali contemplated throughout that the loan should be made not on this proposal but on a duly executed bond. That bond was, in fact, executed by the borrower Arajulla, and it is certainly a point very material to this question of intention to note that had the surety also signed it, no additional stamp duty would have been required. Having regard to these considerations we are of opinion that it cannot be said that the present petitioner shared or took any part in this transaction with intent to defraud the Government. We, therefore, set aside the conviction and sentence and direct that the fine, if paid, be refunded.

V.B./R.K. *Convictions set aside.*

A. I. R. 1918 Calcutta 497

CHATTERJEE AND WALMSLEY, JJ.

Suraj Mal Kharad—Appellant.

v.

Akshoy Kumar Roy Chowdhury and *another*—Respondents.

Appeal No. 273 of 1914. Decided on 10th January 1917.

1918 C/63 & 64

(a) Civil P. C. (1908), S. 91—S. 91 is not controlled by Calcutta Municipal Act (1899), S. 336.

Section 336, Calcutta Municipal Act, does not impose any limitation on S. 91, Civil P. C., so as to exclude from its scope cases in which a local authority, such as a Municipal Committee or a District Board, might be regarded as competent to safeguard the interests of the public against acts of public nuisance created by the obstruction of a public highway. [P 497 C 2; P 498 C 1]

(b) Highway—Public Highway—Dedication of, can be inferred by public user.

No formal act of adoption by any person or authority is required for the acceptance of a highway dedicated to the public use, such acceptance can be inferred from the public user of the way. [P 498 C 1]

Rash Behari Ghose and *Jogendra Nath Mukerjee*—for Appellant.

Provash Chandra Mitter, *Jnanendra Nath Sarkar* and *Bhupendra Nath Basu*—for Respondents.

Walmsley, J.—The suit from which this appeal arises was instituted by two Hindu gentlemen with the permission of the Advocate-General in regard to a piece of land which they described as a public highway, and the relief for which they asked is in the terms of form No. 31 in App. A, Civil P. C. The defendant, now appellant, is a Marwari who has built a temple on land immediately adjoining the strip which the plaintiffs say is a public highway. The learned Subordinate Judge in the first Court found that the plaintiffs had proved their case, and granted them a decree, and this decision was confirmed by the learned District Judge in appeal. The first argument pressed in support of the appeal is that the plaintiffs could not sue under S. 91, Civil P. C., because the land lies within the area of the Calcutta Municipality and reference is made to S. 336, Calcutta Municipal Act, which declares that:

"All public streets . . . including the soil . . . shall rest in and belong to the Corporation."

The defendant has no authority to quote in support of this argument and we have to read the two sections together, and consider whether S. 336, Act 3 of 1899, imposes any limitation on S. 91, Civil P. C. For my part I cannot see anything to suggest such a limitation. S. 91, Civil P. C., is extremely broad in its terms, and if it had been intended to exclude from its scope cases in which a local authority, such as a Municipal Committee or a District Board, might be regarded as competent to safeguard the

interests of the public it would have been very easy to insert words to that effect. As the section stands it does not matter where the alleged public nuisance is situated. Any two persons, provided they obtain the Advocate General's consent in writing, may sue for its removal. Again the other section, S. 336, Calcutta Municipal Act, merely vests the proprietary right in the soil of highways in the Corporation: but it does not add that in case of obstruction the Corporation alone shall have the right to sue for the removal of the obstruction. In my opinion therefore there is no weight in this first argument. Next it is urged that the dedication to the public use on which the plaintiffs rely is invalid and this argument has several branches. It is said that the Courts below have not found when the dedication did take place, that the dedication cannot have been earlier than 27th July 1893 when a letter, Ex. 6, was addressed to the Secretary of the Corporation by Buddh Singh, Bishan Chand and Budree Das, that in 1893 the signatories to that letter were incompetent to make the dedication because they had previously entered into an oral contract with the defendant's father respecting the land, and that in any case such dedication was invalid because there was no acceptance by the Corporation.

Lastly, it was urged that the lower Courts were wrong in holding that the oral agreement set up by defendant was inoperative because it was not reduced to writing. One of these points may be disposed of at once, that is the objection that acceptance by the Corporation was necessary to make the dedication operative. The learned vakil can refer us to no authority for this proposition, while on the other hand, there is the statement in para. 43 of the Article on Highways in Lord Halsbury's laws of England, Vol. 16, that:

"Acceptance by the public requires no formal act of adoption by any persons or authrity, but is to be inferred from public user of the way"

It may be added here that although there was no formal acceptance the lower Courts have found that the lighting, repairing, watering and scavenging of the alleged highway was carried out by the Corporation. Now let us turn to the time and fact of dedication. In this Court it is conceded that a letter in the terms of Ex. 6 was written in July 1893 to the Secretary to the Corporation. That letter speaks of the road as having been used by the public for about six years. The learned Subordinate Judge does not record an exact finding as to the year in which the public began to use the strip of land, but he points out that one of the two highways which it connects was constructed in 1886. The lower appellate Court, however, records very clear findings on this point: and says more than once that the public began to use the land as a passage in about 1887. Paras. 51 and 52 of the Article already mentioned deal with user as evidence of dedication. On the definite finding of user since 1887, I do not think that the dedication must be regarded as made in July 1893 when the letter Ex. 6 was written. Without that letter the evidence of user since 1887 is enough to justify the inference of a dedication in 1887, and the letter with its reference to six years user corroborates that evidence. It must be remembered that the defendant offers no evidence to rebut the inference, but contents himself with pleading that certainly before 1893, possibly before 1887, the signatories had parted with their rights in the land.

The remaining question, therefore, relates to this alleged agreement of 1887 or thereabouts. The evidence of this alleged agreement is to be found in Ex. D, a deed of gift executed in 1911 by Budh Singh and the son of Bishan Chand in favour of the defendant. Regarding this document and its allegation of a previous agreement, the learned District Judge holds that Ex. C is not operative because the signatures of the executants have not been properly attested, that the alleged gift could not be made except by a registered document, and that by the very words of Ex. C, the ownership of the land remained with the executants up to 1911. The first of these objections is fatal: one executant signed the document at Calcutta and the other at Azimganj and one witness only attested each signature. The third objection is equally fatal: to the defendant's assertion that the dedicators were not competent to dedicate, for they say in the document that they are in possession and this is borne out, as the lower Courts remark, by their possession of the title-deeds. In

regard to the second objection the learned vakil has urged that there was a sort of exchange between the parties in 1887 and that no document was necessary. But this attitude is inconsistent with Ex. D, for the executants convey the property by way of free gift. If the appellant received the property by way of free gift in 1911, it is clear that there can have been no operative agreement concluded in 1887. In my opinion none of the arguments put forward on behalf of the appellant has any substance and I think that the appeal should be dismissed with costs.

Chatterjee, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 499

FLETCHER AND SMITHER, JJ.

Niranjan Mukerjee—Plaintiff—Appellant.

v.

Shib Prosad Mukerji and *others*—Defendants—Respondents.

Appeal No. 384 of 1913, Decided on 30th March 1917, from Appellate Decree of Dist. Judge, 24-Pergannas, D/ 18th September 1912.

(a) Landlord and Tenant Joint property—Lease from cosharers of joint property—Lessee takes it subject to rights of other cosharers on partition.

A person taking a lease of a property from some of the co-sharers, who have an undivided interest in it, takes subject to the right which the other co-sharers would have on partition, namely, that if the property on partition falls to the lot of the other co-sharers, they would not be bound by the lease. [P 500 C 1]

(b) Hindu Law—Widow—Portion of husband's estate allowed to be sold in execution of decree against her 50 years after death of husband and purchasing it herself—Presumption is that purchase was made out of income of husband's estate.

Although in an ordinary case the purchase of a property by a Hindu widow cannot be presumed to be made out of the income of her husband's estate, yet where the widow permits a portion of the husband's estate to be sold in execution of a decree against her more than 50 years after the death of the husband, and purchases it herself, the presumption would be that the purchase was made by the widow out of the income of the husband's estate, so that by the purchase the property was put back in exactly the same position in which it was before the decree and the sale thereunder. [P 500 C 2: P 501 C 1]

(c) Hindu Law—Widow—Decree against—Portion of husband's estate sold in execution 50 years after death of husband—Burden of proof that sale was for husband's liability is on person alleging.

Where a portion of the husband's estate is sold in execution of a decree against the widow more than 50 years after the death of the husband, the presumption would be that the property was not brought to sale for the liability of the husband. Therefore the onus of proving that the property was brought to sale to enforce a liability of the husband, lies on the person alleging it. [P 500 C 2]

(d) Landlord and Tenant—Lease—Land in which Hindu widow had share, let out by cosharers and widow without legal necessity—Land allotted to widow on partition—Death of widow—Reversioner held entitled to set aside whole lease—Hindu law—Widow.

Where land, in which a Hindu widow had a 1/5th undivided share, was let out in permanent lease by her co-sharers and the widow without legal necessity, and subsequently on partition that land was allotted to the widow;

Held: that after the widow's death her husband's reversioner would be entitled to set aside the whole lease, but that the lessee would be entitled by a separate suit to enforce his right as against the other co-sharers of getting a lease of property of equal value out of the properties allotted to them. [P 501 C 1]

Bankim Chandra Mukerjee—for Appellant.

Siba Prosunna Bhattacharjya and *Biraj Mohan Mozumdar*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against a decision of the learned District Judge of the 24-Pergannas, dated 18th September 1912, modifying a decision of the Munsif at Sealdah. The suit was brought by the plaintiff to recover possession of a certain plot of land that had been awarded to him in a certain partition suit. The defence set up by the contesting defendant, namely, the tenant, was that he had obtained a permanent lease of the property from the owners prior to the partition. The learned Judge in the Court of appeal below has found these facts and they are not seriously controverted:—That, on 13th November 1894, the contesting defendant took a lease from the Goswami defendants who were then the cosharers of the property. The person representing a one-fifth interest in the property was a Hindu widow named Tripura Sundari, to the estate of whose husband the present plaintiff succeeded on the death of Tripura. The learned Judge has found that that lease, so far as regards the interest of Tripura, was not granted for legal necessity. Therefore, the statement made in the lease of the reasons that moved the Hindu widow to grant this permanent lease obviously was disbelieved by the learned Judge. The question, therefore, arises in the present suit, this property having fallen to the lot of the plaintiff,

"to what extent, if at all, is he bound by the lease granted by the other four co-sharers and Tripura."

The learned Judge in the Court below has held that the plaintiff is bound, at any rate, as regards a portion of the interest so granted and that, therefore, he is not entitled to get actual possession of the land sued for. That seems to be unsupported by the authorities. The findings made in this case show that, as regards one-fifth of the property, the lease was not binding beyond the lifetime of Tripura and, therefore, the reversioner, who is the present plaintiff, is not bound by the terms of that lease. In that view, the lessee had a a lease of an undivided four-fifths of the property which was comprised in the lease. There was also a lease of an undivided one-fifth during the lifetime of Tripura. Under the law laid down in a series of decisions in this Court of which two examples may be given, namely the cases of *Byjnath Lal* v. *Ramoodeen Chawdhry* (1), and *Tarini Kanta Mojumdar* v. *Ishur Chandra Chakravarty* (2), a person taking an interest from persons who have an undivided interest in the property takes subject to the rights of the other cosharers who are not bound by the transaction, namely, that if the property comes to be partitioned, the rights of the other cosharers not bound by the lease, as it is in the present case, would not be affected by the grant of the lease. In the present case, the property comprised in the lease has fallen to the lot of the plaintiff. The persons who were the lessors of the four-fifths received on the partition other properties and therefore, if the present lease stands as against the plaintiff and in his view is not a favourable lease, the property allotted to the plaintiff is seriously affected and cannot be in value anything like the property as the property which has been awarded to the other cosharers of which they have received actual possession. That is so far as the case set up by the plaintiff is concerned. Against that, the defendant says that this transaction by the widow Tripura, jointing along with the other cosharers in granting a permanent lease of a piece of land that was jungle, must have been beneficial to the estate of her deceased husband. That case was not set up and was not tried.

1. (1872) 18 W R 233=1 I A 106.
2. (1913) 18 I C 240.

The case that was put forward and tried was the case of legal necessity as evidenced by the recitals in the lease. Those recitals were found to be wholly illusory and no case of legal necessity, such as is mentioned in the recitals, was proved to the satisfaction of the Judge. The case of benefit, namely, that the widow should join in this permanent lease at a small rent to benefit the estate, has not been tried and we cannot at this stage of the proceeding consider a totally new case. Then, another point was urged by the respondent, namely, that the widow along with the other cosharers purchased this property, it having been brought to sale in execution of a decree against the widow and the other cosharers. It is said that the presumption is that the widow purchased that out of her own money for her own benefit. The first point is:

"Is there anything in this case to show for what purpose the property was, in fact, brought to sale and the decree passed in execution of which the property was sold."

It appears that the widow's husband had died fifty years prior to the suit. There can be no presumption, I take it, that a Hindu who has been deed for fifty years still has liabilities outstanding. Any such liability would apparently be barred years before under the law of limitation of suits; and if such a case is set up that the property was brought to sale for the liability of the husband who has been dead for fifty years, the onus in that case would lie on the person who says that the suit was brought for that purpose. In the present case, there cannot be any doubt that it was not so. Everything points to the fact that it was probably that the cosharers failed to keep down the rent or revenue or some other obligation for which they were responsible and the suit was brought and the property was repurchased by the cosharers including the widow and the widow having an income of Rs. 200 or Rs. 300 a year from her husband's estate, everything points to the fact that the purchase was made by the widow out of the income of her husband's property. This case, I am quite satisfied, was not raised very definitely in the Court of first instance. It was dealt with much more clearly by the learned District Judge. But I think the learned District Judge had ample warrant in finding that the re-purchase by the widow put the property back to exactly

the sameposition as it was before the decree and the sale in execution thereunder. A reversioner cannot be ousted in a manner like this, and although the learned vakil may be right that, in the ordinary case, the purchase by the widow cannot be presumed to be made out of the income of her husband's estate, where the widow permits the property to be sold in execution more than fifty years after the death of the husband and purchases it herself, I am not sure that different considerations do not apply. I think the learned Judge had ample warrant in coming to the conclusion that this purchase was, in fact, made by the widow for the benefit of the estate. That is the position and how the matter stands. I think, on the view of the law, the learned Judge ought to have come to the conclusion that the lessee took the lease from the cosharers subject to the right that the plaintiff would have on partition, namely, that if this property fell to the lot of the plaintiff, the plaintiff would not be bound by the lease granted by the other co-sharers. In that view, the plaintiff ought, I think, be given possession of the land he sues for.

The question then is—"What is the position of the lessee against the other co-sharers?" Can we deal with that in this case? I think, on the whole, it would not be wise to do so. Of course, the lease as against the other cosharers is a perfectly good lease. The lessee is entitled, on general principles that have been followed in cases with reference to mortgages and also to leases, to have a lease of property of corresponding value given to him out of the properties that have been awarded to the other cosharers in the partition suit. Those other cosharers except the minors have not appeared in the present appeal. I think it would be much better to leave the lessee to enforce his rights as against the other cosharers of getting a lease of property of equal value out of the properties allotted to them in a separate suit. The present appeal, I think, ought to be allowed with costs and, in lieu of the decree passed by the learned District Judge, the plaintiff ought to be given a decree for khas possession of the whole of the property that has fallen to him on partition. The cross-objection is dismissed with costs.

Smither, J.—I agree. The plaintiff has inherited as reversioner, after a Hindu widow. There being no legal necessity, the Hindu widow could not place a sikmi, to last beyond her own life, on the share. Also, the other cosharers could not put any kind of encumbrance on this share. Therefore, the plaintiff's share, and the allotment which he now has in place of his share, is free. The sikmidar must follow the allotments of the other co-sharers who created sikmi. The plaintiff must get khas possession of his allotment as against the sikmidar.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 501

FLETCHER AND SHAMSUL HUDA, JJ.

Ahamuddin Tamijuddin and *others*—Defendants—Appellants.

v.

Amiruddin and *others* — Plaintiffs—Respondents.

Appeal No. 103 of 1917, Decided on 18th December 1917, from Original decree of Sub-Judge, 2nd Court, Tipperah, D/- 24th March 1917.

(a) Cosharer — Adverse possession — To make possession of one co-owner adverse to another there must be actual ouster—Presumption may arise from long uninterrupted possession.

The possession of one co-owner is prima facie the possession of the other co-owners and in order to make the possession of one co-owner adverse to the other co-owners there must be an actual ouster of the latter. Where one co-owner has been in uninterrupted possession for a large number of years, the Court may presume that there has been an ouster of the other co-owners without any express evidence of the fact of such ouster. [P 502 C 2]

(b) Partition — Suit — Mofusil Courts—Whether plaintiff is or is not in possession is important from point of view of Court fee.

In a partition suit ordinarily it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in this country in the mofussil Courts it is important, because a person who sues for partition and is out of possession must ask, first of all, to be restored to possession of his share and pay additional ad valorem fee upon his plaint, whereas in a case where the plaintiff is in possession he simply sues for partition and separation of his share on a plaint bearing a stamp of Rs. 10 only. [P 503 C 1]

(c) Practice—Relief—Who finances suit is not material.

If the case of a plaintiff is a genuine one it does not matter much who found the money to finance the suit. [P 504 C 1]

Ram Dayal De—for Appellants.

Sasadhar Roy, (Senior)—for Respondents.

Fletcher, J.—This is an appeal by defendants 1, 2 and 3 from the decision of the learned Second Subordinate Judge of Comillah, dated 24th March 1917. The

appeal is preferred against a preliminary decree passed in a suit for partition. The parties are Mahomedans. They had a common ancestor that is the grandfather of the first three defendants one Fazil Mahomed. Fazil Mahomed had two sons Jamiruddi and Maniruddi. Jamiruddi married Tilakjan, defendant 4, and of that marriage there were two daughters only, namely, Atardan and Nabojan. Jamiruddi then died and Maniruddi married his widow Tilakjan. The children that Maniruddi had were first of all, defendants 1, 2 and 3, three sons. He had also a daughter named Safarjan. Safarjan married plaintiff 1 and had one son and no more namely, plaintiff 2. The share sought to be recovered in this suit was the share that Safarjan took under the Mahomedan Law as one of the heirs of her deceased father Maniruddi. The question in this case therefore, is whether the plaintiffs have the right to recover that share. The learned Judge of the Court below has found that the plaintiffs have got the right that Safarjan had and, as regards the property sued for, the learned Judge has decreed in favour of the plaintiffs a 1/8th share in one of the plots mentioned in the plaint, namely, plot No. 13 and 17/192 share of the other plots. This appeal has been preferred against that finding and the points that have been urged in this appeal have been urged, if I may say so without disrespect, at great length and with considerable particularity and they are these:—

The first point is that the case of the defendants was that after the death of Maniruddi, Safarjan had relinquished in consideration of a payment of Rs. 50 all interest which she had taken in the property as one of the heirs of Maniruddi. That case of payment depended solely on consideration of the oral testimony and the learned Subordinate Judge disbelieved it. It is said that the learned Judge was wrong in disbelieving that because he accepted the story put forward by these defendants that the two daughters of the defendant Tilakjan by her first marriage with Jamiruddi had, in fact relinquished their shares in favour either of the defendants or of Maniruddi. I do not think that that is so. Those payments do not stand or fall together because the daughters of Tilokjan by her first marriage came forward and gave evidence and stated that they made no claim to the property and after such statement it was immaterial for the Judge to enquire whether the statement as to the time and mode of the payment of Rs. 50 was or was not correct. I do not see that that in any way can affect the truth of the story as to the payment of Rs. 50 to Safarjan. So far as I have seen the evidence, I am of opinion that the story of this alleged payment was a wholly improbable and untrue story.

The next question that is raised is a question which the learned vakil for the appellants has placed considerable stress on, and that is the issue of limitation. It is stated that the plaintiffs never having been in possession of the property, their suit is barred by the law of limitation; and the learned vakil cited a great number of cases in support of that argument. The principles applicable to cases of this nature are perfectly simple. They have been laid down in numerous authorities and they are these. That the possession of one co-owner is prima facie the possession of the other co-owners and that in order to make the possession adverse there must have been ouster of the plaintiff, although there are cases that where the possession of the defendant has been long and uninterrupted for a large number of years, the Court has come to the conclusion that the evidence in the circumstances of the case does warrant the finding that there has been an ouster of the plaintiff, without any express evidence of the fact of such ouster. These are the short principles that can be deduced from those cases. Judgments have been cited where a particular set of facts brought the case within those rules. But the rules are stated shortly and clearly in the judgment of the Privy Council in the appeal from the Colony of Ceylon reported as *Corea* v. *Appuhamy* (1). Now what is the evidence in this case on which either it is proved that there was an actual ouster or it may be said that the Court ought to infer that there was an ouster of the plaintiff? The actual ouster is really not set up by anybody. The case was not a case of actual ouster as presented in the written statement but it was a case of the acquisition of the interest of Safarjan by the payment of Rs. 50 and this case of ouster was not set up at all. The learned Judge was much impressed by the evidence of

1. (1912) A C 230=81 L J P C 151.

the fact of the occasional visits paid by Safarjan to her mother Tilakjan and also of the fact that the infant plaintiff was on his mother's death nursed and brought up at Tilakjan's house. Personally, I feel no doubt even apart from that evidence of the infant plaintiff having lived in the premises of Tilakjan, that there was no ouster of the plaintiffs. The case set up in the written statement does not in any way, support an actual ouster which is necessary to prove that the possession of the defendants had become adverse as against the plaintiffs.

The next point urged is a point that is closely allied to the question of limitation and that is whether at the institution of the suit the plaintiffs were or were not in possession of the property. In a partition suit ordinarily it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in this country in the mofussil Courts it is important, because on the rulings of the High Courts of India, including this High Court, a person who sues for partition and is out of possession must ask, first of all, to be restored to possession of his share and pay additional ad valorem fee upon his plaint, whereas in the case where the plaintiff is in possession, he simply sues for partition and separation of his share. In this case, accepting that rule that this suit, if the plaintiffs were out of possession, would require an additional court-fee as being a suit to restore the plaintiffs to possession, I think the evidence on the issue of limitation shows clearly that the plaintiffs had never been ousted from their shares as the possession of the defendants was the possession of the plaintiffs. Therefore agreeing with the learned Judge on this issue, I am of opinion that the plaintiffs were in possession of their shares and were entitled to maintain the suit on a plaint bearing a stamp of Rs. 10 only.

Then the next point that was urged was as regards defect of parties and the defect of parties, I gather was this: It is said that the Court having disbelieved the defendants' story as to the relinquishment by Safarjan, the wife and mother of the two plaintiffs respectively, ought to have disbelieved the story of relinquishment by Atarjan and Nabojan, the two daughters of Jamiruddi, and that therefore the Court ought to have held that there was a defect of parties as the said two daughters of Jamiruddi were not made parties. That seems to me to be a manifest fallacy. The case of these two other persons, Atarjan and Nabojan, was supported by a statement of theirs that they had ceased to have any interest in the property and if they had ceased to have any interest in the property, clearly they were not necessary parties to a partition suit. The next point, which is the only point that has any substance in it, is that the learned Judge of the Court below has awarded to the plaintiffs a larger share in the plots other than plot No. 13, which the facts found by him warrant. It is said that the share awarded ought to have been 29/384 instead of 17/192. Although the method of the calculation is not accurate, it seems on the statements made in para. 13 of the written statement, that the plaintiffs have not been awarded a larger share because the defendants' case was that Atarjan and Nabojan relinquished within one month after the death of Maniruddi and they stated that at the date of that relinquishment, the claim of Atarjan and Nabojan had long been barred by limitation.

If it was long barred by limitation so shortly after the death of Maniruddi then, of course, the relinquishment by Atarjan and Nabojan must have enured for the benefit of Maniruddi and Tilakjan, his wife, she taking her rights as the widow of her first husband, Jamiruddi. On that footing, the plaintiffs have not been given a larger share and there is no reason to disturb the finding of the learned Subordinate Judge in that respect. The other point raised was with regard to plot No. 13, which the learned Judge has found to have belonged solely to Maniruddi and of which the plaintiffs were, therefore entitled to 1/8th share. That this property, was acquired by Maniruddi originally there seems to have been no controversy in the Court below. The kobala, which has not been printed but the date of which and the boundaries are given in the paper-book, seems to show that it is the same property as is mentioned in the sale-certificate (Ex. A) and also in the khatian (Ex. E). What the sale certificate was, whether it was a decree obtained by a cosharer-landlord or not, we do not know, and although the property may be the same, the boundaries

given in it do not agree with the boundaries given in the kobala in favour of Maniruddi, but some of the boundaries in the khatian (Ex. E) do seem to agree with the boundaries in the kobala in favour of Maniruddi.

Exactly what happened as to this property we do not know; but there is nothing to show that the interest that Maniruddi undoubtedly got under this kobala has been put an end to and I do not think that this certificate of sale, the proceedings of which we know nothing about, or the statement in the remarks column of the khatian only is sufficient to displace the title that Maniruddi acquired under the kobala Ex. A. I do not think there is anything in this case. It is quite clear on the findings of fact and the statements made in the judgment of the learned Subordinate Judge that the present plaintiffs have perfectly good title to the share in the properties allotted to them. It may be that they had been urged on to bring this suit or that they have been financed by Neazuddi, the brother of plaintiff 1. But if the case is a genuine one, it does not matter much who found the money to finance the suit. There cannot be, in my opinion, any doubt that these two plaintiffs have got an interest in the property and that they have been rightly given their share. The points raised in the present appeal seem to me to have no force in them and I agree in the conclusion arrived at by the learned Judge of the primary Court. The present appeal, therefore fails and must be dismissed with costs. We assess the hearing fee at five gold mohurs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 504

FLETCHER AND NEWBOULD, JJ.

Raj Kumar Missra and *others* — Defendants—Appellants.

v.

Rama Nath Singha and *others* — Plaintiffs—Respondents.

Appeals Nos. 692 and 1184 of 1914, Decided on 28th May 1917,

Landlord and Tenant— Lease— Construction — Agreement not to vary rent until actual measurement — Bengal Tenancy Act (1885), S. 52, held not applicable.

A plot of land described to be one thousand bighas, then in jungly state was let out rent free for six years and thereafter at a progressive rent rising to 8 annas per bigha a permanent lease which provided that the tenant shall pay Rs. 500 every year, and after rent-free period and the period of progressive rents were over, on a measurement being made ....., for land found to be in excess the tenants should pay additional rent at the above rate from the time of the measurement and should from that time get an abatement at the above rate for land which was found to be less, and the tenant or his heirs or successors should never have to pay any additional jama for the above lands, and the landlord or his heirs and successors should never receive or be entitled to receive any additional jama:

Held: (1) that upon a proper construction of the lease the land lying within the boundaries mentioned in the schedule lease was demised at Rs. 500 per annum, with an option to the tenant or the landlord to have an actual measurement made of the land, and until that was done the rent was fixed at Rs. 500 per annum; [P 505 C 1]

(2) that S. 52, Ben. Ten. Act, did not apply because the lease was a permanent one, but that when the measurement would be actually made the tenant or the landlord would get the benefit of S. 52 according as the measurement showed the land to be less or more than one thousand bighas. [P 505 C 1]

Hiralal Chakerburtty and *Sita Ram Banerjee*—for Appellant.

Sarat Chandra Roy Chowdhury and *Satya Churn Sinha* — for Respondents

Fletcher, J.—These two appeals are preferred by the defendant against a judgment of the learned Additional District Judge of the 24-Pergannahs modifying the decision of the Munsif of Baruipur. The suits were brought for rent by the landlords. The defence was that there was deficiency in the area demised and that therefore the tenant was entitled to abatement. The defendant's holding is governed by a permanent lease, and by that permanent lease was let out a piece of land described as a plot of 1,000 bighas then in jungly state rent free for six years and thereafter at progressive rent rising in the year 1305 to 8 annas per bigha. The lease provided:

"I shall pay Rs. 500 every year according to the kists stated below and shall hold with sons, grandsons, etc., the ordinary form."

Then the lease provided:

"After the rent-free period and the period of progressive rent are over, on a measurement being made with a claim of 80 cubits, each cubit measuring 18 inches, for the land found to be in excess I shall pay additional rent at the above rate from the time of the measurement and shall from that time get an abatement of the above rate for the land which is found to be less. I or my heirs or successors shall never have to pay any additional jama for the above lands and you or your heirs and successors shall never receive or be entitled to receive any additional jama."

The point that has been raised is this : It is said that, on a measurement being made, it was found that the tenant was not in possession of 1,000 bighas. The question is, whether on the construction of the lease on the contract that the tenant had entered into, namely, to pay Rs. 500 for the piece of land being let and appertaining to Gheri No. 11 as per boundaries stated below, what was demised was with a fixed rent of Rs. 500 with option to either party at any time after the expiration of the rent-free period and the period of progressive rent to apply to have a measurement made and the actual amount of rent adjusted, or whether the land was let out at the rate of 8 annas per bigha subject to deduction on account of the diminution in area. Upon proper construction of the lease, it appears that until one or other of the parties applies for a measurement the rent was fixed at Rs. 500 per annum.

The next point that was raised was that the case was governed by S. 52, Ben. Ten. Act, and that the terms of the lease, so far as it was attempted to make the tenant pay rent for more land than he was in possession of, were in excess of the powers given by the Bengal Tenancy Act. This is a case to which S. 52 does not apply because it is a permanent lease. Under the terms of that lease what was demised was this land lying within the boundaries mentioned in the schedule to the lease at Rs. 500 per annum, with option to the tenant or the landlord to have an actual measurement made of the land, and until that was done the tenant had to pay at the rate mentioned ; and it was provided that either party might apply for a measurement. When the measurement is made, the tenant, of course, gets the benefit of S. 52, Ben. Ten. Act, if the measurement shows that the land is less than 1,000 bighas and the landlord gets the benefit if it is shown that the land is more than 1,000 bighas. I think learned Judge of the lower appellate Court was right in holding that the land was let out to the defendant at Rs. 500 a year until a measurement was made. In that view I think the decrees of the lower appellate Court are correct. The present appeals, therefore, fail and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 505

FLETCHER AND SMITHER, JJ.

Prasanna Kumar Bhattacharjee — Plaintiff—Appellant.

v.

Ibrahim Mirza and *others* — Defendants—Respondents.

Appeal No. 1197 of 1914, Decided on 2nd April 1917, from Appellate Decree of Sub-Judge, Murshidabad, D/- 4th February 1914.

Civil P. C. (1908), O. 21, Rr. 92 and 93—Suit for refund of purchase money, maintainability of—Judgment-debtor found to have no saleable interest—Purchaser at execution sale can sue for refund of purchase money—Suit is maintainable though plaintiff does not ask to set aside sale.

A purchaser in execution of a decree can by a regular suit obtain a refund of the purchase-money paid by him on the ground that the judgment-debtor had no saleable interest in the property at the time it was put up to sale. The remedy of such a purchaser is not limited to making an application for the purpose under the terms of Civil Procedure Code. [P 506 C 2]

The suit is maintainable even though the plaintiff does not ask to set aside the auction-sale. [P 506 C 1]

Brajendra Nath Chatterjee—for Appellant.

Krishna Kamal Moitra, Gagan Chand Boral for *A. K. Fazlul Huq* and *Biraj Mohan Mazumdar*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Berhampur, dated 4th February 1913, affirming the decision of the Munsif of Lalbagh. The plaintiff brought the suit asking, first of all, for possession of a certain occupancy holding which he had bought at a sale in execution held under a decree founded on a mortgage. In the alternative, he asked that, in the event of his not being able to recover possession of that land, he might be allowed to recover back the money that he had paid for the purchase of the land. Defendant 1, who was a co-sharer-landlord, resisted the plaintiff's claim on the ground that he was a purchaser of the property under a rent-decree and that, therefore, the plaintiff could have no right as against a person claiming under a rent-decree. The learned Judge found that portion of the case against the plaintiff and there is no appeal here with reference to that, namely, that defendant 1 is not liable to be ejected by the plaintiff as he claims to have purchased the property in execution of a rent-decree.

With regard to the other point, namely, as to whether or not the judgment-debtor at the time the plaintiff purchased the property had any saleable interest, and whether, if the judgment debtor had no saleable interest, the plaintiff is entitled to recover back his purchase-money in this suit, the case has been dismissed by the learned Judge. The learned Judge in the primary Court found quite clearly that the judgment-debtor had no saleable interest at the date of the sale to the plaintiff. The lower appellate Court seems to have adopted the same view, and in fact, it is impossible to read the rest of the judgment of the learned Subordinate Judge except on the footing that the judgment-debtor had no saleable interest. But the learned Judge in the lower appellate Court declined to decree the suit on the ground that even if a separate suit could be maintained to recover the money which the plaintiff had given for the purchase of the property, he did not ask to set aside the sale and that, therefore, he could not recover the money. That obviously cannot be right. The mere fact that the plaintiff asked for his money back but did not ask for the sale being set aside cannot bar his right. In fact, it is quite absurd that he should ask to set aside the sale when the Judge found that there was nothing to pass because the judgment-debtor had no interest in the property and, if the plaintiff had no interest, why he should go through the farce of asking the Court to set aside the sale?

The only point in this case is whether a suit of this nature does lie. Apparently, all the High Courts in India seem to agree that a suit of this nature does lie. It is sufficient to refer to the decision of this Court in the case of *Ram Kumar Shaha* v. *Ram Gour Shana* (1). There are cases also in the other High Courts in support of this view. But it has been objected that those decisions related to applications under the provisions of the old Code of Civil Procedure, and that, under the new Code, there has been a change. The authorities that have been cited show that that is not so. In the case of *Rustomji* v. *Vinayak Gangadhar* (2), which was clearly a case under the new Code, the Court held expressly that a suit would lie under the provisions of the Code of Civil Procedure (5 of 1908). A similar view has been taken in the case of *Muhammad Najib Ullah* v. *Jai Narain* (3). The cases seem to establish that a suit of this nature does lie and that the purchaser in execution is not limited to making an application under the terms of the Civil Procedure Code. If that is so, and the learned vakil who appears for the contesting defendants has not challenged that it is not so, the case seems to be a perfectly simple one because all that the learned vakil has attempted to urge is that it is not established that the judgment-debtor had no saleable interest, and, if he had no saleable interest, I gather from the learned gentleman's argument that he did not deny that the plaintiff would be entitled to recover back the money paid by him in those execution proceedings. That apparently is the only matter in this case. As I have already said, I think the learned Subordinate Judge, although he has not stated so in express terms, did mean to find, and his judgment is only consistent with that view, that the judgment-debtor had no saleable interest in the property. Therefore, in my opinion, the plaintiff is entitled to recover back the money paid by him to the decree-holder in the suit brought on the mortgage and in execution of which he purchased the property.

I think the decree of the learned Subordinate Judge in the lower appellate Court ought to be varied and in lieu of the decree dismissing the plaintiff's suit in toto a decree ought to be passed against defendant 3, namely, that the defendant 3 should be ordered to pay to the plaintiff the sum of Rs. 50 together with interest at the rate of 6 per cent. per annum from 17th March 1911 until realization. Defendant 3 must pay to the plaintiff his costs not only in this Court but also in the lower Courts. The appellant must pay to the other defendants, who have appeared and against whom the appeal has not been pressed, their costs in this Court. We do not disturb the order of costs made in the lower appellate Court in favour of these last mentioned defendants,

Smither, J.—I agree.

V.B./R.K. *Decree varied.*

1. (1910) 37 Cal 67=2 I C 559.
2. (1911) 35 Bom 29=7 I C 955.
3. A. I. R. 1914 All 252=26 I C 59=36 All 529.

A. I. R. 1918 Calcutta 507 (1)

FLETCHER AND NEWBOULD, JJ.

Lokenath Dey and *another* — Defendants—Appellants.

v.

Hara Chandra Majumdar—Plaintiff and *others*—Defendants—Respondents.

Appeal No. 426 of 1916, Decided on 2nd August 1917, from appellate decree of Sub-Judge, Second Court, Mymensingh D/- 30th September 1915.

Practice—New plea—Point not raised in pleadings, issue or grounds of appeal cannot be decided.

A plaintiff cannot be allowed to make a case that turns on the evidence which differs from the case set up in the plaint. [P 507 C 2]

Where the lower appellate Court decided an appeal on a point not set up in the plaint nor raised before the Primary Court, nor in the grounds of appeal before the lower appellate Court, the high Court reversed the decision and remanded the case to the lower appellate Court to have the appeal re-heard on the matters raised in the grounds of appeal. [P 507 C 2]

Jogesh Chandra Roy and *Jatindra Mohan Choudhury*—for Appellants.

Birendro Kumar De—for Respondents.

Fletcher, J.—This is an appeal by defendants 1 and 2 against a decision of the learned Subordinate Judge of Mymensingh, dated 30th April 1915, reversing the decision of the Munsif of Kesharganj. The suit was brought by a person who claimed as the transferee of a jote right for recovery of possession. The case has been decided in the lower appellate Court on the question of adverse possession. Having read that judgment, I am of opinion that if the point was open to the learned Judge to decide, the evidence was ample to warrant him to come to the conclusion that he did. But on the facts that the learned Judge has found, it is almost impossible to hold having regard to the cases decided by this Court with reference to adverse possession of limited interests, that the plaintiff has established the case of adverse possession. Of course, if the plaintiff was entitled to make that case, it had to be raised. The point made in this appeal is that the learned Subordinate Judge has decided a case not set up in the plaint, not raised before the Primary Court neither by way of issue nor by way of argument—and which found no place in the grounds of appeal preferred by the plaintiff when he appealed to the learned Subordinate Judge. That, I am afraid, is correct. The gentleman who represents the plaintiff has not been able to show either in the plaint or in the judgment of the First Court in the issue settled between the parties or in the grounds of appeal which his client preferred to the learned Subordinate Judge that this question of adverse possession of limited interest was raised. It may be an unfortunate result, but we are bound to administer the law as it is. One of the rules of the Court is that you cannot make a case that turns on the evidence which differs from the case set up in the plaint. This case of adverse possession which seems, on the facts found by the learned Judge, to be a good case was clearly not raised in any of the proceedings and was not open for decision by the learned Subordinate Judge. In that view of the case, the case must go back to the Court of the learned Subordinate Judge to have the appeal re-argued on the matters raised in the plaint and in the issues before the learned Munsif and with reference to the points raised in the grounds of appeal preferred by the plaintiff to the lower appellate Court. The costs of this appeal will abide the result of the re-hearing by the learned Subordinate Judge.

Newbould, J.—I agree.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 507 (2)

TEUNON AND RICHARDSON, JJ.

Lalit Mohan Chakrabarty and *others*—Petitioners.

v.

Harendra Kumar De and *others*—Opposite Parties.

Criminal Revn. No. 515 of 1917, Decided on 6th June 1917, against order of Addl. Dist. Magistrate, Dacca.

Eastern Bengal and Assam Disorderly Houses Act (1907), S. 3—Order under—District Magistrate cannot interfere.

A District Magistrate has no jurisdiction to interfere with an order passed by a criminal Court in the exercise of its jurisdiction under S. 3, Eastern Bengal and Assam Disorderly Houses Act. [P 508 C 1]

Hemendra Kumar Das—for Petitioners.

J. N. Ray and *Khitish Chandra Neogy*—for Opposite Parties.

Teunon, J.—In this case it appears that on a complaint made in accordance with the provisions of S. 5 (c), Eastern Bengal and Assam Disorderly Houses Act, 1907, proceedings or prosecutions under S. 3 were taken against the owners

and occupiers of houses Nos. 7, 25 and 26 of a certain lane in the city of Dacca. On the inquiry held in accordance with the provisions of S. 3 of the aforesaid Act the inquiring Magistrate found that as a matter of fact the houses in question were used as brothels, as disorderly houses and for the purpose of habitual prostitution to the annoyance of the inhabitants of the vicinity, that is to say, in contravention of the provisions of S. 2 (b) of the same Act. He thereupon directed that such use of the houses in question should be discontinued within 15 days from the date of the order. The persons affected by the order moved the Additional District Magistrate of Dacca, obtained from him an order by which he practically stayed the order of the inquiring Magistrate for a period of six months and also modified it in certain other particulars.

The question involved in this Rule is whether the District Magistrate had jurisdiction or was competent to modify the order of the inquiring Magistrate in the manner in which he has done, on in any manner whatsoever. Neither in the Act itself, nor in the Criminal Procedure Code, nor in any law that has been brought to our notice do we find any provision which justifies the District Magistrate in interfering with an order passed by a criminal Court in the exercise of its jurisdiction under S. 3 of the Act, to which we have made reference. It is also clear that if orders made under S. 3 are modified by other Magistrate, difficulties would arise in applying the provisions of S. 6 of the Act. We are therefore clearly of opinion that the Magistrate's action was wholly without jurisdiction, and in so far as it is an order modifying the Trying Magistrate's order and not an order directed to Police Officers, we direct that it be set aside.

Richardson, J.—I have only one word to add with reference to the case of *Rajani Khemtawali* v. *Emperor* (1), which was cited in the course of argument. Whatevar opinion may have been expressed in the judgment delivered in that case, I do not understand that any point was actually decided by the learned Judges inconsistent with our decision in the present case.

V.B./R.K. *Order set aside.*

1. (1910) 37 Cal 287=5 I C 323.

A. I. R. 1918 Calcutta 508

FLETCHER AND NEWBOULD, JJ.

Jadab Chandra Bhattacharjee—Plaintiff—Appellant.

v.

Mafijuddi and *others*—Defendants—Respondents.

Appeal No. 1135 of 1916, Decided on 23rd July 1917, from appellate decree of Sub-Judge, 1st Court, Jessore, D/- 28th February 1916.

Evidence Act (1 of 1872), Ss. 91 and 92—Arrangement to exempt one co-mortgagor from personal liability is provable though mortgage stipulates payment to be endorsed on mortgage.

An arrangement, by which one of several mortgagors procures a release of his own personal liability in respect of the whole of the mortgage money on payment of a consideration to the mortgagee, is admissible in evidence even where the contract between the parties as contained in the mortgage-deed provided that any payment on account of the mortgage must be endorsed on the back of the mortgage-bond.

[P 508 C 2; P 509 C 1]

Haradhan Chatterjee—for Appellant.

Satis Chandra Ghose and *Bhupendra Kumar Ghose*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Jeesore, dated 28th February 1916, reversing the decision of the Munsif at Narail. The suit was brought to enforce a mortgage security. The only question that has been raised in this appeal is a question with regard to the liability of defendant 9 and his property. Defendant 9 set up two cases. First of all, he set up the case that he, in consideration of the payment of Rs. 161, had procured from the mortgagee a release of his personal liability in respect of the mortgage money. The answer to that was that the payment could not be proved because the contract between the parties as contained in the mortgage-deed provided that a payment on account of the mortgage must be endorsed on the back of the mortgage bond. But the arrangement that the learned Judge has found to be proved in this case is not an arrangement covered by the terms of the mortgage.

It is an arrangement by which defendant 9 procured a release of his own personal liability in respect of the whole of the mortgage-money. That is a matter not covered by the terms of the mortgage. On the findings of fact, it is quite clear that the learned Judge correctly held that

defendant 9 had been released by the plaintiff from his personal liability with respect to the mortgage. The other point was the question of limitation. Defendant 9, having stated that he had procured his personal release on payment of the sum of Rs. 161, alleged that the claim of the plaintiff as against the property which remained subject to the mortgage and liable to be sold in satisfaction of the whole mortgage-money was barred by limitation. The learned Judge came to the conclusion that it was so barred. The learned Judge was led into that error owing to the mistake that appears in the plaint. But an examination of the original document and of the date of the institution of the suit show quite clearly that the suit, so far as regards the enforcement of the mortgage against the whole of the property comprised therein, was brought within twelve years from the date when the mortgage-money became due. In that view, we must set aside that portion of the decree of the learned Judge of the lower appellate Court and hold that the interest of defendant 9 in the property comprised in the mortgage is liable to be brought to sale in satisfaction of the whole amount due to the plaintiff on the mortgage just as much as that of the other defendants. Subject to that, the appeal must be dismissed. We make no order as to costs of this appeal.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 509

CHITTY AND BEACHCROFT, JJ.

Genu Sheik and *others*—Defendants—Appellants.

v.

Taramani Choudhurani— Plaintiff—Respondent.

Appeal No. 87 of 1917, Decided on 27th June 1917, from order of Special Judge, Mymensingh, D/- 23rd September, 1916.

Bengal Tenancy Act (1885), S. 50 (2)—Applicability of, enunciated.

Section 50 (2) applies to a holding held at a certain rate in which abatement has been allowed in respect of portions of the holding which have gone out of cultivation, if the abatement bears to the whole rent the same proportion that the land given up does to the whole area.

[P 510 C 1]

Nagendra Nath Ghose and *Brojendra Kumar Roy*—for Appellants.

Dwarka Nath Chakravarti — for Respondent.

Chitty, J.—I agree in the judgment about to be delivered by Beachcroft, J.

Beachcroft, J.—This is an appeal by the tenant defendants in proceedings under S. 105, Ben. Ten. Act. The Assistant Settlement Officer without going into the details of the holdings of the various tenants decided in general terms that the tenants were entitled to the presumption provided for in S. 50, of the Act. On appeal the learned Special Judge remanded the case to the Assistant Settlement Officer, for the purpose of deciding which tenants held at fixed rents and of disposing of the applications in view of the other considerations affecting enhancement of rent, which arose in the case. The learned Special Judge rightly held that the case of each tenancy must be considered separately. He further made certain observations with regard to the fixity of rent, and it is these remarks that have been called in question in the present appeal. For the respondents it has been argued that no appeal lies. In my opinion it is not necessary to decide this point for whether an appeal does or does not lie, the appeal should be dismissed. For it is conceded by the appellants that the order of remand was a proper order, though objection is taken to the lines on which the enquiry ordered should proceed, as indicated in the learned Judge's judgment.

Now if we find that the learned Judge has laid down wrong principles for the guidance of the Settlement Officer, in my opinion we ought to indicate in what respect the learned Judge is in error, whether the present appeal does or does not lie, to obviate the possibility of the further enquiry being subsequently challenged on the ground of the same error in law.

The learned Judge has pointed out that various rates of rent obtain in the locality for various classes of land. He has further found as a fact that lands in the village have been reclassified and alterations made with the effect generally of alterations in rent. In such cases of alteration he has held, and the correctness of this part of his judgment is not and cannot be disputed, that there cannot be a presumption of fixity of rent. He also held, in my opinion rightly, that the holding must be regarded as the unit. The part of his judgment to which exception has been taken is that part in which

he says that the presumption of S. 50 cannot be applied except in cases where the tenant can show that in the twenty years preceding the application there has been no change of rent or only such slight variations as are of no account. It appears that the holdings of some of the tenants originally included land, referred to as jala land, which has become incapable of cultivation and in respect of which the tenants got abatement of rent. In such cases it is possible that the proposition stated by the learned Judge is in too wide terms. For though there may have been a change of rent it is possible there has been no change in the rate of rent. If a holding has been held at a certain rate and abatement has been given in respect of a portion of the holding which has gone out of cultivation and the abatement bears to the whole rent the same proportion that the land given up does to the whole area, it is obvious there has been no alteration in the rate of rent, though there has been an alteration in the rent itself. In such a case S. 50(2) of the Act will apply. But obviously this will not be the case if the holding includes various classes of land assessed at different rates of rent. No other point is urged. The appeal should, in my opinion, be dismissed, each party bearing their or his own costs respectively.

V.R./R.K. *Appeal dismissed.*

A. I. R 1918 Calcutta 510 (1)

WOODROFFE AND CUMING, JJ.

Tarangini Dei — Petitioner— Appellant.

v.

Baikuntha Nath Mandal and *others*— Respondents.

Appeal No. 61 of 1916, Decided on 27th March 1917.

Civil P. C. (5 of 1908), S. 47—Non-bona-fide purchaser of equity of redemption is not representative of judgment-debtor and cannot object to execution of mortgage decree.

An alleged purchaser of the equity of redemption, whose purchase is found not to be bona fide but a collusive transaction, has no locus standi to maintain an application under S. 47, Civil P. C., objecting to the execution of the mortgage-decree as a representative of the judgment-debtor. [P 510 C 2]

Jyotish Chandra Hazra, *Mohesh Chandra Banerjee* and *Abhoy Charan Sarkar*—for Appellant.

Manmatha Nath Roy — for Respondents.

Woodroffe, J.— The only question that arises from the judgment of the lower appellate Court is whether the petitioner was or was not a benamidar. It must be shown that she was either a party to the suit or a representative of the party to the suit. Doubtless she was not a party to the suit, for that party was one Shyam Maiti. She was not also, according to the finding of the lower appellate Court, a representative of Shyam Maiti who himself was a party to the proceeding. Admitting for the sake of argument that a purchaser from a judgment-debtor is his representative, it was found as a fact that the alleged purchase on the part of the petitioner was not bona fide but a collusive transaction, which is equivalent to saying that there was no conveyance and that nothing passed to the petitioner. That being so, the Judge was right in holding that the petitioner had no locus standi to maintain an application under S. 47, Civil P. C. The appeal is accordingly dismissed with costs, one gold mohur.

Cuming, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 510 (2)

BEACHCROFT AND WALMSLEY, JJ.

Srimoti Prasanna Moyee Basu, In re. Applicant—Appellant.

Appeal No. 31 of 1907 of 16th February 1917, from original decree of Dist. Delegate, first Court, 24-Parganas, 30th January 1917.

Court-fees Act (1870), Ss. 19 (1) and 19 (H) (4)—Payment of Court-fees—Delay in motion by Collector under S. 19 (H)—Grant of probate cannot be delayed—Probate.

The grant of Probate to a petitioner, who has filed the valuation required by S. 19 (1), Court-fees Act, and has also paid the Court-fee requisite under that section, cannot be delayed on account of the Collector's omission in making a motion under S. 19 (H), sub-S. (4), Court-fees Act. [P 511 C 1]

Bipin Behary Ghose and *Bipin Chandra Bose*—for Appellant.

Ram Charan Mitra—for the Crown.

Facts.—In this matter Srimati Prasanna Moyi Basu, executrix to the will of the late Babu Kritanta Kumar Basu made an application for probate in the Court of the District Deligate of 24-Pergannahs. The application was made on 3rd May 1916, and probate was ordered to be granted on 28th July 1916 and the affidavit as to valuation was sent to the

Collector of 24 Pergannas on 29th June 1916; but the Collector made delay in sending his reports as to the valuation. Thereafter an application was made under S. 19 (1), Court-fees Act, praying for issue of probate on the valuation made by the petitioners on which proper duty had already been paid. The District Deligate rejected the application recording the following order:

"Collector has not as yet sent his report. The applicant prays for the issue of a certificate at once under sub-S. (2), S. 19-1, Court-fees Act, but in this case there is no motion by the Collector under S. 19-H, sub-S. (4). I do not find any provision to issue a certificate pending inquiry by the Collector regarding the valuation. Prayer rejected."

Against this order the petitioner preferred an appeal to the High Court.

Judgment.—The learned Government Pleader, to whom we ordered a notice of this application to be given, has conceded that he cannot oppose this application for issue of probate. The petitioner has filed the valuation required by S. 19 (1), Court-fees Act, and has also paid the fee requisite under that section. The learned Judge seems to think that because the Collector has not made a motion under S. 19-H, sub-S. (4), the probate cannot be granted. Sub-S. (2), of S. 19 (1) says that the grant of probate should not be delayed by reason of a motion by the Collector under S. 19 (H). If the grant is not to be delayed in a case where the Collector has made a motion, we do not see on what principle the grant can be delayed where he has not made a motion. The appeal is allowed and probate will be issued at once. Let the order be sent down at once.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 511

WOODROFFE AND MOOKERJEE, JJ.

Sati Nath and *others*—Defendants—Appellants.

v.

Ratanmani Naskar — (Plaintiff *others* and) Defendants—Respondents.

Letters Patent Appeal No. 51 of 1912, Decided on 27th February 1917, against the judgment of Richardson, J., D/- 26th April 1912, in Appeal from appellate decree No. 3686 of 1910.

Execution sale—Purchaser from decree-holder of property purchased by latter in execution—Subsequent setting aside of sale with notice to decree-holder binds purchaser though he is entitled to refund—Civil P. C. O. 21, R. 92.

The purchaser of a property from a decree-holder, which the latter purchased at a sale in execution of his decree, cannot treat as a nullity subsequent proceedings of the execution Court in which the execution sale is set aside with notice to the decree-holder but in the absence of and without notice to the purchaser, as such proceedings against the decree-holder, are good also as regards the purchaser who claims through the decree-holder. [P 511 C 2]

But such purchaser is entitled to a refund of the price paid by him with interest from his vendor. [P 512 C 1]

Manmatha Nath Mookerjee—for Appellants.

Soshi Sekhar Bose—for Respondents.

Woodroffe, J.—The plaintiff seeks in the first place to recover possession of a property purchased from one Aditya Chakravarti. He was a decree-holder who purchased the property at a sale held under his decree. After his sale to the plaintiff, the Court sale was set aside on notice to Aditya but in the absence of and without notice to the plaintiff. It is conceded that the plaintiff is not in the position of a stranger who has purchased at a Court sale and who is pleading a bona fide purchase without notice; and, it is conceded, he is, therefore, a person taking through the decree-holder purchaser at the sale and standing in the same position as the decree-holder. The question, therefore, before us is whether or not we should treat the order setting aside the execution sale as a nullity or as a mere irregularity. If it was a nullity, then of course the plaintiff's title is made out; if, however, it was an irregularity then the plaintiff's remedy was in the execution Court to set aside the proceedings which were held in his absence. I think, however, that it has not been made out that it was a nulity and that this is so is shown by the fact that there is no doubt that the proceedings were held on notice to Aditya. Therefore, they were good proceedings as regards him, and the plaintiff claims through him. Possibly if the plaintiff had gone to the execution Court and had represented to that Court that Aditya having disposed of his interest was no longer concerned in the matter and that he should be made a party to these proceedings, the Court might have acceded to his request. But the fact that the proceedings were held in the absence of the plaintiff would not make them a nullity, seeing that they were held in the presence of a person

through whom he claims, namely, Aditya. Therefore, on this ground the suit, so far as it is a suit for possession as against defendants 1 to 8, fails and must be dismissed with costs in all Courts.

There is, however an alternative relief sought by the prayer (gha) of the plaint. The plaintiff says: If the plaintiff be not held by the Court to be entitled to recover khas possession, then in that case he prays that he may have a decree directing refund of the consideration money by the pro forma defendants 9 to 12 and payment of the sum of Rs. 10 as compensation on account of cultivation expenses. As regards the latter part of this claim, we know nothing and there is no mention of it in the judgment. But as regards the consideration money which amounts to Rs. 95, the plaintiff is entitled to a decree for that sum against the defendants 9 to 12 with interest thereon at six per cent. per annum from the date of the suit to the date of realization. It does not appear that these defendants have taken any part in the suit in any of its stages, and therefore, though the suit is decreed as against those defendants, the decree will not carry any costs.

The appeal is allowed in these terms.

Mookerjee, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 512

CHATTERJEA AND RICHARDSON, JJ.

Krishna Das Roy and *others*—Decree-holders—Appellants.

v.

Kali Tara Chowdhurani and *others*—Judgment-debtors—Respondents.

Appeal No. 153 of 1916, Decided on 23rd July 1917, from appellate decree of Dist. Judge, Tipperah, D/- 15th March 1916.

(a) **Civil P. C. (1908), S. 52—Suit for arrears of rent against six persons three of them being dead—Decree is not nullity—It can be executed as money decree only against judgment-debtors living at date of suit—Landlord and Tenant.**

The plaintiff brought a suit for arrears of rent against six persons, three of whom were dead, and obtained a decree. In execution the representatives of the deceased defendants were brought on the record, but they objected to the execution of the decree on the ground that the decree was a nullity having been obtained against persons some of whom were dead:

Held: that the decree was not a nullity and could be executed as a money decree as against those judgment-debtors who were living at the date of the suit and the decree passed therein, although it could not be executed as against the representatives of the judgment-debtors who were dead when the suit was instituted: 33 *Cal.* 580, 11 *C. W. N.* 1026, 6 *I. C.* 387, *Foll.* 7 *I. C.* 840; 10 *W. R.* 304 and 3 *C. W. N.* 371; *Dist.*

[P 515 C 2; P 517 C 1]

(b) **Landlord and Tenant—Rent—Suit for—Liability of joint tenants is joint and several.**

The liability of joint tenants for rent is, like the liability of joint promisors, a joint and several liability. [P 514 C 2]

Per *Richardson, J.*—The liability of co-tenants is presumably joint and several, unless it is shown to be merely joint. [P 517 C 1]

(c) **Contract Act (1872), S. 43—Joint promissors—Promisee can sue one or more under S. 43.**

Section 43 enables a promisee to sue one or more of several joint promisors to enforce the joint liability. [P 513 C 1]

(d) **Landlord and Tenant—Rent—Suit for—Joint tenants are jointly and severally liable—Contract with single person—Liability of his heirs is joint.**

When a contract is made with several persons as tenants, they are jointly and severally liable for rent. But, when the contract is made with a single person, after his death the liability of his heirs is a joint liability. [P 514 C 2]

(e) **Contract Act (1872), S. 43—Persons jointly liable for debt cannot insist on being sued together in absence of express agreement.**

In England it is the right of persons jointly liable to pay a debt to insist on being sued together. But in India, apart from express agreement, this right has been abrogated by S. 43.

[P 513 C 1]

(f) **Landlord and Tenant — Rent — Joint tenants—Liability of each for entire rent depends upon intention of parties.**

Per *Chatterjea, J.*—Where a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent depends upon the intention of the parties and where there is a written contract, the intention would depend largely on the contract. [P 514 C 1]

Rupendra Kumar Mittra—for Appellants.

Bhabataran Brahmachari—for Respondents.

Chatterjea, J.—This appeal arises out of an application for execution of a decree. The appellant brought a suit for arrears of rent against six persons who were the tenants and obtained a decree. It appears that three of them had died before the institution of the suit, and when the decree-holder brought the representatives of the deceased judgment-debtors on the record in the proceedings in execution of the decree, they objected to the execution on the ground that the decree was a nullity having been obtained against persons who were dead, and the Court of first instance gave effect to the contention, and the order of that Court

was confirmed by the Court of Appeal below. The decree-holder has appealed to this Court, and it is contended on his behalf that although the decree was not binding upon the heirs of the judgment-debtors who were not living at the date of the suit, the liability of the judgment-debtors is joint and several and that the decree-holder is competent to proceed against such of the judgment-debtors as were not dead at the time of the institution of the suit and that as against them the decree was binding.

The first question for consideration therefore is whether the liability of joint promisors is a joint or a joint and several liability. Now S. 43, Contract Act, lays down that when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promises. As pointed out in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (1), the section allows the promisee to sue one or more of several promisors in one suit and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him. It was decided in that case, following the rule laid down in *King* v. *Hoare* (2), that a decree obtained against one of several joint promisors is a bar to a subsequent suit against the others. We are not concerned in this case with that question, upon which there is a difference of opinion. But as pointed out by Strachey, C. J , in *Muhammad Askari* v. *Radhe Ram Singh* (3), the right of joint debtors to have all the co-contractors joined as defendants in any suit to enforce the joint obligation, which in England before the Judicature Acts could be enforced by means of a plea in abatement and since the Judicature Acts by an application for joinder, has been in India expressly excluded by S. 43, Contract Act.

The next question is whether the liability of joint tenants for rent is a joint and several liability. That question has been considered in several cases in this Court. In *Joy Gobinda Laha* v. *Monmotha Nath Banerji* (4) a preliminary objection was taken to the hearing of the appeal on the ground that one of the defendants-respondents (in a suit for rent), had died and no substitution of his heirs had been made. The learned Judges (Mitra and Geidt, JJ.,) overruled the objection on the ground that the

"liability of the defendants is however joint and several, and the death of one of the defendants without his legal representatives being substituted in his place cannot exonerate the other defendants from liability. The appeal abates only so far as the deceased defendant is concerned.

The same principle was followed in *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (5), where a suit for rent was brought and an ex parte decree obtained against all the tenants, which was set aside at the instance of some of the defendants, and the other defendants not having been served with notice of the restoration of the suit, the plaintiff did not proceed against them; it was held by Rampini, Ag. C. J., and Sharfuddin, J., that

"joint tenants are jointly and severally liable for the rent. To hold that they are only liable each for his own share of the rent would be directly opposed to the policy of the Act as laid down in S. 88 of the Act (Bengal Tenancy Act."

This decision was approved of by D. Chatterjee and Vincent, JJ., in *Rameswar Singh* v. *Jaidib Jha* (6). In that case one of the defendants in a suit for rent died before the issue of summons. The fact of the death was brought to the notice of the Court, and there was an application to bring in his heirs. No further steps were taken by the Court and a decree was passed against the deceased defendant as if he were living. In the lower appellate Court the alleged heirs of the deceased were brought in as defendants, and there it was contended that they had been brought in after the expiry of the period allowed by law, that the application for substitution was therefore barred by limitation and that the whole suit ought to fail and the contentions were given effect to. On second appeal this Court held that the deceased being only one of several tenants, it was quite competent to the plaintiff to maintain his suit against any number of several joint tenants and that therefore the suit against the other defendants was maintainable.

In another case however in the same volume *Kashi Kinkar Sen* v. *Satyendra*

1. (1877-78) 3 Cal 353.
2. (1844) 13 M & W 494=14 L J Ex 29.
3. (1890) 12 All. 307.
4. (1906) 33 Cal 580.
5. (1907) 11 C W N 1026.
6. (1910) 6 I C 387.

Nath Bhadro (7), Mookerjee and Sharfuddin, JJ., were of opinion that the proposition that the landlord may maintain a suit for rent against any number of several joint tenants had been too broadly laid down in *Rameswar Singh* v. *Jaideb Jha* (6), and that when a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent depends upon the intention of the parties, and that in order to determine whether the promise is joint and several, it is to be ascertained not only whether several persons have joined in making a promise to the same person, but also whether at the same time each of them has in addition made the same promise separately to the same promisee. In that case, the landlord sued three persons who were the tenants for recovery of rent at the rate of Re. 1-5 annas per year. The defendants pleaded that the rent payable was at the rate of 12 annas 16 gandas only, but the plaintiff having produced a roadcess return filed by defendant 1 which supported the rate alleged by the landlord, the Ccurt of first instance gave a decree at that rate as against defendant 1 for the entire rent and dismissed the suit against the other two. That decree was affirmed on appeal and in second appeal the learned Judges after stating that the rule that the landlord may maintain a suit for rent against any number of several joint tenants was stated in too comprehensive terms observed as follows:

"We may add that even if it could be laid down that ordinarily a landlord may make one of several joint tenants responsible for the whole rent, the doctrine would be inapplicable to the present case for two special reasons. In the first place, the landlord has brought his suit against all three tenants, as against one he has got an admission in favour of the rate of rent asserted by himself, as against the other two, he has no evidece to prove the rate and cannot possibly obtain a decree at a rate higher than the rate admitted by them. Under such circumstances, he cannot obviously be permitted to obtain a decree for the whole rent against defendant 1 and ask for a dismissal of the suit as against the others. If this decree were maintained in a suit for contribution by defendant 1 against his cosharers, the position of the former would be one of considerable embarrassment. Defendant would be liable to satisfy the claim of the landlord at one rate and then possibly find himself unable to recover anything from his cosharesr except at a very much smaller rate: this would be clearly unjust. In the second place the tenancy is admittedly an ancient one and the tenants in occupation are the representatives of the original tenant. Now, even if it be assumed that one of several joint tenants is liable for the whole rent, it does not follow by any means that when land is let out by *A* to *B* upon the death of *B* every one of his heirs is liable for the whole rent. As was pointed out in the case of *Ahinsa Bibi* v. *Abdul Kader Saheb* (8), the heirs really constitute one body and cannot be treated necessarily as persons who have made joint and several promises."

I think the principle upon which the actual decision in the above case was partly based, viz., that the heirs of the original tenant constitute one body, and that in such a case there is only a joint liability, cannot be disputed. In such a case there is no promise by two or more persons. The contract is with a single person as tenant and when he dies the liability of his heirs is a joint liability. The principle was followed in *Shaik Sahed* v. *Krishna Mohan Basak* (9). In the present case the contract was made with six persons who were the tenants, and the cases cited above go to show that in such a case there is a joint and several liability. The earlier cases referred to in the judgment in the case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (7) are distinguishable. In *Roop Narain Singh* v. *Juggoo Singh* (10), it was no doubt held that a suit for rent due from several raiyats on account of a holding which had been let out to them cannot be brought against one of them, but must be brought against all of them.

The case however was decided before the passing of the Contract Act and S. 43 of that Act therefore, was inapplicable to that ease. In *Khetter Mohan Pal* v. *Pran Kristo Kabiraj* (11) the suit for rent was brought against one of the heirs of the original tenant and the question was whether he alone could be made liable for the entire rent. The rent claimed was on account of a permanent tenure and the learned Judges held that there is no law which compels a landlord in order that he might succeed in a suit for rent to sue all the heirs of a deceased tenure-holder when he had no notice who the heirs are. As stated above the liability of the heirs of a tenant is a joint liability and in the case of an occupancy right all the heirs must be sued and it was because the rent claimed in that case was on account

7. (1910) 7 I C 840.

8. (1902) 25 Mad 26.
9. (1916) 35 I C 563.
10. (1868) 10 W R 304.
11. (1899) 3 C W N 371.

of a permanent tenure (in respect of which the law provides for notice of succession to the landlord), that the learned Judges observed that the defendant being admittedly one of the heirs and in possession of the tenure was liable for the rent and he could not defeat the plaintiffs' suit by showing that there are other heirs equally liable unless possibly he goes further and shows that their names have been notified as successors of the original holders or that they have been paying the rent and getting receipts as successors. In *Ram Taran Chatterjee* v. *Asmatullah Sheikh* (12) one of several joint tenants, who had executed a kabuliyat in favour of the landlord for the entire tenure was held not to be bound in excess of his share and not liable for the whole rent but it was proved in that case that the other tenants did not acquiesce in the kabuliyat and in a separate suit by the other tenants against the landlord it was found that they were not bound by the kabuliyat. The case of *Ananda Kumar Naskar* v. *Hari Das Haldar* (13) related to the heirs of the original tenant (an occupancy raiyat) and as the landlord had sold the holding in execution of a decree obtained against some of the heirs ignoring the plaintiffs who were also heirs and from whom he had accepted rent, it was held that the entire jama did not pass by the sale and the plaintiffs' right was not affected thereby. In *Abdul Rab Chowdhury* v. *Eggar* (14) it was held that the landlord cannot succeed in a suit for rent in respect of a patni tenure (which had devolved on two muttawalis) against one of the mutwalis because muttawalis stand in the position of trustees.

The actual decision in the case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (7) turned upon the grounds stated at p. 645 (of 12 *C. L. J.*) of the report, which I have quoted above. There are, however, the observations made by the learned Judges that where a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent depends upon the intention of the parties. In a case where there is a written contract, the question of intention would depend largely upon the terms of the contract. But in the present case it does not appear that there was any written ontract and we do not know what were the terms of such contract if there was any. There is, therefore, nothing to show that the parties intended only a joint liability. No argument can be founded on the ground that the landlord chose to sue all the tenants because the landlord had no knowledge that some of the tenants were dead when he instituted a suit. So far as the decree is concerned, there is nothing in the decree to indicate that the nature of the original liability was changed by it. It is unnecessary to state that if the landlord wished to proceed against the holding itself under the provisions of Ch. 14, Ben. Ten. Act, he could not do so unless he obtained a decree against the heirs of the deceased tenants also, but he wants to execute the decree only as a money decree.

The present case is covered by the principles of the decisions in the cases of *Joy Gobind Laha* v. *Monmotha Nath Banerjee* (4), *Jogendro Nath Roy* v. *Nagendra Narain Nandi* (5) and *Rameswar Singh* v. *Jaideb Jha* (6). I accordingly hold that the decree is not a nullity and that the plaintiff is entitled to execute the decree against the judgment debtors who were living at the date of the rent suit and the decree passed in that suit. The case will go back to the Court of first instance for proceeding with the execution against them. The decree, however, will be executed only as a money-decree. We make no order as to costs.

Richardson, J —I agree that the appeal should succeed. It is clear that the decree cannot be executed as against the representatives of the judgment debtors named in it who were dead when the suit was instituted, but why should it not be executed as against the judgment-debtors who were alive at the date of the suit or their representatives? In the argument before us the question was raised whether under the original contract between the landlords and their tenants, the liability of the latter was joint or joint and several. The question, I suppose, where there is a written contract, must turn largely on its express terms. But as I understand the matter, the principal difference between a joint liability and a joint and several liability is this. A liability is joint if on the death of one of the joint promisors the liability becomes the liability of the surviving pro-

12. (1902) 6 C W N 111.
13. (1910) 27 Cal 545.
14. (1908) 35 Cal 182.

misors and no liability devolves upon the heirs or legal representatives of the deceased promisor. In *Kendall* v. *Hamilton* (15), Lord Penzance says at p. 526:

"If a man deliver goods or lend money to two partners, the promise which the law implies is a joint promise. The effect of such a promise as distinguished from a joint and several promise, is that in case of death the debt is enforcible only against the survivor."

It may be said, therefore, that this survivorship is the distinguishing mark of a joint contract. Where there is no survivorship and the liability extends beyond the surviving debtors to the estate of a deceased debtor, the liability is presumably joint and several with the ordinary incidents of such a liability subject possibly, in exceptional cases, to any modification imposed by express agreement. No doubt there may be differences in other respects between a liability which is joint and a liability which is both joint and several. For instance, in England, it is

"the right of persons jointly liable to pay a debt to insist on being sued together: Lord Cairns, L. C, in *Kendall* v. *Hamilton* (15)."

In India however apart from express agreement, this right has been abrogated by S. 43, Contract Act. Nevertheless even in India the doctrine established in England by *King* v. *Hoare* (2) may still hold good: *Hemendro Coomar Mullick* v. *Rajendrolail Monshee* (1). But such differences as these, where they exist, are consequences which flow from a liability being joint or which a particular system of law annexes to a joint liability. They are not the essential distinctions between a joint and a joint and several liability. Now it may be the general rule in England that

"where sevral persons agree to perform a particular act, they are bound jointly and not severally: Addision on Countracts, Edn. 11, p. 319."

But is this general rule applicable in India in the case of co-tenants holding under a common landlord? As between the co-tenants themselves, their interest in the tenancy is presumably not a joint interest but an interest in common. The principle of joint ownership

"appears to be unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family: *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (16)."

If the rent is in arrears and the landlord desires to obtain a decree good against the land under the Bengal Tenancy Act, he must ordinarily (apart from any question of representation) implead all the co-tenants including the heirs or legal representatives of a deceased co-tenant. In the ordinary case neither side contemplates a survivorship of the liability. As to a money-decree for the rent, good only under the Civil Procedure Code, even if the liability be one which would in England be regarded as joint and not as joint and several, the landlord need not under our law in the absence of express agreement compelling him to do so) bring all the co-tenants on the record: (Contract Act, S. 43. But if he were bound to sue all the persons liable or if he in fact intends to take that course, he would, I imagine, naturally include the representatives of a deceased co-tenant. He would not in the ordinary case suppose that his remedy was against the surviving co-tenants and them alone. If then there is no survivorship and if under S. 43 the co-tenants have not the right to insist on being sued together, I should have thought that prima facie the liability was joint and several. This seems to have been the view adopted in *Sourendra Mohan Tagore* v. *Surnomoyi* (17), *Joy Gobind Laha* v. *Monmotha Nath Banerji* (4), *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (5) and *Rameswar Singh* v. *Joideb Jha* (6). It may be that in *Kashi Kinker Sen* v. *Satyendra Nath Bhadro* (7), Sir Asutosh Mookerjee, J., expressed a somewhat different view, but in that case the question was as to the liability to the landlord of the representatives of the original tenants. A similar question was considered in in *Shaik Sahed* v. *Krishna Mohan Basak* (9). The question was decided in both cases on the footing that different considerations arose where the defendants were the representatives of a single tenant and not the co-tenants who had themselves contracted with the landlord. For the present purpose therefore it is not necessary to consider the result which was arrived at in those two cases and as to that I express no opinion.

I have made these observations because it was urged on behalf of the respondents in support of the order made below that as the original liability of the co-tenants was a joint liability and as the appellants chose to sue all the co-tenants therefore the decree could only be executed if it was a good and valid decree as against all the co-tenants. The precise

15. (1879) 4 A C 504=48 L J Q B 705.
16. (1896) 23 Cal 70=43 A 37 (P C).
17. (1899) 26 Cal 103.

terms of the agreement between the parties are not before us. I do not even know whether the agreement was embodied in a written lease. The answer, in my opinion, to the first part of the argument, is that presumably the liability of the co-tenants was joint and several and it is neither found nor shown to be merely joint. But even if it was a joint liability, I do not follow the second part of the argument. It was put on the ground of election. But the question raised has to do with the legal rights of the parties and has nothing to do with election. Reference may be made to the head note of the case already so often cited, *Kendall* v. *Hamilton* (15) and to the observations of Lord Blackburn at p. 542. Even if anything turned on election, there is nothing to show and it is not found—that the appellants know that some of the persons whom they joined as defendants in their plaint were already dead. It certainly cannot be supposed that they intended or elected to join the dead with the living. As to the legal rights of the parties, even if the contract was joint, it is not shown that there was any express agreement which obliged the landlord to bring all the tenants on the record. It was open to the landlords, therefore under S. 43, Contract Act, to bring their suit against one or more of the tenants, and there is nothing in the law which prevents the suit from being a good suit as against the tenants who were alive at its institution. In my opinion, in the absence of anything to show the contrary, the tenants were jointly and severally liable to the landlords but in any view of the matter the decree is as against those tenants who were alive when the suit was instituted a good and valid decree capable of execution against them or their present representatives. I concur in the order proposed.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 517 (1)

CHITTY AND SMITHER, JJ.

Karim Buksh and *another* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1160 of 1917, Decided on 7th December 1917.

Criminal P. C. (1898), S. 106 (3)—Scope.

An appellate Court cannot exercise the powers given by S. 106 (3) where the conviction has not been by a Court specified in sub-S. (1) of the section. [P 517 C 1]

D. N. Bagchi—for Petitioners.

Judgment.—There is a decision of this Court, *Emperor* v. *Momine Malita* (1), that an appellate Court cannot exercise the power given by S. 106 (3), Criminal P. C., where the conviction has not been by a Court specified in sub-S. (1). Having regard to the fact that amendment of the Code is under contemplation it does not appear to be worthwhile to refer the question to a Full Bench, though the decisions in the Madras and Bombay High Courts are to the contrary effect. We accordingly, without expressing an opinion on the subject, make the rule absolute and set aside the order under S. 106 (3) in this case.

V.B./R.K. *Rule made absolute.*

1. (1908) 35 Cal 434.

A. I. R. 1918 Calcutta 517 (2)

RICHARDSON AND WALMSLEY, JJ.

Prodyot Coomar Tagore and *others*—Plaintiffs—Appellants.

v.

Krishnamoni Dasya — Defendant — Respondent.

Appeals Nos. 2245 to 2248 of 1915, Decided on 19th April 1917, from appellate decrees of Special Judge, Mymensingh, D/- 5th June 1915.

(a) Civil P. C. (5 of 1908), S. 100—Tenancy whether jote or raiyat is question of fact.

The decision of the question whether a certain jote (tenancy) is a tenure or a raiyati holding is a finding of fact which is not open to question in second appeal. [P 518 C 1]

(b) Civil P. C. (5 of 1908), S. 100—Tenure whether permanent—Decision depending on construction of kabuliyat—Question is not merely of fact.

The question whether a tenure is a permanent tenure is not merely one of fact if it depends, at any rate to a large extent, on the construction of the kabuliyats executed from time to time by the tenant or his predecessors. [P 518 C 2]

(c) Land tenure — Permanent tenancy Quaere—Whether non-transferability is consistent with permanency.

A permanent tenure may bear a variable rent.

Per *Richardson, J.*—*Quaere*—Whether a non-transferable tenure can be a permanent tenure. [P 518 C 2]

(d) Land tenure — Heritability — Proof—Succession by son and his widow is not sufficient—Omission of words from generation to generation—Burden of proof of heritability is heavy.

Per *Walmsley, J.*—The descent of a tenancy from father to son and then to the son's widow is not enough to establish that the tenancy is heritable.

A tenant who claims an hereditary right under a lease which does not contain the words "from

generation to generation" has a heavy onus to discharge. [P 519 C 2]

(e) Land tenure—Permanent — Transferability is generally invariable incident.

The right of alienation though not an essential feature of a permanent tenure, is commonly regarded as an invariable incident. [P 520 C 1]

(f) Lease — Construction — Tenancy continuing for 70 years—Succession by son and his widow—Kabuliyat restraining removal of trees, transfer or partition — Tenancy held not permanent.

Per *Curiam*.—Where a tenancy was held for a long time and for a period of 70 years out of it only four kabuliyats were executed and the tenancy descended from father to son and then to the son's widow, but the kabuliyats bound the tenant to keep the trees intact and restrained him from making any transfer or partition of the lands and there were no words of heritability in the kabuliyats :

Held : that the tenancy was a non-permanent tenure. [P 520 C 1]

Ram Charan Mitra and *Mukunda Nath Roy*—for Appellant.

Dwarkanath Chakravarty and *Romesh Chandra Sen*—for Respondents.

Richardson, J.—I confess that I have had some difficulty with this appeal and the analogous appeals which were argued along with it. I have been greatly impressed with what the Settlement Officer says in his judgment in the present case (para. 3) about the origin and special character of these jotes. He says that they are known as khud jotes and he observes with great force that the terms is reminiscent of the khud kasht raiyats of an earlier period. He mentions other features in the evidence which go far to show that in the opinion at any rate of the landlord's officers, the tenants of these jotes possess rights which, to use a natural term, may be described as permanent residential rights. I have a strong suspicion that in spite of their present area the jotes were in their origin raiyati holdings, or they may have grown out of smaller holdings of a raiyati character. The special incidents now attached or sought to be attached to them by contract resemble very largely the ordinary incidents of a raiyati holding at the present day. On the question, however, whether the jotes are tenures or raiyati holdings, we are confronted with the concurrent findings of the Courts below that they are tenures. No attempt was made in the argument before us to displace that finding on any ground open in second appeal and it must, therefore, be accepted as final.

In the appeal before us, the tenant's rights being, as we must now take them to be, those of a tenure-holder, there is great difficulty in agreeing with the Courts below that the tenure is a permanent tenure. The question is not merely one of fact. It depends at any rate to a large extent on the construction of the kabuliyats executed from time to time by the tenant or his predecessors. It is a question of construction for instance whether the word "sharashari" or "temporary," which occurs in these documents or some of them, refers to the variability of the rent or the nature of the tenancy. The learned Special Judge in the lower appellate Court has come to the conclusion that while the tenure is permanent and heritable, the rent is variable, and the tenure is not transferable. Now there is no inconsistency at all between a permanent tenure and a variable rent, but permanency and non-transferability are not so easily reconcilable. S. 179, Tenancy Act, has no application because the tenure is not a mukarari tenure, If the tenure is permanent it falls under the provision in S. 11 Ben. Ten. Act, which says that

"Every permanent tenure shall, subject to the provisions of this Act, be capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property."

If this section be read with S. 10, T. P. Act, it may be that, as the kabuliyats do not provide for re-entry by the landlord in case of breach of the condition against transfer, the condition is in any case void, whether the tenure is permanent or not. But, however that may be, I express no opinion on the point. Taking the terms of the series of kabuliyats as a whole, it is not easy to suppose that the kabuliyats or any of them is either creative of, or refers to, a permanent tenure. The difficulty and responsibility of deciding in the first instance whether a particular tenancy is a tenure or raiyati holding is often, in cases near the border line, enhanced by the fact that if the tenancy is held to be raiyati the tenant will have permanent rights of occupancy, while if it is held to be a tenure it may almost necessarily follow that the tenure is not permanent. The problem is sometimes specially difficult in the case of leases of new lands which are to be brought under cultivation, because the position of the tenant at the inception of the tenancy may be very different from

his position, it may be many years later, when the land has been successfully reclaimed and the question arises. At first it may not be to the landlord's interest to deny that the tenant is a raiyat and there may be an understanding, probably on an informal basis, that he is a raiyat. As time goes on it may be very much to the landlord's interest to assert that the tenant is a tenure-holder.

The present is a case in point. The dispute between the parties really turns on the question whether the jote is a tenure or a raiyati holding and the decision on this question is not now open to review. On the whole I am forced to the same conclusion as that arrived at by my learned brother and concur in the order which he proposes to make. I may add that the relations between the landlord and his khud jote tenants appear to have been in the past of the friendliest character. I trust that the present controversy will not disturb the excellent relations hitherto existing and will not lead the landlord to treat his tenants with less consideration than he has hitherto done. The judgments delivered in this case will govern the other analogous appeals. In all these appeals the parties will bear their own costs.

Walmsley, J.—This appeal is by the landlord, and arises out of an application under S. 106, Ben. Ten. Act. The substance of the application is that the defedant-respondent's interest in a tenure has been entered in the record as permanent, whereas it should be only temporary. The defendant pleaded that her interest was that of a raiyat, and was permanent. The claim of raiyati interest is no longer under discussion, and the question now is whether the tenure is permanent or not. The Assistant Settlement Officer held that the tenure was permanent. On appeal the learned Special Judge upheld this decision with the qualifications that the tenure was not transferable and that the rent was liable to enhancement. The landlord now asks us to go further and hold that the tenure is not permanent. A permanent tenure is described in S. 3 (8) of the Act as a tenure which is heritable and which is not held for a limited time.

I will deal first with the feature of heritability. Four kabuliyats have been laid before us, one produced by the defendant, and three by the landlord, the first executed in 1250 B. S (1843 A. D) and the other three in the years 1277, 1285 and 1295 B. S. From the evidence it appears that Rup Nath Das, who executed the first, was a benamindar for Bishnu Charan and that the second was executed by Bishnu's son Biseshwar, and the third and fourth by Biseshwar's widow, the present defendant. The learned Judge holds, and I think rightly, that the descent from father to son, and then to the son's widow, is not enough to establish the facts of heritability and he finds that heritability is proved by the oral statement of P. W. 1. This statement is set out in full by the Settlement Officer, and I need not repeat it. The part of it on which special emphasis is laid is the sentence "why should the malik do an injustice by settling the jote with a new tenant." It appears to me however that these words do not go very far. The witness only means that the dead man's heir is recognized as having a moral claim to succeed to his father's rights; he does not mean that the heir has a legal right which the malik cannot ignore. Against this evidence we have the very important omission in the kabuliyats: not one of them contains the words from generation to generation. These words form a well known phrase, and the tenant who claims an hereditary right under a document which does not contain them has a heavy onus to discharge. Not only does the oral evidence just refereed to fail to discharge that onus, but the same witness by his reference to the payment of nazarana at least suggests that succession of son to father is not a matter of right but a matter of grace and payment. In my opinion, therefore, the feature of heritablity is not proved.

Next as to the words "which is not held for a limited time." The finding of the Courts below is that the settlement of the tenure was permanent, but the settlement of the rent payable in respect of it was temporary. It is not necessary to consider whether such a contract is possible, because, there are other terms in these kabuliyats which call for remark, and help to decide the true nature of the arrangement. In the first place all the kabuliyats bind the tenant to keep the trees intact; and in the second place they all restrain him from making any transfer of the land. The last three add that he

must not partition the lands. In the ordinary way a tenure-holder has the right to cut down trees, and the right of alienation, though not an essential feature of a permanent tenure, is commonly regarded as an invariable incident.

Next the three later kabuliyats speak of a sarasari and like the first they are for a term of years. They contain no clause to the effect that the rent only is temporary. The most that can be said for them is that each in turn gives the tenant the right to enter into a fresh arrangement on terms to be fixed by the landlord. More important than this is the condition in the three later kabuliyats for the landlord's right of re-entry in the event of the tenant not entering into a fresh arrangement. It is true that this condition is not in the kabuliyat of 1250 B. S., but I think the learned vakil for the appellant is right in asking us to look at the terms of the latest agreement rather than of the earliest. This condition cannot I think be reconciled with the defendant's claim for permanency and is by itself sufficient to prove that the tenure is held for a limited time. It seems to me impossible to hold in the face of such a condition that the temporary character of the agreement was limited only to the amount of rent. On the other hand, it is pointed out that the tenant has been in possession for a long time, and that for a period of 70 years only four kabuliyats, for terms aggregating 29 years, are produced. I fail to see that these facts alter the nature of the agreement between the parties, and it is to be remarked that the first kabuliyat is for an area less than one-fourth of the area mentioned in the last kabuliyat. Repeated renewals of an agreement do not change the character of an agreement. It is I think equally unsafe to draw any inference from the fact that the landlord has granted settlement again and again to the same man or to his successor-in-interest. Self interest may be the explanation, or friendly relations between landlord and tenant. In my opinion the decision of the learned Special Judge is wrong and I would decree the appeal and order the entry in the Record of Rights to be corrected, that is to say by substituting the word "non permanent" for the words "permanent and heritable."

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 520

FLETCHER AND SMITHER, JJ.

Naresh Narayan Roy—Petitioner.

v.

Midnapore Zamindary Co. Ltd.,—Opposite Parties.

Rules Nisi Nos. 132 and 143 of 1917, Decided on 7th May 1917, against order of District Judge, Murshidabad, in Misc. Appeals Nos. 46 anp 47 of 1916.

Bengal Tenancy Act (1885), S. 153-A—Ex-parte rent decree—Application to set aside is not maintainable without statement of injury.

An application for setting aside an ex parte rent decree is not entertainable unless it contains a statement of the injury sustained by the applicant by reason of the decree. 11 *I. C* 123 *Foll.* [P 521 C 2]

Dwarkanath Chackerbutty and *Jatindra Nath Lahiri*—for Petitioner.

Sen Gupta and *Probodh Kumar Das*—for Opposite Parties.

Facts material to the report will appear from the judgment of the lower appellate Court and from the bona fide petition of the petitioners, which were as follows:

"These two appeals arise out of two applications for setting aside two ex parte decrees in rent suits. The learned Munsif rejected the applications on the ground that, as required under S. 153-A, Ben. Ten. Act, they did not contain a statement of the injury sustained by the applicant by reason of the decrees. In my opinion the view taken by the lower Court was perfectly correct. It is true that in a subseqnent application filed by the applicant on the date of the final hearing it was stated that through some mistake it had not been mentioned in the original application that the appellant had sustained injury by reason of the ex parte decrees. But even in this subsequent application as pointed out by the lower Court, there is no statement of the injury, by which is meant a statement describing concisely the nature of the injury, in order to enable the Court to pass necessary orders under Cls. (a) and (b) of the section in question. It is obvious that unless some description of the injury be noted in such applications, the Court will not be in a position to pass necessary orders under the above clauses. The result is that I dismiss both these appeals with their respective costs, pleader's fees being assessed at Rs. 4 in each appeal."

Against this decision the following application was made to the High Court for revision under S. 115, Civil P. C.

To

The Hon'ble Sir Lancelot Sanderson, Kt., C. J. and his companion Justices of the said Hon'ble Court. The humble petition of the abovenamed petitioner

Most Respectfully Sheweth:

That the opposite party named above instituted a rent suit against your peti-

tioner in the Court of the 2nd Munsif of Jangipore, and by the suppression of the processes against your petitioner obtained an ex parte decree. (2) That on 26th December 1915, your petitioner came to know of the said decree when the process in execution of the said decree was served upon his Cutchery. (3) That your petitioner filed an application on 25th January 1916, in the Court of the said Munsif of Jangipore for setting aside the said ex parte decree. (4) That your petitioner averred in the said application that the plaintiffs would not get any decree against your petitioner if the petitioner had an opportunity of filing his defence on knowing the contents of the plaintiff opposite party's plaint. (5) That your petitioner further stated in the said application that even then at the time of filing the said application your petitioner had no knowledge of the contents of the plaint in the said suit. (6) That your petitioner further prayed that as he had no knowledge of the suit, he may be allowed to file his defence appropriate to the suit for there was no relationship of landlord and tenant between your petitioner and the said opposite party. (7) That the learned Munsif refused to take evidence in the matter and dismissed your petitioner's application for setting aside the said ex parte decree on the ground that the said application did not fulfil the requirements of S. 153-A, Ben. Ten. Act. (8) That your petitioner appealed to the District Judge of Murshidabad against the said decision of the Munsif but the said appeal has also been dismissed on 14th November 1916. (9) That your petitioner being aggrieved by the aforesaid orders begs to move your Lordships for setting aside the same on the following amongst other.

Grounds.

(1) For that the Court below failed to exercise the jurisdiction vested in it by law. (2) For that the application sufficiently fulfilled the requirements of S. 153-A, Ben. Ten. Act. (3) For that the Court below ought to have exercised its jurisdiction to prevent gross abuse of the process of the Court. (4) For that in any case the Court below ought to have entered into evidence so that your petitioner might have had an opportunity of showing that there was no relationship of landlord and tenant between your petitioner and the opposite party and that nothing would be due by your petitioner to the plaintiff on account of rent and that further that the plaintiff's rent suit was not maintainable. Your petitioner, therefore, humbly prays that your Lordships may be pleased to call for the records of the case and to issue a Rule calling upon the opposite party to show cause why the orders of the District Judge of Murshidabad, dated 14th November 1916, in Miscellaneous Appeal No. 46 of 1916, and of the Munsif of Second Court of Jangipore, dated 29th July 1916 should not be set aside or pass such other or further orders as to your Lordships may seem fit and proper. And your petitioner as in duty bound shall ever pray.

Judgment.—These Rules must be discharged. It is sufficient to say that we follow the decision of this Court in the case of *Annoda Prasonno Mukherjee* v. *Nil Madhab Parui* (1). The Rules are discharged with costs one gold mohur in each case.

V.B /R.K. *Rules discharged.*

1. (1911) 11 I C 123.

A. I. R. 1918 Calcutta 521

WOODROFFE AND CUMING, JJ.

Manindra Nath Ghose and *others*—Judgment-debtors—Appellants.

v.

Ashutosh Ghose—Respondent.

Appeal No. 106 of 1916, Decided on 30th March 1917, from appellate order of Sub-Judge, 3rd Court, Hooghly, D/- 29th February 1916.

(a) Landlord and Tenant—Decree in rent suit obtained when plaintiff was not landlord can be executed when plaintiff is restored to status of landlord.

A plaintiff, who institutes a suit for arrears of rent and obtains a decree at a time when the landlord's interest is not vested in him by reason of an execution sale thereof, can, after the restoration of his status as a landlord on the cancellation of the execution sale, execute the decree as a rent decree. [P 522 C 2]

(b) Practice—Judgment—Every judgment is to be read as applicable to fact proved—Precedents.

Every judgment must be read as applicable to the particular facts proved, and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found. [P 522 C 2]

(c) Precedents—Value of.

A case is an authority for what it decides, and not for what may seem to follow logically from it. [P 522 C 2]

Bepin Behari Ghosh (Senior)—for Appellants.

Jogendra Kumar Dey—for Respondents.

Judgment.—This appeal arises out of certain execution proceedings. The facts are briefly these: The respondent is or rather was the owner of a certain patni taluk called Mouza Khasmara. The appellants hold a jama of some 5 bighas odd cottahs at an annual rental of Rupees 27-2-8 within the taluk under the respondents. Their contention is that they have a non-transferable occupancy right in these five bighas. The taluk belonging to the respondent was sold in November 1909 at the instance of the zemindar under Regn. 8 of 1819. On 14th April 1910 the respondent who was the putnidar brought a suit for rent of the 5 bighas odd against the present appellant and obtained a decree in January 1911. In February 1911 the sale of the respondent's patni taluk was set aside. On 28th January 1914 the respondent applied for the execution of the rent decree which he had obtained for the 5 bighas odd of land in January 1911 against the present appellant. The proceedings appear to have dragged on for some time. On 27th April 1915 it was ordered that sale proclamation and attachment should be issued under S. 163, Ben. Ten. Act, and the same order was passed on 2nd August 1915. On the 15th May 1915 the putni taluk of the respondent under which appellant held these 5 bighas odd was once more sold under Regn. 8. Then on 19th July the present appellant appeared and objected to the sale of the holding on two grounds:

(1) that the decree could not be executed as a rent decree as the decree-holder was no longer the landlord; (2) that it could not be executed as a money decree as the appellant had no transferable interest in it. The learned Munsif found the first objection in favour of the respondent decree-holder. He did not, therefore, find it necessary to decide the second objection. The judgment-debtor then appealed. The learned Subordinate Judge dismissed the appeal. He held that the case was covered by the Full Bench ruling, *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (1) and distinguished the case from the Privy Council decision in *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (2). He held that the Privy Council case did not overrule the Full Bench decision in *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (1) He held that the decree holder had the landlord's interest vested in him at the time when he instituted the rent suit and obtained his decree and so was entitled to execute it as a rent decree, even though he had lost his title as landlord before the property was put up to sale. The judgment-debtor has appealed to this Court. His contentions are two fold:

(1) that as the tenure was sold in 1909 and the sale was not set aside till February 1911, the decree for rent, which was obtained in January 1911, is not a rent decree as the respondent was not then the landlord; (2) even if it were then a rent decree, the decree-holder is no longer the landlord as the putni was again sold in May 1915, and so cannot execute it as a rent decree. He contends that the Privy Council case, *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (2) overrules the Full Bench case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (1). The respondent argues that with regard to the first contention as the status of the decree holder as landlord was restored in February 1911, he must be considered to have been landlord at the time of the rent suit This is the view of the lower appellate Court with which we agree. The case is thus within the Full Bench decision, as the relation of landlord and tenant existed when the suit was brought and decree was given therein. With regard to the second contention the respondent submits that the Privy Council case does not over rule the Full Bench decision. It cannot, we think, be said that the Privy Council overruled the Full Bench decision to which they referred and distinguished from the case before them. They laid down, however, certain principles which if applicable fully and in all cases are, as pointed out in the case of *Profulla Krishna Deb* v. *Nosibannessa Bibi* (3), inconsistent with those upon which the Privy Council judgment proceeds. But every judgment must be read as applicable to the particular facts proved and the general expressions used must be considered to be governed and qualified by the particular facts of the case in which such expressions are found. A case is an authority for what it decides and not for what may seem to follow

1. (1906) 33 Cal 566.
2. A I R 1914 P C 111=23 I C 632=41 Cal 926 (P C).
3. (1917) 37 I C 425.

logically from it. If the Privy Council had considered the Full Bench decision to be erroneous, they would have doubtless said so. The facts of the case before them were wholly different, as the relationship of landlord had in the Privy Council case ceased before the suit was brought. In the result, the decision under appeal must be affirmed and the appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 523

SANDERSON, C. J. AND CHATTERJEA, J.

Priya Sankar Chowdhury—Defendant—Appellant.

v.

Jitendra Nath Bahaduri and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 87 of 1916, Decided on 14th March 1917, against decree of Newbould, J., D/- 21st March 1916, in appeal from appellate decree No. 3902 of 1913

Civil P. C. (1908), S. 11—Question of transferability of holding in issue — No finding given—Suit decreed—Decision cannot operate as res judicata on question of transferability.

In a suit the question of the transferability of an occupancy holding, which was directly and substantially in issue, was not decided by the Court, which decreed the plaintiffs' suit but left the question open between the parties. In a subsequent suit between the same parties in which the same question was in issue:

Held: that though the course adopted by the Court was not proper, yet its decision in the previous suit could not operate as res judicata on the question of the transferability of the holding.

[P 524 C 1,2]

Manmatha Nath Roy and *Mohendra Nath Roy*—for Appellant.

Krishna Kamal Moitra—for Respondents.

Sanderson, C. J.—I think that this appeal ought to be dismissed: and inasmuch as the circumstances are rather peculiar I think it right to make a few observations. The first point which was raised by the learned vakil was with regard to estoppel, but he did not argue it very strenuously and did not read the judgment of the learned Judge upon that point: and, the fact was, I think, brought home to him, during the course of the argument by the observations which fell from my learned brother and myself, that there was no case of estoppel. I need not say anything upon that point except that I agree with the judgment of the learned Judge. The real point which has been argued before us is that this was a matter of res judicata. The action in this case was brought by the plaintiffs to obtain possession of the land and upon this question of res judicata, it appears that in a previous suit in which the present defendant was the plaintiff and the present plaintiffs and one Madan Mandal were the defendants there was an express issue as to whether the rights of occupancy were transferable or not. I ought to have said that that is an issue which has been tried in this case,—the Court of first instance avoided the decision of that issue by saying that the present plaintiffs, who were the defendants in the previous suit, as auction purchasers of the holding could not raise the question of the transferability, and the learned Subordinate Judge stated in his judgment:

> "This decision will be no bar to the defendants (that is to say, the present plaintiffs) if they raise the question of transferability at any other time as landlords."

Now, the learned Judge, Newbould, J., has decided that under these circumstances the matter of the issue of the transferability of the occupancy holding was not res judicata.

The learned vakil for the appellant has argued that the learned Subordinate Judge in the first suit, if I may so call it, had no jurisdiction to do that which he did, namely, to leave open the question of the transferability of the occupancy holding, and to say that the decision in that case would be no bar to the plaintiffs to raising the question at a later date; and, he then proceeds to argue that if that be so, and the learned Judge had no jurisdiction to make that order, then that part of the order must be taken as if it had not been made and consequently he argues that inasmuch as the issue of the transferability of the occupancy holding was in fact raised in the first suit and inasmuch as the plaintiffs obtained a decree in the first suit it must be taken that that issue was decided, and was decided in favour of the plaintiff in that case, that is to say, in favour of the defendant in this case. In my judgment, that is not a sound argument. Before I give my reasons for that opinion, I must say that I cannot approve of the course which was taken by the learned Subordinate Judge in the first suit. I think that if that course were to be adopted in other cases, it

might lead to multiplication of law suits and to much delay and also to unnecessary expenses to the parties and might lead to considerable injustice. I hope that such course will not be adopted and that anything we say in this case will not be taken as approving in any sense whatever of the course which was adopted by the learned Subordinate Judge in the first suit. But that is not the point that is material to the question in this case. The point that I have to consider is whether the issue is a matter of res judicata within the meaning of S. 11. Civil P. C. That section is as follows:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially In issue in a former suit between the same parties..... litigating under the same title in a Court competent to try such subsequent suit."

now all that, as far as I have gone,—applies to this case because it is clear that the Court was a comptent Court; the parties are the same; and there is no doubt that the matter in issue in this suit was in issue in the first suit—then the section goes on to say, "and has been heard and finally decided by such Court."

In relying upon this defence of res judicata Mr. Roy's client has to show two things: first he has to show that this matter was in issue in the first suit and the second thing he has to show is that it has been heard and finally decided by such Court. We find that the matter in the first suit was dealt with in this way; in the first Court it was decided that it was not open to the then defendants (the plaintiffs in this case) to raise this point, and, therefore, as regards the first Court it cannot be said that that issue was decided by the first Court. Then the learned Subordinate Judge said in effect that though he was giving the plaintiff a decree, he was not giving the plaintiff a decree on the ground that the occupancy holding was transferable: on the contrary effect of what he said was that he did not decide that question but that he left that question to be decided on a future date, if necessary. In this state of things how can it be said that Mr. Roy's client has shown that the matter was not only in issue in the former suit but was finally decided in that suit? In the case of *Parsotam Gir* v. *Narbada Gir* (2) Lord Macnaghten said this: "The question is not whether the judgment of the High Court in 1886 was right"—so also here the question is not whether the judgment of the learned Subordinate Judge in the former suit was right—

"but whether it did or did not finally decide the present question as between Nepal Gir and Narbada Gir."

So here the question is whether the learned Subordinate Judge did or did not finally decide the present question between the parties, namely, whether this occupancy holding was transferable or not.—

"It would be a contradictiou in terms to say that the Court had finally decided matters which it expressly left untouched and undecided."

I think these remarks are applicable to the present case and, for these reasons I think that the learned Judge's judgment, which if I may say so is quite clear, is right and ought to be supported and this appeal dismissed with costs.

Chatterjea, J.—I agree.

V.B./R.K. *Appeal dismissed.*

I. (1899) 21 All 505=26 I A 175 (P C.)

A. I. R. 1918 Calcutta 524

MOOKERJEE AND BEACHCROFT, JJ.

Chandi Charan Bandopadhyaya — Plaintiff—Appellant.

v.

Kazi Jawadal and *another*— Defendants—Respondents.

Appeal No. 1554 of 1915, Decided on 6th August 1917, from appellate decree of Sub-Judge, Second Court, Burdwan, D/- 19th April 1915.

Execution Sale—Sale in mortgage decree though subsequent affects purchaser in execution sale after mortgage-decree.

A purchaser of a property which was subject to a mortgage, in execution of a money-decree, held after the passing of the mortgage-decree, but before the sale the property in execution thereof is bound by the subsequent sale of the property in execution of the mortgage-decree.

[P 525 C 1]

Surendra Kumar Bose—for Appellant.

Dwarkanath Chakrabarty and *Aslu Arkam*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of possession of land on declaration of title. The land belonged originally to one Srinath Ganguly. The plaintiff claims title by purchase at a sale held in execution of a decree in a mortgage executed by Srinath. Defendant 1 claims title by purchase at a sale held in execution of a money decree against the representatives of Srinath. The defendant purchased on 8th August 1907, that is, after the mortgage decree had been made on 26th March 1907 and

before the mortgage sale took place on 6th January 1908. On ,these fscts there can be no room for controversy that the defendant is bound by the mortgage sale. In support of this position reference may be made to the decision of this Court in the case of *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (1). The view taken by the Subordinate Judge cannot consequently be supported. But the learned vakil for the respondent has contended with considerable force that his client as one of the superior landlords is in a position of advantage and is entitled to questhe validity of the title by purchase set up by the plaintiff, and he has pressed that the case should be remanded for retrial from this point of view after proper issues have been raised. We have anxiously considered this point and we have come to the conclusion that the case should not be remanded. It transpires from the judgment of the Court of first instance that this aspect of the case was put forward at a very late stage of the trial and the judgment of the lower appellate Court does not contain any trace of this point. We are of opinion therefore that this appeal should be allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

V.B./R.K. *Appeal allowed.*

1. (1909) 1 I C 264.

A. I. R. 1918 Calcutta 525

FLETCHER AND NEWBOULD, JJ.

Nara Narayana Kapali and *others*—Plaintiffs—Appellants.

v.

Kali Mohan Das Kapali—Defendant Respondent.

Appeal No. 793 of 1916, Decided on 3rd August 1917, from appellate decree of Sub-Judge, 2nd Court, Backergunge, D/-28th July 1915.

Landlord and tenant— Cosharer —Landlord purchasing holding at rent sale and re-settling it, is not entitled to whole rent if he cannot secure to tenant peaceful possession.

A cosharer landlord purchasing the holding of the tenant at a sale held in execution of a decree for his share of the rent and re-settling the whole holding with the same tenant is not entitled to the full 16-annas rent, if he cannot secure to the tenant peaceful possession of the whole holding and the tenant continues to be liable to the other cosharer landlords for their proportionate shares of the rent. [P 526 C 1]

The principle of equitable estoppel has no application to a case like this. [P 525 C 2]

Prokas Chandra Mozumdar—for Appellants.

Indu Bhushan Roy—for Rospondent.

Fletcher, J.—This is an appeal by the plaintiff against a judgment of the learned Subordinate Judge of Backergunge, dated the 28th July 1915, reversing the decision of the Munsif at Patnakhali. The plaintiffs brought the suit to recover certain rents in arrear. The plaintiffs claimed as being entitled to the whole 16-annas rent and they claimed that in these circumstances. The plaintiffs had formerly a two anna odd share in the kowla. They brought a suit to recover rent of their own share and obtained a decree. In execution of that decree, they brought the holding to sale and purchased it themselves. They said that they re-settled the property with the defendant and that, therefore, they were entitled to receive and recover the whole rent. The facts found by the learned Subordinate Judge are these: Although the defendant was not entitled to question the validity of the sale in execution of his own holding as he had not objected in the execution proceedings, still when the plaintiffs became the lessors of the defendant after the purchase, they were under the ordinary obligation of a lessor to secure to the tenant peaceful and quite enjoyment of the whole holding.

The learned Judge has found—and it seems to me correctly found—, first of all, that the plaintiffs did not give quiet possession to the defendant of the whole of this holding and that is shown, as the learned Judge says, by the fact that the other cosharer landlords declined to recognize the purchase made by the plaintiffs and had instituted and successfully prosecuted suits for their own portions of the rent. The nett result, if we accept the view of the plaintiffs, is that it is a case of equitable estoppel as between the defendant and the plaintiffs as to the right of the plainaiffs to recover the whole rent and the defendant is at the same time to be held liable to pay over again the 13-annas odd of the rent to the cosharers of the plaintiffs in respect of the houla right. That is neither equitable nor estoppel. Obviously, it is not equitable that a man by any argument like this should be precluded from putting forth before the Court what are the true facts. Obviously, it is not a case of estoppel. You cannot extend the estoppel

that arises by reason of the purchase in execution of the interest (formerly held by the defendant) to the new interest that the plaintiffs created in favour of the defendant when they purported to lease to him the whole of the land after the sale The fact found by the learned Judge is that the plaintiffs had never performed their new contract of tenancy, inasmuch as they never secured to the defendant peaceful possession of the property. That is borne out by the fact that suits were brought against the defendant by the other cosharer landlords and he had to pay their proportionate shares of the rent in addition to the rent claimed by the plaintiffs after the purchase of the holding in execution. I think, on those facts, the learned Judge arrived at a correct conclusion. Therefore, the present appeal must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 526 (1)

WOODROFFE AND MOOKERJEE, JJ.

Jadub Chandra Maulik—Appellant.

v.

Manik Sarkar—Respondent.

Letters Patent Appeal No. 91 of 1915, Decided on 28th February 1917.

Practice—New plea—New point involving question of fact cannot be taken.

A point involving questions of fact, which was not taken in either of the lower Courts, cannot be taken for the first time in second appeal. (Decision of Court of Second Appeal was reversed for the same). [P 526 C 1]

Mohini Mohan Chakraburty—for Appellant.

Panchanan Ghose—for Respondent.

Judgment.—In our opinion this judgment of Chapman, J., must be reversed. The learned Judge bas allowed a point to be taken before him which was not taken in either of the lower Courts and which involves two questions of fact. In the first place, it had to be shown before S. 29, Ben. Ten. Act, came into operation that the defendant was an occupancy raiyat, and, even if that were shown, it would further have to be proved that the contract was a mere device to evade the provisions of the statute. The appeal, therefore, is decreed with costs and the decree of the first Court restored.

V.B./R.K. *Appeal decreed.*

A. I. R. 1918 Calcutta 526 (2)

FLETCHER AND SMITHER, JJ.

Saradendu Mukerjee — Plaintiff—Appellant.

v.

Charu Chandra Dutt and *others*—Defendants—Respondents.

Appeal No. 1699 of 1914, Decided on 9th March 1917.

(a) Civil P. C. (1908), S. 35—Discretion in respect of costs exercised by trial Court—Presumption is that discretion has been exercised—Appellate Court will not interfere unless discretion proceeds on manifestly wrong ground.

Under S. 35 the costs of, and incident to all suits are in the discretion of the Court and where the primary Court has exercised its discretion in dealing with the costs, it is an unusual course for the appellate Court to interfere with that discretion of the primary Court. [P 527 C 1]

Where costs are in the discretion of the Judge the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised it. The appellate Court will not interfere with an exercise of the discretion of the primary Court unless it has proceeded on a manifestly wrong ground. [P 527 C 1, 2]

(b) Costs — Appeal — Question as to cost does not form subject of appeal unless question of principle is involved—Civil P. C. (1908), S. 35—Appeal.

It was never intended by the legislature that that the award of costs by a Court should form the subject of an appeal unless some question of principle is involved on which that Court failed to exercise its discretion. [P 527 C 2]

Dwarka Nath Mitter, *Profullah Chander Bose* and *Promotho Lal Dutt*—for Appellant.

Baransibasi Mukerjee for *Mohini Mohan Chatterjee*—for Respondents.

Fletcher, J.—This is an appeal from a decision of the learned Additional District Judge of the 24-Pergannas, dated 25th February 1914, reversing the decision of the Subordinate Judge of the same place. The appeal before the learned Additional District Judge involved only one question on the merits, namely, as to the manner in which the Judge in the primary Court had dealt with the costs of defendants 1 and 2. The learned Judge in the primary Court, considering all the circumstances, in the exercise of his discretion made a partial award to defendants 1 and 2 of their costs in the suit. As to the remainder of their costs, he made no order and left them to bear them themselves. Against that decision an appeal was preferred to the learned Additional District Judge, who reversed the decision of the learned Subordinate

Judge and awarded to defendants 1 and 2 the whole of their costs. The present appeal is preferred against that decision. The facts are these so far as they are material :—One Suresh Chandra Gangully died in February 1907, having by his will made a few days before his death, dedicated the whole of his properties to a goddess to be installed at Benares. The form of the bequest which formed the subject of judicial decision has been held to be valid. Defendants 5 and 6 on 29th September 1908 alleging that they had a two-fifths share of the properties left by Suresh Chunder, mortgaged it to the predecessor of the present plaintiff. That mortgage was transferred subsequently on 27th September 1909 to the plaintiff who obtained a mortgage decree against defendants 5 and 6. Then the plaintiff brought the present suit and the Snbordinate Judge held that the plaintiff under his mortgage decree was entitled only to the benefit of certain annuities that has been given to the mortgagors and that the rest of the property had been validly dedicated to the deity which was to be installed at Benares ; and taking into consideration all the facts, the learned Judge made a partial award of costs to defendants 1 and 2. Against that award, defendants 1 and 2 appealed to the learned Additional District Judge and the learned Additional District Judge decreed the appeal. The learned District Judge has altogether overlooked the provision of S. 35, Civil P. C. S. 35, Civil P. C., provides that the costs of and incident to all suits shall be in the discretion of the Court ; and where the primary Court has exercised its discretion in dealing with the costs, it is an unusual course, to say the least of it, for the appellate Court to interfere with that discretion of the primary Court. This, I think, is well laid down by Sir Lawrence Jenkins Chief Justice of Bombay, and Candy, J., in the case of *Parshram Bhawoo* v. *Dorabji Pestonji* (1) where, having stated the general rule, the learned Chief Justice states that, where costs are in the discretion of the Judge the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised it and secondly, that the appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. Those two propositions are amply established by the cases in England and, so far as I know, it is the general rule that has been consistently followed in this country. There are grounds of public convenience which render such a rule as one which ought to be adhered to. In many cases, it is an extremely difficult thing for a Judge to review all the circumstances to say how and in what manner the costs ought to be borne by and between the parties and, if the discretion of the Court in such a matter is interfered with by the appellate Court the number of appeals that would be preferred to the appellate Court would be stupendous. It was never intended that matter of that nature should form the subject of an appeal. Some question of principle must be involved on which the Judge failed to exercise his discretion. I think in this case that the learned Judge of the lower appellate Court was not justified in interfering with the discertion of the primary Court in the award of costs.

The other question that has been urged as to the suit being barred by limitation is an interesting point. It is not necessary for us to decide that matter in the present appeal. A matter of such importance ought not to be decided unless it is necessary for the decision of the case. I always have a strong objection to decide a point that it is not necessary for the purpose of the decision of the case before the Court. It tends to tie the hands of the Court on subsequent occasions when the matter becomes perhaps of more importance and perhaps the only question to be considered. I think the learned Judge was altogether wrong in allowing the appeal from decision of the learned Subordinate Judge with reference to this question of costs only, which had been fully dealt with by the learned Subordinate Judge in the exercise of his discretion. In my opinion therefore the present appeal should be allowed, the decree of the learned District Judge should be set aside and the decree of the Subordinate Judge restored. The respondent must pay to the appellant his costs in this Court and in the lower appellate Court.

Smither, J.—I agree.

V.B./R.K. *Appeal allowed.*

1 (1877-78) 2 Bom L R 254.

A. I. R. 1918 Calcutta 528

FLETCHER AND NEWBOULD, JJ.

Nogendra Nath Roy Chowdhury and *others*—Plaintiffs—Appellants.

v.

Asuhtosh Roy Chowdhury and *others*—Respondents.

Appeal No. 2207 of 1913, Decided on 23rd July 1917, from appellate decree of Dist. Judge, 24-Parganas, D/- 2nd April 1913.

Civil P. C. (1908), S. 102 — Appeal— Suit cognizable by Small Cause Court—Mere addition of prayer for declaration does not alter nature of suit.

The mere addition of a prayer for a relief by way of declaration does not alter the character of a suit which is of a nature cognizable by a Small Cause Court, so as to give a party a right of second appeal which is prohibited by the terms of S. 102. Where all the reliefs which the plaintiff claims in a suit can be obtained without asking for a declaration, the mere addition of a prayer for a declaration does not prevent the suit from being a suit cognizable by a Small Cause Court.

[P 528 C 2]

Amarendra Nath Bose—for Appellants.

Baranashibashi Mukherjee, Khitish Chander Chuckerbutty and *Satish Chunder Lahiri*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs against a decision of the learned District Judge of the 24-Pergannahs dated 2nd April 1913, modifying the decision of the Munsif at Baruipore. The action was an action instituted, at first, in a Court of Small Causes to recover damages by the plaintiffs for certain wrongful acts said to have been done by the defendants with reference to a property to which they were both jointly entitled. The learned Judge in the Small Cause Court, in the exercise of his discretion under S. 23, Provincial Small Cause Courts Act, thought fit to return the plaint to the plaintiffs for presentation to the regular civil Court. The only question now for our decision is, "does a second appeal lie or is a second appeal barred under S. 102, Civil P. C." It has been decided quite clearly that the mere fact that the Judge exercised has discretion under S. 23, Provincial Small Cause Courts Act does not give the parties a right of second appeal. The suit notwithstanding the fact that the plaint has been returned, remains one whic is cognizable by a Small Cause Court. The only difference that is said to have occurred in this case is that the plaintiffs, when the plaint was returned to them, added in it a prayer for a relief that they asked for by way of declaration. In the original plaint, there was no prayer for such a relief; but, in the amended plaint, this relief was asked for in the form of a declaration; and the only question is whether the mere fact of adding a prayer for a declaration to the plaint gives the plaintiffs a right of second appeal. The case relied on by the plaintiffs, namely, the case of *Rash Behari Pal Chowdhry* v. *Sridhar Belal* (1), does not establish the point that the plaintiffs wish to establish by that case. That case does not establish that the mere addition of a prayer for a declaratory relief gives the plaintiff a right of second appeal. It says that where the suit is, as it was in the Small Cause Court, for damages and remains such in the civil Court, then the plaintiff has got no right of second appeal. The learned Judges in that case did not consider, not had they before them the case, that the mere addition of a relief asking for a declaration would alter the character of suit. On the other hand, there is the decision of a Full Bench of the Madras High Court that had the very point for consideration.

That is the decision in *Ramachandrayar* v. *Narulla Sahib* (2), and there it was held that where all the reliefs which the plaintiffs claimed in a suit could have been obtained without asking for a declaration, the mere addition of a prayer for a declaration did not prevent the suit from being a suit cognizable by the Small Cause Court. I think that that decision is clearly correct and, in that view, the mere addition of such a prayer does not alter the character of the suit so as to give a party a right of second appeal which is prohibited by the terms of S. 102, Civil P. C. In that view, it is quite clear that a second appeal does not lie in the present case. The appeal therefore fails and must be dismissed. The cross-objection is not pressed and is accordingly dismissed. We make no order as to costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1902) 6 C W N 687.
2. (1907) 30 Mad 101.

A. I. R. 1918 Calcutta 529

MOOKERJEE AND BEACHCROFT, J.J.

Mohendra Nath Das and *another*—Plaintiffs—Petitioners.

v.

Mohi Lal Koley and *others* — Defendants—Opposite Parties.

Rule Nisi No. 356 of 1917, Decided on 24th July 1917, against the order of Sub. Judge, 3rd Court, Hughly, in Misc. Appeal No. 137 of 1916.

(a) Arbitration — Clause in contract — Written notice provided by agreement — Absence of such notice does not necessarily invalidate proceedings:

Absence of a written notice to a party as provided for by the agreement to refer the dispute to arbitration does not necessarily invalidate the proceedings of the arbitrators. [P 529 C 2]

Where an agreement of reference provided that the arbitrators would be entitled to proceed ex parte if any of the parties did not appear notwithstanding the service of a written notice:

Held: that a party, who having had verbal notice of the proceedings did not appear, was not entitled to challenge the validity of the award on the ground of non-service of written notice: *Oswald* v. *Earl Grey*, (1855) 24 L. J. Q. B. 69; Rel. on. [P 529 C 2]

(b) Civil P. C. (1908), Sch. 2, para. 14 (a)—Award of costs in excess of authority—Does not invalidate whole award.

An order for costs made by the arbitrators in excess of their authority does not invalidate the whole award, if the remainder of the award remains unsuffected on the order for costs being expunged. [P 530 C 1]

Satish Chandra Mukerjee—for Petitioners.

Haradhan Chatterjee — for Opposite Parties.

Judgment.—We are invited in this Rule to set aside an order of dismissal of the application to enforce a private award. There were differences between the plaintiffs and the defendants regarding the boundary between their respective homesteads. On 17th November 1914, they appinted five persons as arbitrators to settle the dispute. The arbitrators made their award on 6th July 1915. By their award they fixed the boundary line between the homesteads and directed the defendants to pay to the plaintiffs Rs. 6.2 0 as one-half share of the remuneration and travelling expenses of one of the arbitrators, which had been paid in full by the plaintiffs. The plaintiffs thereupon applied under para. 20, Sch. 2, Civil P. C. 1908, to enforce the award. The Court of first instance dismissed the application, on the ground that the arbitrators acted in excess of their authority when they directed the defendants to pay to the plaintiffs the sum mentioned in the award. Upon appeal the Subordinate Judge has taken the same view. He has further held that the award is open to objection also on the ground that the arbitrators did not give written notice of their meetings to defendant 2. In our opinion, the order of the Subordinate Judge cannot be sustained.

It is plain that the absence of written notice to one of the defendants does not necessarily invalidate the proceedings. We are not prepared to accept the contention that under the terms of the agreement of reference the parties were entitled to written notice. The agreement states that the arbitrators would be entitled to proceed ex parte if any of the parties did not enter appearance notwithstanding the service of written notice. This provision, however, is not equivalent to a condition that if the arbitrators proceeded with the arbitration and all the parties had knowledge of these proceedings, still the award would be invalidated merely because one of the parties did not receive a written notice. The Subordinate Judge has found that the defendant 2 had verbal notice of the proceedings and yet did not enter appearance. In such circumstances, we cannot hold that the defendant may challenge the validity of the award on the ground that a written notice was not served on him. *Oswald* v. *Earl Grey* (1). In our opinion he is as much bound by the award as if a written notice had been served upon him.

The question next arises, whether the award is invalid because the arbitrators made an order for payment of costs. It is not necessary for our present purpose to determine whether they did or did not act in excess of their authority when they made an order for costs. It has been held in the case of *Mohanlal* v. *Nathuram* (2) that when a suit has been referred to arbitrators, they have authority to deal with the costs of the reference and the award. We need not enquire whether this principle can reasonably be extended to private references to arbitration. But even if it be assumed that the order for costs was made without jurisdiction, it is plain that this does not invalidate the whole award. The decision in *Sabitree*

1. (1855) 24 L J Q B 69=101 R R 835.
2. (1868) 1 B L R 144.

Dabi v. *Promoda Prosad Chatterjee* (3) does not really assist the contention of the opposite party. That case no doubt shows that under para. 21, Sch. 2, Civil P. C. 1908, the Court is competent to direct a private award to be filed if the grounds mentioned in paras. 14 and 15 are not established; if such grounds are established the Court is bound to refuse to file the award. Now para. 14 (a) provides that an objection may successfully be taken to the validity of an award where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred. Consequently, where a matter has been left undetermined though referred to arbitration or a matter has been determined though not referred to arbitration, and such matter can be separated without affecting the determination of the matters referred, objection to the whole award cannot be sustained. The present case is precisely of that description. Even if the order for costs be expunged, the remainder of the award remains unaffected, and the petitioner is content to have the award enforced to that extent. It follows accordingly that neither of the grounds on which the award has been rejected by the Subordinate Judge can be sustained.

The result is that this Rule is made absolute and the order of the Court below set aside. The award will be filed and a decree drawn up in accordance therewith, except in so far as the award directs the defendants to pay Rs. 6 2.0 to the plaintiffs. The plaintiffs are entitled to their costs in all the Courts. We assess the hearing fee in this Court at two gold mohurs.

V B /R K. *Rule made absolute.*

3. (1913) 19 I C 94.

A. I. R 1918 Calcutta 530

MOOKERJEE AND BEACHCROFT, JJ.

Sadupadhya Uneshanand Oja—Plaintiff—Petitioner.

v.

Ravaneswar Prosad Singh—Defendant—Opposite Party.

Rule Nisi No. 499 of 1917, Decided on 20th August 1917, against order of Addl. Dist. Judge, Burdwan, in Title Suit No. 18 of 1897, D/- 4th July 1901.

(a) Civil P. C (1882), S. 539—Scheme for management of charitable trust can be varied on mere application without fresh suit.

A Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme as the exigencies of the case may require. [P 532 C 1]

In pursuance of a decree in a suit under S. 539 for the formulation of a scheme for the management of a temple a Committee was appointed and a scheme was drawn up, which was amended from time to time. On the application of a party to this decree for the insertion of a clause in the scheme for the removal of a member of the Committee by a mere application to the District Judge:

Held: that a clause could be inserted in the scheme to the effect that a member of the Committee might, on good grounds established, be removed by a mere application to the District Judge without the institution of a fresh suit. [P 531 C 2]

(b) Practice—Appeal—Amendment of decree during pendency—Amended decree appended to memo—Appeal is against amended decree—Civil P. C. O 6, R. 17.

If a decree is amended after an appeal has been preferred against it, and an application to the appellate Court to attach to the memorandum of appeal a copy of the amended decree is granted, then from that moment the pending appeal becomes an appeal against the amended decree. [P 531 C 2]

Biraj Mohan Majumdar, *Mohini Mohan Chatterjee*, *Jyotish Chandra Sarkar* and *Satyendra Nath Mitter* — for Petitioner.

Jogendra Chandra Ghose and *Manmotha Nath Ganguly* — for Opposite Party.

Judgment.—This Rule was granted upon the application of the high priest of the Temple of Baidyanath, who was elected to the office in execution of a decree of this Court, made in affirmance of the decree of the Court below in a suit instituted under S. 539, Civil P. C., 1882: *Shailajananda Dut Jha* v. *Umeshanunda Dut Jha* (1). A scheme for the management of the temple was drawn up pursuant to that decree and from time to time the scheme has been amended by order of this Court: *Umeshananda Dut Jha* v. *Ravaneswar Prosad Singh* (2) and *Umeshananda Jha* v. *Maharaja Sir Ravaneswar Prosad Singh* (3). Under the decree of this Court the high priest was appointed the trustee, and a Committee of management was appointed to supervise the work of the temple. On the present occasion, the application is made by the high priest for insertion of a clause

1 (1905) 2 C L J 460.
2 (1912) 17 I C 969.
3. R A No. 111 of 1916.

in the scheme to the effect that the Maharaja of Gidhour, who is a member of the Committee, may be removed from his office on an application to the District Judge and without the institution of a fresh suit. The application has been opposed on behalf of the Maharaja. We are of opinion that the application has not been properly framed and that an order cannot possibly be made in its terms. The whole matter, however, has been placed before the Court, and it is plain that there is considerable difference between the high priest on the one hand and at least one member of the Committee on the other hand. On the last occasion, a clause was inserted in the scheme by an order of this Court to the effect that on good cause established, the high priest may be removed on an application to the District Judge without the institution of a fresh suit for administration of the trust. The question arises, whether a similar provision should or should not be inserted in the scheme for the removal of a member of the Committee. We find on an examination of the judgment delivered on 4th July 1901 by Mr. Jogesh Chandra Mitter who tried the original suit, that he intended the insertion of a clause to the following effect in the scheme:

"The members of the Committee shall hold the office for life, but it will be competent to the said Deputy Commissioner, or on his refusal, the District Judge, on his own motion or on the application of any person interested in the temple, to remove from the Committee any member who may be found to be unfit or incompetent to continue a member of the Committee."

Pursuant to this judgment, a decree was drawn up, and it was signed by Mr. G. K Deb on 15th July 1901 The decree contained a provision to the following effect: "The aforesaid supervisors," that is, the members of the Committee:

"will be appointed for life, but the aforesaid Deputy Commissioner, and, on his declining, the aforesaid Judge, may, in his discretion, or on the application of any person interested in the temple, dismiss any of the aforesaid persons, if they happen to be unfit or disqualified for the work."

Subsequently, the decree was amended after an appeal had been preferred to this Court on the 5th August 1901. The amended decree was signed by Mr. H. D. Corey, the then District Judge, on 18th January 1902. For some unexplained reason, the clause mentioned does not appear in the decree as signed by Mr. Corey. From an examination of the records in this Court, it appears that the appeal to this Court was originally preferred against the decree as signed by Mr. G. K. Deb. On 21st April 1902, an application was made to this Court to attach to the memorandum of appeal a copy of the decree as amended by Mr. Corey: the application was granted, and from that moment, the appeal then pending in this Court became an appeal against the amended decree. We must hold accordingly that the decree as amended by Mr. Corey is the final decree operative in respect of the trust properties; for the judgment of this Court shows that no question as to the propriety of the details of the scheme was raised here and the appeal was dismissed, with the necessary consequence that the decree as amended by Mr. Corey stood confirmed. We cannot hold after the lapse of 15 years that the decree as amended by Mr. Corey is of no effect between the parties to the litigation or their successors. In this view it is difficult to resist the conclusion that a clause chold be inserted in the scheme to the effect that a member of the committee may on on good grounds established be removed, by way of an application to the District Judge without the institution of a fresh suit.

This was, in fact, the course adopted in the case of *Damodarbhat* v. *Bhogilal Karsondas* (4). There, in the scheme originally framed, a Committee of management was appointed, without provision made for the removal of a member of the Committee. In execution of the decree, an attempt was made to remove one of the members on the ground that he had rendered himself unfit, by conduct subsequent, to hold the office. The Court held that this could not be done in execution of the decree, and that the proper course was, not to institute a fresh suit under S. 539, but to adopt the more convenient and obvious procedure of amendment of the scheme by the inclusion of a provision for the removal of the trustees, if necessary. The authority of the Court to amend the scheme from time to time has not been and cannot possibly be questioned. As was pointed out by Subrahmania Ayyar, J., in the case of *Prayag Dossji Varu Mahant* v. *Tirumala Srirangacharla Varu* (5), which was subsequently affirmed by the Judicial

4. (1900) 24 Bom 45.
5. (1905) 28 Mad 319.

Committee in *Prayag Dossji Varu* v. *Tirumala Srirangacharla Varu* (6), there is ample authority for the proposition that a Court, which has sanctioned a scheme for the administration of a charitable trust, is competent from time to time to vary the scheme as the exigencies of the case may require. Reference need only be made to the decisions in *Attorney-General* v. *Bovill* (7), *Attorney General* v. *Bishop of Worcester* (8), *Mayor of Lyons* v. *Advocate General of Bengal* (9) and *Re Browne's Hospital Stamford* (10). We direct accordingly that the decree of this Court, which confirmed the decree as finally amended by Mr. Corey, be further amended by the insertion of a clause to the following effect:

"The members of the Committee shall hold office for life but it shall be competent to the District Judge, on his own motion or upon the application of any person interested in the temple, to remove, for good cause, from the committee, any member, on the ground of unfitness or incompetence or for any like reason. The District Judge may, when an application is made to him in this behalf, consult the Deputy Commissioner."

We desire to add that we make this order because we are of opinion that it is in the best interest of the temple, and not because we are satisfied that the allegations made by the petitioner against the Maharaja of Gidhour are well-founded; on the other hand, there is, we think, good ground for suspicion that the application has been prompted by personal motives rather than by a genuine regard for the welfare of the trust. There will be no order for costs in this Court.

V.B./R.K. *Rule made absolute*

6. (1907) 10 Mad 38 (P C).
7. (1840) 1 Phillip 762.
8. (1851) 9 Hare 328=21 L J Ch 25.
9. (1876) 1 A C 91.
10. (1889) 60 L T 288.

A. I. R. 1918 Calcutta 532

FLETCHER AND SMITHER, JJ.

Gnanendra Nath Sanyal—Plaintiff—Appellant.

v.

Mohendra Mohini Debya—Defendant—Respondent.

Appeal No. 176 of 1915, Decided on 3rd April 1917, from appellate decree of Dist. Judge, Nadia, D/- 29th October 1914.

(a) Specific Relief Act, (1877), S. 9—Ejectment suit—Possessory title except under S. 9 is insufficient.

In a suit for ejectment the plaintiff must rely on his own title, and the defendant, even though a trespasser, can set up the right of a third party, so that a mere possessory title, except under the provisions of S. 9, will not support a suit in ejectment. [P 533 C 1]

(b) Hindu Law—Widow—Gift to female for maintenance is presumed to confer life interest only.

A gift to female for her maintenance is presumed to confer a life-interest only, and it would require a very strong case to establish that the person making a gift to a childless Hindu widow intended to give an absolute interest in the property. [P 533 C 1]

(c) Adverse Possession—Possession from life estate holder—Possession after holder's death cannot be added to prior possession to make out title by adverse possession.

A person who enters into possession of an estate under a title derived from a life-estate-holder cannot by continuing his possession after the death of such holder add it to his prior possession so as to make out a title by adverse possession for the statutory period. [P 534 C 1]

Brojendra Nath Chatterjee—for Appellant.

Sarat Chandra Khan—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned District Judge of Nadia, reversing a decision of the Munsif of Meherpur. The plaintiff brought the suit to recover possession of a moiety share of a garden which had been conveyed to him by a conveyance executed in the year 1305 corresponding with the year 1898. The conveyance was executed by a Hindu widow named Soshi Sundari. The plaint as originally drawn, alleged that Soshi Sundari derived title to the property from her husband. That was proved to be a mistake, and the plaint was amended and it was alleged that Soshi Sundari took the property by gift from her father-in-law, Ganga Naraian Acharjee, in the year 1271 corresponding with the year 1864. Soshi Sundari was at that time a childless Hindu widow and apparently, at any rate, it is found by the Courts below that Ganga Narain was about to renounce this world and in the view of the lower appellate Court, the gift was made to Soshi Sundari for her maintenance. Soshi Sundari died in the year 1314. Then plaintiff on the allegation of dispossession by the principal defendant—the dispossession being alleged to have taken place on 24th October 1911 when a certain order was made under the provisions of S. 145, Criminal P. C.—brought the suit to recover possession, the suit being a common suit in ejectment. Before proceeding further with the case it is well to recognize what the law is as regards a suit in ejectment.

In a suit for ejectment, the plaintiff must rely on the strength of his own title. It is not a suit in which the plaintiff not being in possession asks for being maintained in possession. It is a suit in which the plaintiff must rely on his own title and the defendant, even though a trespasser, can set up the right of a third party. That is well established and it is further established in this Court by a decision reported as *Nisa Chand Gaita* v. *Kanchiram Bagani* (1) that possessory title, except under the provisions of S. 9, Specific Relief Act, will not in India support a suit in ejectment. That decision has been recognized and has been followed in this Court for a good number of years. It has been recognised so late as 1913 by Jenkins, C. J., in the case of *Adhur Chandra Pal* v. *Dibakar Bhuyan* (2). That decision is binding on us and it is obvious that, unless the case is sent to a Full Bench, we are not entitled to depart from the decisions of another Bench that settled the law which has been followed for a large number of years. In the present case, the Munsif decreed the plaintiff's suit. He found that the plaintiff had established his title and that he had been in possession within twelve years prior to the suit. No other express finding was made in the Court of first instance as regards possession and the Judge simply decreed the suit on the gift plus the finding that the plaintiff had been in possession within twelve years prior to the institution of the suit. The case then went on appeal before the learned District Judge and the only point that was urged before him was that, if there was a gift in favour of Soshi Sundari, it was a gift for maintenance in its strictest sense and did not confer on her an absolute right to dispose of or in any way deal with the property as she thought fit. The gift itself was a verbal gift. The transaction took place prior to the coming into force of the Transfer of Property Act. But that does not make any difference. The presumption in India, as has been laid down in a series of cases, is that a gift to a female for her maintance confers a life-interest only. There are many cases in support of that proposition.

I take the statement from Golap Chandra Sastri's work on Hindu law, Edn. 3, p. 498. There it is stated that the decisions both in the Courts in India and of the Judicial Committee of the Privy Council establish conclusively that a gift for mainentance to a Hindu female, especially if she be a Hindu widow, confers a life-estate only. As to what would happen in the case of a male is another matter. There are many cases in the Court of India showing that a gift for maintenance by a deed inter vivos in favour of a male does not confer more that a life-interest. However, as regards a female widow, it would require a very strong case to establish that the person making a gift to a childless Hindu widow intended to give an absolute interest in the property. In my opinion, the learned District Judge had ample warrant in this case, there being no evidence other than the fact that the Hindu widow had been given this grant for her maintenance, to find that the interest which she took was an interest which she took for her own life. That was the only interest which could be conveyed to the present plaintiff. The interest she conveyed to the plaintiff, therefore, terminated on her death The plaintiff had no interest in the property other than the possession which he maintained without any title between the death of Soshi Sundari and the dispossession by the defendant. If that be so, I do not understand how person, who had bought a life-interest in a property which terminated at the end of the life for which the estate had been granted, can maintain a suit in ejectment to recover possession of the land on a title which the Court has found has determined. I think the learned Judge in the present case, having found that this was an interest granted to Soshi Sundari for her maintenance, properly came to the conclusion in the absence of other evidence that the estate was, in fact, granted for the life of Soshi Sundari. If it was granted for life and that interest determined when Soshi died in 1314 B. S., the plaintiff has no title to the property. I agree in the view of the learned District Judge in this respect.

Then it is suggested that the plaintiff has got a title by adverse possession. I do not know against whom the adverse possession as suggested is claimed. The defendant has been found to be a trespasser. She has succeeded on the ground that she has set up a title of a third party. That the plaintiff's title can be adverse as againt the true owner when

1, (1899) 26 Cal 579.
2, A I R 1915 Cal 128=25 I C 76=11 I C 394.

he claims under a grant of a life-estate down to 1314, I cannot for one instance accept. Up to 1314, the plaintiff was in possession as under the estate for life of Soshi Sundari and when that has terminated, he cannot add on that period during which he was in possession under a rightful title to the period for which he was in possession under no title. No case has been suggested before us in support of that view; and, when the learned Vakil put forward such a proposition, I asked him to show us any authority in support of it and he frankly said that he had none. To me it seems to be a novel proposition and one that has not been heard of before. The plaintiff cannot add the period during which he was in possession under the conveyance from Soshi to the period for which he was in possession under no title. In this case, there is no finding as to the plaintiff having been in adverse possession for 12 years or upwards. The finding is on a totally different question, namely, that the plaintiff was in possession within 12 years prior to the suit. But that is not a finding with reference to adverse possession at all. It is a finding which has got nothing to do with the question of adverse possession. A careful study of the two judgments of the lower Courts has satisfied me that there is no finding in either of these judgments as to the plaintiff having been in adverse possession for 12 years or upwards.

Another point has been raised, namely, that the plaintiff was taken by surprse when the learned Judge came to the conclusion that the grant was one for life only and that the case ought to be remanded to the lower appellate Court for evidence to be taken as to the actual form of the grant. The grant was a verbal grant made by a person who has been dead for more than 50 years, and I cannot believe that any honest evidence can be produced before any Court to show what was said by Ganga Charan to his widowed daughter in law before he started for good for the holy city of Benares. I think to send the case back on any such footing would be inviting the parties to produce before the Court evidence which, in fact, has no foundation. In my opinion the present appeal fails and ought to be dismissed with costs.

Smither, J.—There should not be a remand, and there being no finding of possession of the plaintiff and his predecessor for more than 12 years, I think the appeal should fail.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 534

FLETCHER AND SMITHER, JJ

Basudebo Narayan Sinha—Defendant—Petitioner.

v.

Kadambini Dassi—Plaintiff—Opposite Party.

Rule Nisi No. 769 of 1916, Decided on 28th March 1917, against the order of Munsif, First Court, Kandi, in Mortgage Suit No. 1008 of 1015.

Civil P. C. (1908), S. 115 and O. 23, R. 1—Leave to withdraw with liberty to bring fresh suit granted on insufficient grounds—High Court will not interfere unless there is material irregularity.

The mere fact that the Primary Court granted leave to a plaintiff to withdraw from his suit with liberty to bring a fresh suit on the same cause of action on in sufficient grounds, is no ground for the High Court's interference in revision under S. 115 unless the lower Court in granting leave acted without jurisdiction or with material irregularity in the exercise of its jurisdiction. [P 534 C 2]

Bemal Chandra Deb—for Petitioner.

Sajani Kanta Sinha—for Opposite Party.

Fletcher, J—This is a Rule calling on the opposite party to show cause why the order complained of should not be set aside. The plaintiff opposite party brought a suit to enforce a mortgage. A question was raised as to whether the plaintiff could be successful and the plaintiff applied to the learned Judge for permission to withdraw from the suit with liberty to bring another suit on the same cause of action which the learned Judge granted. The learned Judge under the terms of the rule clearly had power to grant the plaintiff permission to withdraw from the suit with liberty to bring a fresh suit at any stage of the proceeding. The mere fact that the learned Judge granted that leave on a ground that may or may not appear to us to be sufficient is no ground for interfering under the terms of S. 115, Civil P. C. This is not a case of want of jurisdiction nor did the learned Judge act with material irregularity. The Rule is discharged with costs—one gold mohur.

Smither, J.—I agree.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 535

CHATTERJEA AND RICHARDSON, JJ.

Takarunnessa Chowdhurani — Defendant—Appellant.

v.

Tarini Charan Sarkar and *another*—Plaintiffs—Respondents.

Appeals Nos. 160 and 329 of 1914, Decided on 10th July 1917, from appellate decrees of Sub-Judge, Pabna, D/- 26th September 1913.

(a) Civil P. C. (5 of 1908), S. 11, Expl. 4—Suit for possession of land dismissed—Subsequent suit for same land on different title is barred.

Plaintiff, who was the purchaser of two jotes *R* and *A* in execution of money decrees against their owner, instituted a suit for recovery of possession, or declaration of title, of some lands on the allegation that they appertained to jote *R* purchased by him. On his claim being disallowed on the ground that the lands did not appertain to the said jote *R*, the plaintiff instituted another suit for recovery of possession of the same lands on the allegation that they appertained to the other jote *A*, which he had purchased:

Held: that the subsequent suit was barred as res judicata under S. 11, Expl. 4. [P 536 C 1]

(b) Civil P. C. (1908), S. 11—Might and ought—Decision is res judicata even though ground not finally decided in previous suit.

Semble: A matter which might and ought to have been made a ground of attack in a previous suit between the same parties may be res judicata even though it was not finally decided in the previous suit. [P 536 C 1]

B. C. Mitra and *Hiralall Sanyal*—for Appellant.

Dwarka Noth Mitra, *D. N. Chuckerbutty*, *Tarakeswar Pal Chowdhury* and *Girija Prasanna Sanyal*—for Respondents.

S. A. No. 160 *of* 1914.

Judgment.—This appeal arises out of a suit for a declaration of the plaintiff's right to a jote by purchase and for recovery of khas possession thereof. The plaintiff purchased two jotes, both belonging to one Mr. Bray, on 21st March 1893 at sales held in execution of decrees for money, and he claims that the land in suit appertains to one of those two jotes situated in Mauza Ram Chandrapur. It appears that the plaintiff had brought another suit, No. 167 of 1901, in which a portion of the land in suit together with certain other lands were claimed as part of the other jote of Mr. Bray situated in Mauza Athna. A question has been raised in this Court whether the lands in dispute in the present case formed the subject-matter of the previous suit. There is no dispute that these lands were also claimed in that suit. What is contended before us is that although they were originally claimed as part of the jote in Mauza Athna, the plaintiff subsequently confined this claim to such portion of the jote as was found by the Amin to lie within the Mauza Athna, and that therefore it must be taken that the subject-matter of the previous suit was the land of the jote which lay in Mauza Athna only.

We are referred to the judgment on issue 4 in the previous suit, but reading the decision on issue 6 along with the decision on the 4th, it is clear that the whole land was claimed in the suit and the contention that subsequent to the institution of the suit, the suit was confined to a part of the land claimed, cannot be supported. The judgment shows that the suit was partially decreed. In other words, it was decreed in respect of the lands which lay in mauza Athna and dismissed with regard to the remaining lands. That the lands in suit were the subject-matter of the previous suit has been found by the Courts below and does not appear to have been disputed before the point was taken (for the first time) before us. That being so, the question arises whether the decree in the previous suit operates as res judicata so far as the lands claimed in the present suit are concerned. The learned Subordinate Judge holds that the title on which the disputed lands are claimed being different in the two suits, the decree in the previous suit does not operate as res judicata. We think that the learned Subordinate Judge was wrong in so holding; we do not think that the titles are different in the two cases. The plaintiff claimed the lands in the present suit as part of the jote of Mr Bray which he had purchased. That was also his case in the previous suit. The only question is to which jote do they belong? The plaintiff was the owner of the jote in Mauza Athna as well as the jote in Mauza Ram Chandrapur. It was open to him to claim, we think he ought to have claimed, the land now in suit as part of the jote in Mauza Ram Chandrapur in the previous suit.

In the case of *Kashee Kishore Roy Chowdhry* v. *Kristo Chunder Sandyal Chowdhry* (1) a suit for a declaration of plaintiff's right to a share which they

1. (1874) 22 W R 464.

claimed as an accretion to Mauza L, was held to be barred by a judgment in a former suit in which they had claimed the same land as an accretion to Mauza R because

"whether by accertion to the one estate or to the other, the question in both suits was that of title by accretion."

Couch, C. J., pointed cut that the plaintiff was bound to bring forward all the grounds of origin of his right and that a difference in the origin of the right is not a matter which makes a different cause of action. Expl. 4, S. 11, Civil P. C., expressly lays down that any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to hava been a matter directly and substantially in issue in such suit. We have been referred on behalf of the respondent to a decision of this Court in the case of *Kailash Mondul* v. *Baroda Sundari Dasi* (2), in support of the contention that even if the matter ought to have been made a ground of attack in the previous suit, it must have been finally decided in order that the decision might operate as res judicata. The view taken in that case however has not been followed in some later cases. We may refer to the decision in the case of *Jamadar Singh* v. *Serazuddin Ahmad Chaudhuri* (3) and to the observations of Sir Lawrence Jenkins in the case of *Guddappa* v. *Tirkappa* (4), where he observed as follows:

"But that case is based on the conclusion that in the former suit the matter was not finally heard and determined. How far this view is reconcilable with the decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (5) to which I have already referred, but which was not cited to the Calcutta Bench, I need not pause to consider. Suffice it to say that in the light of that Privy Council decision, it seems to me impossible to hold, under the circumstances of the case, that the matter was not finally heard and decided."

Having regard to the decision of the Judicial Committee in that case, we think that the plaintiff might have claimed and ought to have claimed these lands in that suit, and is therefore precluded under S. 11, Civil P. C, from claiming them in the present suit. The case will accordingly be remitted to the Court of first instance in order that that Court may ascertain the lands which were the subject-matter of the previous suit. The suit should be dismissed with regard to such lands, and decreed with regard to the rest of the disputed land as is situate to the south of the Ichhawati river as it stood at the time of the revenue survey map. There will be proportionate costs in all Courts, the proportion depending upon the ascertainment of the lands which were the subject-matter of the previous suit by the lower Court. The cross-objection and Appeal No. 329 of 1914 were preferred on behalf of the respondent in this case. It was contended that the plaintiff ought to get the lands up to the northern bank of the Ichhawati. But it is clearly found that the northern boundary of the jote was the Ichhawati river. There is no doubt, as found by the learned Subordinate Judge, that the plaintiff can get the lands only up to the southern bank of the Ichhawati. There is therefore no force in the contention raised on behalf of the respondent. Second Appeal No. 329 of 1914 and the cross-objection are dismissed. We make no order as to costs.

V.B./R.K. *Order accordingly.*

2. (1897) 24 Cal 711.
3. (1908) 35 Cal 979.
4. (1901) 25 Bom 189.
5. (1893) 20 Cal 79=19 I A 234 (P C).

A. I. R. 1918 Calcutta 536

MOOKERJEE AND WALMSLEY, JJ.

Abdul Rahman Kazi and *others* — Appellants.

v.

Baikunta Nath Roy Chowdury and *others*—Respondents.

Letters Patent Appeal No. 76 of 1915, Decided on 4th July 1917, against decree of Mullick, J., D/- 26th April 1915, in Appeal from Appellate Decree No. 1424 of 1911.

(a) Bengal Land Revenue Sales Act (11 of 1859), S. 37—Purchaser takes estate as created at time of permanent settlement subject to certain qualifications.

The purchaser of an estate at a revenue sale takes the estate as created at the time of the permanent settlement subject to certain well known qualifications. [P 538 C 1]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 37 — Revenue free lands — Purchaser cannot claim lands described as revenue free and in respect of which no rent was claimed merely because they are within geographical limits of estate purchased by him unless it is established that those lands were included in the estate at time of permanent settlement.

A purchaser of an estate at a revenue sale (under Act 9 of 1859), cannot claim lands, which have been described in the Record of Rights as revenue-free lands and in respect of which no

rent was ever claimed or realized by any previous proprietor of the estate, merely because those lands are situate within the geographical limits of the estate purchased by him unless he establishes that those lands were included in the estate at the time of the permanent settlement or, in other words, that the revenue was assessed on the basis af the assets of those lands.

[P 538 C 1]

Abinash Chandra Guha — for Appellants.

Jogesh Chandra Roy — for Respondents.

Judgment.—This is an appeal under Cl. 15, Letters Patent, from a judgment of Mullick, J., in a suit for recovery of possession of land, upon declaration of title, by purchase of an entire estate sold for arrears of revenue. The case for the plaintiffs is that on 25th March 1897, they purchased the estate at a sale for arrears for revenue, and that the disputed lands, though comprised therein, have been wrongfully retained by the defendants. The contending defendants disclaim title and possession in a large number of parcels set out in para. 9 of their written statement filed on 10th February 1909 ; the other plots, they allege, never constituted the mal lands of the estate purchased by the plaintiffs. They assert, on the other hand, that they have been in possession of those lands under a revenue free grant made in the year 1731. The suit was decreed in the Court of first instancce, in respect of all lands other that 34 bighas, in which, it was held, the defendants had established their revenue free title. The Court however found it impossible to locate the exact situation of these 34 bighas and directed that the question be determined in the execution department. The Subordinate Judge confirmed this decree, and added that he could not find fault with the lower Court for leaving the question about the site of those 34 bighas undetermined till the execution of the decree, when each party would have the right to represent his case. The decree of the Subordinate Judge has been confirmed on appeal by Mullick, J.

On the present appeal, the defendants have contended that the burden lay upon the plaintiffs to establish that the lands in dispute constituted the mal lands of the estate purchased by them, that there is no evidence on the record to show that the plaintiffs had discharged the burden which lay upon them, and, that, consequently, the suit should have been dismissed. In support of this proposition, reference has been made to the decision of the Judicial Committee in *Hurryhur Mookhopadhya* v. *Madhub Chunder Baboo* (1), which was applied in the cases of *Arfunnessa* v. *Peary Mohun Mookerjee* (2) and *Koylashkashiny Dossee* v. *Gocoolmoni Dossee* (3), to reach the conclusion that in resumption suits, the zamindar must prove the mal character of the lands claimed by him. It is not necessary for our present purpose to enter into a discussion of the abstract question of onus of proof in suits for resumption of revenue-free lands. It is sufficient to observe that in the present instance the lands are described in the Record of Rights as revenue free lands. The burden, consequently, lies primarily upon the plaintiffs to establish that the entry in the Record of Rights is erroneous. The question thus arises whether the plaintiffs have adduced evidence to show that the disputed lands are mal lands of the estate purchased by them. It is conceded that there is no evidence on the record to show that rent had ever been claimed or realized by the proprietor of the estate in respect of the lands now in controversy.

On the other hand, the defendants have produced a grant of 1731 which shows that an area of 63 bighas was granted to their predecessors to enable them "to burn lamps at the Durgah of Shah Amirullah." 34 bighas are said to have been situated in Kismat Sabanal, but as the document is in a tattered condition it is impossible to state at this distance of time where the remaining 29 bighas were situated. The plaintiffs, it may be observed, claim in this suit lands situated in two villages, namely, Sahangal and Latimshah and the case for the defendants was that the lands in their possession were situated in those two villages and were held by them revenue-free. In these circumstances, it is plain that there was a grant of 68 bighas of land, a portion whereof, at any rate, was situated in village Sahangal. It is also clear that this grant was anterior not merely to the permanent settlement, but to the grant of the Dewany on 12th August 1765. There is, on the other hand, no evidence to show that the

1. (1870-72) 14 M I A 152=8 B L R 566 (P C).
2. 1875-76) 1 Cal 378=25 W R 209.
3. (1882) 8 Cal 230.

plaintiffs or any previous proprietor ever claimed or realized rent in respect of those lands. In these circumstances, it is difficult to appreciate how the plaintiffs can possibly succeed.

They are no doubt entitled to the privileges of a purchaser of an entire estate at a sale for arrears of revenue. But what are those privileges? Concisely stated (omitting well-known qualifications), the rule is that the purchaser takes the estate as created at the time of the permanent settlement. The question, accordingly, reduces to this: Have the plaintiffs established that these lands were included in the estate at the time of the permanent settlement; in other words, was the revenue assessed on the basis of the assets of these lands? The answer must be in the negative. If there had been any indication that rent had been realized in respect of these lands, that would have furnished evidence that the lands were impressed with a mal character. In the total absence of such evidence, it is impossible to say that merely because the lands are situated within the geographical limits of the estate purchased by the plaintiffs, they were mal lands and formed part of the zamindari at the time of the permanent settlement. We are clearly of opinion that the decree made by the Courts below cannot be sustained.

The result is that this appeal is allowed, and the decrees of the Courts below set aside subject to the qualification presently to be stated. Our order will not affect the title of the plaintiffs to the parcels set out in para. 9 of the written statement. The decree will declare the title of the plaintiffs to those plots and they will be placed in possession in execution of the decree of this Court. Subject to this reservation the suit will stand dismissed with costs in all the Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 538

FLETCHER AND NEWBOULD, JJ.

Khudi Bibi—Defendant—Appellant.

v.

Abdul Majid and *others*—Plaintiffs—Respondents.

Appeal No 3864 of 1914, Decided on 1st August 1917, from appellate decree of Sub Judge, 2nd Court, Sylhet, D/-10th September 1914.

Registration Act (1908), S. 17 (2) (i)—Agreement to give up possession of land contained in compromise petition does not require registration.

An agreement to give up possession of certain land contained in a petition of compromise filed in a criminal case does not require registration and is admissible in evidence without being registered. [P 539 C 1]

Jotindra Mohan Chowdhury—for Appellant.

Jnanendranath Sircar—for Respondents.

FACTS of the case will appear from the following extract from the judgment of the lower appellate Court: 'The appeal arises out of a suit brought by the plaintiffs for recovery of khas possession of the lands described in the first schedule of the plaint, after ejecting the defendants from the same and removing their houses described in the second schedule. The plaintiffs' case is that they are the owners of the land, that the defendants hold the land in suit under them, that there were some criminal cases between the parties which were compromised, that in the petition of compromise filed in these cases the defendants made an agreement that they would give up their jote right and remove their houses from the land in suit and allow the plaintiffs to take possession of it in the month of Magh 1318 B. S. and that in spite of the agreement the defendants did not give up possession of the land in suit and remove their houses from the same. Defendant 2 filed a separate written statement. His defence was that the suit was not maintainable without notice to quit, that the petition of compromise filed in the criminal cases was not admissible in evidence. Defendant 1 did not appear though duly summoned. The lower Court decreed the suit. Defendant 1 preferred this appeal against that decree. The plaintiffs' claim for khas possession is based upon an agreement made by the defendants in a petition of compromise filed in a criminal case. Under this circumstance no notice to quit was necessary. The plaintiffs have proved the petition of compromise or the solenamah filed by the defendants in the criminal case between the parties. By this solenamah the defendants made an agreement that they would give up possession of the land in suit in favour of the plaintiffs; . . . this petition of compromise is admissible in evidence though

it is an unregistered deed. The petition of compromise did not extinguish or create any title to any land. . . . In my opinion the petition of compromise is admissible in evidence as indicating the existence of an oral agreement on the part of the defendants to surrender the land. . . . . The petition of compromise is admissible in evidence to prove the existence of an oral agreement. . . . . The decree passed by the lower Court is, therefore, quite right. The appeal is accordingly dismissed with costs." Against the above judgment of the lower appellate Court defendant 1 preferred this second appeal.

Judgment.—This appeal must be dismissed on the findings of fact made by the learned Judge of the lower appellate Court. The reasons given by the learned Judge of that Court are conclusive. It is not arguable that a document as this which has been read to us requires registration. The rest of the judgment of the learned Judge is clearly right. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 539 (1)

FLETCHER AND NEWBOULD, JJ.

Amid Ali and *others* —Defendants—Appellants.

v.

Abdul Mea Mozumdar and *others* —Plaintiffs—Respondents.

Appeal No. 312 of 1916, Decided on 3rd August 1917, from appellate decree of Offg. Sub-Judge, Cachar, D/- 18th September 1915.

Registration Act (16 of 1908), S. 47—Priority in execution prevails in documents duly registered.

A mortgage deed executed prior to a deed of sale, but registered after the registration of the latter within the time limited by the Registration Act, has priority over the deed of sale.

[P 539 C 1]

Govinda Chunder De Roy—for Appellants.

Hemendra Kumar Das—for Respondents

Judgment.—This appeal must fail on the findings of fact made by the learned Judge of the lower appellate Court. It is quite clear that, on those facts, the plaintiffs' document being registered within the time limited by the Registration Act had priority over the document under which the defendants claimed. It is urged also that the interest was penal. No issue was raised on this point and the point does not arise for our decision. In any event this contract about interest, in the absence of any evidence of extortion or that the interest itself is so high that it amounts to extortion, is a valid contract. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 539 (2)

CHATTERJEE AND WALMSLEY, JJ.

Kala Chand Shaha and *others*—Petitioners.

v.

Secy. of State—Opposite Party.

Rule Nisi No. 1 of 1917, Decided on 31st January 1917.

(a) Railways Act (1890), S. 77—Agent of Eastern Bengal Railway is "Manager"—Notice under S. 77 must be given to Agent.

The Agent of the Eastern Bengal Railway is the "Manager" within the meaning of S. 77 and the notice required by that section must be given to the Agent. Service on the Traffic Manager is not sufficient. [P 540 C 1]

(b) Estoppel—No estoppel against statute.

(Per *D. Chatterjee, J.*)—There can be no estoppel against the express provisions of a Statute. [P 540 C 1]

Urendra Lal Roy—for Petitioners.

Ram Chandra Mitter — for Opposite Party.

Chatterjee, J —Upon the findings this case seems to be one of considerable hardship. The plaintiff delivered a parcel containing valuable Dacca muslin, etc., to the Eastern Bengal Raiway on 24th February 1915 for conveyance to Calcutta. On 26th February the parcel reached in a damaged condition and open delivery was given to the consignee at his request showing the goods that were missing. It is admitted that they must have been stolen by some railway servant. The plaintiff at once gave notice to the Traffic Manager as required by the rules printed in the Time and Fare Table. Time after time the Traffic Manager wrote to say that the matter was under enquiry and at last on 30th August 1915, several days after the expiry of six months from delivery, wrote to the plaintiff that his claim was not admissible as he had not insured the goods as required by S. 75 of the Act. The plaintiff on 13th September 1915 gave notice to the Agent, who referred the matter to the Traffic Manager, who again wrote to the plaintiff that his claim was barred by S. 75. It must be said to the credit of the Traffic Manager

and the Agent that they did not set up a bar under S. 77 for want of notice within six months. It is quite probable they thought that the section had been complied with when notice was given to the Traffic Manager. The plea was, however, taken when the matter came to the Court and we have to see if it was rightly taken.

The Court below has held that there was no bar under S. 75, but the bar under S. 77 was fatal as the Agent is not shown to have had notice within six months. I am constrained to think that the lower Court is right. It has been argued that the Estern Bengal Railway does not entertain any officer who is called a Magager and the plaintiff could not give any notice to the Manager. But if there is no Manager, the plaintiff could have given notice to the Government, but he did not do so within time. The learned Government Pleader says that the Government has, by a notification in the Calcutta Gazette, ruled that the Agent should be considered the Manager. I may take it, therefore, that the Agent was the Manager. If he was, he was entitled to a notice within the required time. The notice to the Traffic Manager is for the purpose of ensuring an immediate enquiry and is not sufficient. The delay in the enquiry is to be regretted as the plaintiff may have thought that he would have his remedy from that officer. But there can be no estoppel against the express provisions of the Statute and the plaintiff's suit must fail. I think there should be a supplementary rule printed in the Time and Fare Table as in the Coaching Tariff that a further notice must be served upon the Agent or the Government under S. 77 within six months of the delivery. This ought to be done for the purpose of preventing possible misconception and hardship by reason of delay in the enquiry by the Traffic Manager. I would, therefore, discharge the Rule but without costs.

Walmsley, J.—I agree that the Rule should be discharged. In my opinion, the Agent of the Eastern Bengal Railway is the Manager within the meaning of the Railway Act, and the notice required by S. 77 must be given to the Agent, and service on the Traffic Manager is not sufficient.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 540

RICHARDSON AND BEACHCROFT, JJ.

Basiruddin Thanadar— Decree-holder —Appellant.

v.

Mokima Bibi and *others* — Objectors and Creditors—Respondents.

Appeal No. 166 of 1917, Decided on 9th January 1918 from the order of Dist. Judge, Rungpur, D/- 16th April 1917.

(a) Provincial Insolvency Act (1907), S. 36—Debtor transferring property to wife in lieu of dower within two years of adjudication—He continuing in possession along with wife—Dower debt found to be genuine and value of property transferred commensurate with amount of debt — Transaction cannot be impugned under S. 36.

An insolvent had transferred certain property to his wife in lieu of dower within two years before his adjudication. He continued in possession of the property along with his wife, but it was found that the dower debt was genuine and that the value of the property transferred was not incommensurate with the amount of the debt:

Held: that the transaction could not be impugned under S. 36. [P 543 C 2]

(b) Prov. Insol. Act (1907), S. 36—Burden of proving good faith is on transferee—Actual possession is not sure test specially when transferee is wife.

In a case arising under S. 36, the burden of proving that the transaction impugned was carried out in good faith and for valuable consideration is on the transferee. [P 541 C 1]

Antecedent debts might constitute a good consideration for a conveyance impugned under S. 36. [P 542 C 1]

With regard to the question whether a sale is a benami or a real transaction, the fact that the transactions relating to the property sold were carried out in the name of the transferee is not conclusive. Though the question of actual possession is in some cases a test and an important test, yet where the property transferred is a house and the transferor is the husband of the transferee, much importance cannot be attached to the fact of actual possession, inasmuch as the husband might after the sale not unnaturally live in the house which he has transferred to his wife. [P 542 C 2]

(c) Evidence Act, (1872), Ss. 101 and 102—Onus immaterial.

The question of the burden of proof retains little, if any, importance, where there is evidence on both sides. [P 543 C 2]

(d) Prov. Insol. Act (1907), S. 36—Value of property sold is material.

The question whether a transfer challenged under the provisions of S. 36, was in good faith involves as an important element the value for which the properties were sold. [P 543 C 2]

B. C. Mitra, Salendra Nath Mukerjee and *Alindra Nath Mukerjee* —for Appellant.

Mohendra Nath Roy and *Atul Chandra Gupta*—for Respondents.

Richardson, J.—This appeal is preferred from an order of the District Judge

of Rungpur, dated 16th April 1917. For the present purpose the order must be treated as an order made under S. 36, Provincial Insolvency Act, refusing an application made by certain creditors of the insolvent that two conveyances executed by him within two years of the date on which he was so adjudged should be annulled. The conveyances in question were in favour of his two wives Nabnat Bibi and Mokima Bibi and are both dated 11th January 1915. They are each in the nature of a hiba-bil-ewaz. In other words, they purport to have been executed in consideration of the dower debts which the insolvent owed to his wives respectively. In January 1915, the insolvent had been married to Nabnat for about 11 years and to Mokima for about 5 years. The dower promised in the case of Nabnat is said to have been Rs. 1,500 and in the case of Mokima, whose father was in better circumstances than the father of Nabnat, Rs. 5,000. The insolvency proceedings were commenced by an application made by the insolvent on 17th August 1916 and the order of adjudication is dated 25th November 1916. In the schedule of debts attached to the application the insolvent estimates his liabilities at Rs. 17,975 and his assets at Rs. 19,872. The case made for the creditors, one of whom Basiruddin Thanadar is the appellant before us, is that at the time the hibas were executed the affairs of the insolvent were in an involved state and the two hibas represent merely benami and colourable transactions. The insolvent has himself admitted that in January 1915 he was indebted to the extent of ten or twelve thousand rupees. He has not admitted, however, that he was at the time insolvent nor does it appear that there were then any outstanding against him.

He owed a considerable amount to the appellant creditor for which the appellant in the course of the year 1915 after the execution of the hibas brought a suit against him. The suit was for the balance due on business transactions which took place in 1912-13. It is further in evidence that on 15th May 1914, the insolvent had borrowed on a note of hand the sum of Rs. 6,000 from the Rungpur Bank. In August of the same year he also borrowed Rs. 1,000 on a note of hand from the North Bengal Bank. The appellant creditor obtained a decree against the insolvent on 12th January 1916 for the sum of Rs. 5,785. The Rungpur Bank and the North Bengal Bank also sued the insolvent in the course of the year 1915 and obtained decrees on 13th December 1915 and 4th January 1916 respectively. It appears that there was another decree against the insolvent obtained in the Small Cause Court for Rs. 684 with costs, dated 15th June 1916. Regard being had therefore to the prevalency of benami transactions in this country and to the surrounding circumstances, it mey well be that conceded there is some initial suspicion about these two hibas.

It may also be conceded, as it is not disputed, that in a case arising under S. 36, Provincial Insolvency Act, the burden of proving that the transaction impugned was carried out in good faith and for valuable consideration is on the transferee. This has been so held in the case of *Nilmoni Chowdhuri* v. *Basanta Kumar Banerjee* (1) decided by this Court and in the case of *Muhammad Habibullah* v. *Mushtaq Husain* (2), decided by the Allahabad High Court. Now in the Court below it has been found on the evidence that these two ladies, the wives of the insolvent, have succeeded in showing that their husband owed them as dower the sums I have stated. We have been taken through the evidence and I see no reason to differ from the opinion formed by the learned District Judge on this part of the case. It is practically common ground, regard being had to the admission made by the witness on behalf of the appellant creditor that the insolvent was the son of a prosperous man and that he was at one time himself a prosperous shopkeeper. He and his wives came from the District of Ballia in the United Provinces, though the insolvent had a shop at Rungpur and lived there for a number of years. On the evidence as it stands on the record it cannot be said that the sums claimed as dower are in any way excessive. The main point which was made by the appellant in this connexion is that the dower debts are not supported by any kabilnama or written document. But witnesses on both sides who are acquainted with the District of Ballia and with the practice of people there in simila

1. (1915) 29 I C 814.
2. (1917) 39 All 95=37 I C 684.

circumstances with the insolvent state that in that district it is not usual to execute such document.

There is no doubt evidence for the appellant creditor that the dower stipulated for in most cases is much smaller than the sums mentioned in the present case. But one of the witnesses states in cross-examination that at his own marriage dower was fixed at 202 gold ashrafis, that is to say, a sum of about Rs. 3,232, and that no document was executed. It is said that what the witness really said was that the dower which he promised was Rs. 200 and 2 gold ashrafis. But the learned District Judge has taken the statement as it stands in the deposition. No step appears to have been taken to clear up the point in the Court below and we must also, like District Judge, take the statement as it stands. On this part of the case, therefore, as to the probability of these sums having been promised as dower and being in fact due by the insolvent to his wives, I accept the conclusion arrived at by the District Judge. It follows that there were in fact in respect of these conveyances, which are challenged antecedent debts which might constitute good consideration for them and the argument in this Court has turned mainly on the value of the properties transferred.

Before dealing with that point, however, it is well to refer to an admission said to have been made by the insolvent himself in conversation with an officer of the Rungpur Bank. The principal witness on this point is the Pleader Babu Rajani Kanta Bhattacharjee who is the managing director of the Rungpur Bank. The conversation occurred, he says, a few months before the Rungpur Bank instituted its suit against the insolvent and it related to these hibas. Apparently the insolvent was trying to obtain time for paying off his debts and it is said that he admitted that the transfers were merely benami transactions. It appears, however, that what the insolvent said at the time was not quite understood by the learned pleader. The answer which the witness gave in cross examination leaves the matter somewhat vague. He says:

"I did not ask Abdur Rahman distinctly if the hiba was an out and out transaction. I did not inquire then in whose possession the properties at that time were."

Even if the insolvent made some statement of the kind which might be construed as an admission that the transactions were benami, it does not necessarily follow, regard being had to his position and to the fact that he was trying to gain time, that the admission was true. What appears to have happened afterwards is that a draft was made of a power of attorney by which his wife Mokima Bibi was to empower him to pledge the property transferred to her as security to the Rungpur Bank. This draft was sent to the lady but she having consulted her own advisers refused to sign it or to give her husband the authority that he wanted. Her conduct in the matter seems to indicate that she was in real and not merely in nominal possession of the property, and the incident therefore, is rather in her favour than otherwise.

In this connexion, I should also mention that the title created by the hiba has been respected ever since, at any rate on paper. Transactions relating to the property, such as payments of rent to the superior landlord and receipt of rent from the tenants in occupation and so forth are carried out in the name of the transferee. No doubt that is not conclusive. It has been pointed out that when a benami transaction is entered into no benefit can be derived or expected from it unless the fictitious title is afterwards on paper treated as the true title. The question of actual possession is in some cases a test and an important test but in the present case not much can be said about this either way because the husband afterwards, not unnaturally, lived in the house which he had transferred to one of his wives. The co-wife also lived there. Similarly in the circumstances little turns on the fact that the servants employed by the husband for managing the property were also employed by the wives or one of them after the properties were transferred. The mode in which the properties were enjoyed and managed is of little assistance in the present case and no doubt, the learned counsel was right in putting the case as dependant mainly on the question as to the value of the properties.

Now it appears that the question of the value of the property transferred to Mokima Bibi was raised in the lower Court but so far as the record shows, it

does not appear that in that Court any question was raised as to the value of the property transferred to Nabnat Bibi.

The facts as to the property transferred to Mokima Bibi were as follows: The property is a maurasi mukararai property with pucca buildings standing upon it. At the date of the hiba one building seems to have been nearly completed and since then another building has been commenced. We have a lease executed by certain tenants in favour of the lady on 19th September 1916. That document shows that on that date she let out to those tenants nearly the whole house at a monthly rent of Rs. 110. The house is described as consisting of 12 doors, a door being, as I understand, a synonym for a room. The tenants took 11 doors for the monthly rent of Rs. 110 and there remained one room which was let out to Faizulla at a small rent. There was also a rent of Rs. 5 a month payable by a panwallah for the verandah. The total annual rent comes to something more than Rs. 1,400. It is said that deducting Rs. 20 per cent. as costs for repairs and the annual rent payable to the superior landlord (Rs. 620) the annual profit works out at Rs. 500 or Rs. 530. The creditor claims that the value of the property should be taken at 20 years' purchase or say Rs. 10,000. Now this calculation may very well be on paper, but the evidence on which it rests, consists of passages carefully selected from the depositions of the witnesses for Mokima Bibi. There is no independent evidence of any value on behalf of the appellant-creditor. One of his witnesses, who sets himself up to be an engineer and an expert, states that on looking at the house he could say that the building, apart from the land, was worth of rupees 11,000, but he could not say how much of this value was to be attributed to the old building and how much to the new, nor did he make any sort of examination of the buildings themselves. His estimade can only be regarded as a very rough and ready one and little more than a guess. As I have said, it is probable that the house was not complete at the date of the hiba. The insolvent himself in his evidence states that there were 12 doors at the time. But he was not asked to say definitely whether the building was actually finished and completed. On the other hand one of the witnesses for the appellant-creditor, Kailas Chandra Gupta, makes the following statement:

"He (the insolvent) did not agree to that even and left the place somewhat annoyed. He had said that the value of the complete portion of his house was Rs. 8,000."

And further on the same witness says this:

"I cannot deny that the building was not complete in December 1916. He (the insolvent) told me that there were 9 complete rooms which were let out on hire. I cannot say how many rooms there are in the building altogether."

Then it appears that in the application for execution of decree obtained by the North Bengal Bank the market value of this property was stated, on 9th December 1914, to be approximately Rs. 5,000. Similarly in an application for execution filed on 4th February 1916, the market price of the property is stated to be approximately Rs. 7,000. No doubt estimates made for the purposes for which those estimates were made are not of much value. At the same time we have to consider the evidence on the record as a whole and to do the best we can with the materials which the parties have placed before the Court. On those materials the learned District Judge in the Court below has come to the conclusion that the value of the property transferred to Mokima Bibi is not by any means as large as the appellant creditor would have us believe. The question of the burden of proof was brought forward as a factor which would turn the scale, but when there is evidence on both sides the question retains little, if any, importance. Granted that it is for the transferees to prove that these transfers were made in good faith and for valuable consideration, it has been found that there was some valuable consideration inasmuch as there was a debt due to each of the wives at the time. The question then is whether the transfers were made in good faith. No doubt, as the learned counsel for the appellant contends, this involves as an important element the value of the properties transferred. The evidence on that question perhaps leaves something to be desired, but on the whole, I am unable to differ from the conclusion at which the learned District Judge has arrived. I am not persuaded either in the case of Nabnat or in that of Mokima that the value given was so incommensurate with the debt due as to justify us in saying that the transfer was not at the time made in

good faith. Before leaving the case I should like to add that I am disposed to believe the insolvent when he says that he would never have applied to be declared an insolvent unless he had been arrested at the instance of the North Bengal Bank in execution of that decree. The result is that, in my opinion, this appeal should be dismissed with costs. We assess the hearing fee at five gold mohurs.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 544

FLETCHER AND NEWBOULD, JJ.

Baroda Prosad Roy Chowdhury—Defendant—Appellant.

v.

Manmatha Nath Mitra—Plaintiff—Respondent.

Appeal No. 884 of 1915, Decided on 11th May 1917, from appellate decree of Addl. Dist. Judge, 24-Perganas, D/- 22nd January 1915.

(a) Evidence — Admissibility — Suit for possession — Facts of previous proceedings under S. 145 and order therein are relevant —Criminal P. C. (1898), S. 145.

The facts of a previous proceeding under S. 145, and the order passed therein are relevant in a suit between the same parties for recovery of possession of the land on declaration of title, but the reasons for the order are not relevant.

[P 544 C 2]

(b) Civil P. C. (1908), S. 100—Lower appellate Court stating that only one of three material witnesses examined though all three were examined—Decision based on evidence of that witness is nullified.

Where the Judge of the lower appellate Court stated in his judgment that only one of three material witnesses was examined whereas, as a matter of fact, all the three were examined :

Held : that the error of the Judge in criticising the evidence of one of the witnesses on the footing that the other two had not been examined went to nullify his decision based upon the evidence of that witness. [P 544 C 2]

Rash Behari Ghose, Sarat Cnandra Roy Chowdhury, Hemendra Chandra Sen and *Satya Charan Sinha*—for Appellant.

Narendra Chundra Bose and *Satyendra Nath Mitter*—for Respondent.

Fletcher, J.—This is an appeal by the defendant against a judgment of the learned Additional District Judge of the 24-Parganas, affirming the decision of the Subordinate Judge at Alipore. The suit was brought to recover possession of a small piece of land. The question is whether it belongs to the plaintiff or to the defendant's estate. The case has had an unfortunate history. It was heard by a former District Judge of the 24-Perganas and an appeal was preferred to this Court on 4th August 1911. The appeal was heard and the case was remanded to the lower appellate Court. Clearly, the litigation has been pending for many years and as regards a small piece of land of this nature the Court would be reluctant to disturb the decision of the learned Judge of the lower appellate Court, unless there are strong and cogent reasons why the judgment cannot be maintained. The case has been argued before us on these points : First of all the learned vakil for the appellant, relying on a statement in the judgment of this Court directing the remand, has urged that certain proceedings under S. 145, Criminal P C., were not relevant under the provisions of the Evidence Act and that the learned District Judge in this case has relied upon those proceedings under S. 145, Criminal P. C. I do not agree with that view. The learned Judge was bound to consider as a part of the history of the case, as he has done, these proceedings under S. 145, Criminal P. C. One cannot shut out those proceedings under S. 145, Criminal P. C, and leave that part of the story blank. It is quite obvious that the learned Judge has not relied on the reasons for the order; but the facts of the proceedings and the order, it seems to me, must be taken into consideration as a part of the history of the case.

The next point that has been relied on is that the learned Judge of the Court of Appeal below has misdirected himself in his judgment, because although he states that according to the defendant's story there were three persons owning shops on the land in dispute, only one Nilkamal has been examined as a witness in the case. The learned Judge was clearly in error in so stating. The record shows that all these three shopkeepers were examined and the learned Judge, when he was criticising the evidence of one of these shopkeepers on the footing that the other two had not given any evidence, clearly was in error and this goes to nullify the decision based upon the evidence of Nilkamal. The next point that was urged was about the observations of the learned Judge about a public school that was erected without doubt by the Court of Wards, when in possession of

the defendant's estate, on a portion of the property. That school, there seems to be no doubt from the plaintiff's own pleadings, was erected by the Court of Wards apparently out of the moneys coming to their hands as the manager of the defendant's estate. The learned Judge seems to consider that, because under the constitution of the school the committee of management is formed from the residents of both the estates, therefore, the public at large own the school house. That does not follow at all. The school house may have vested and belonged to the defendant's estate, although the committee of management is formed from the residents of both the estates to carry on the school. It seems to me quite clear that the reasons, that the learned Judge gives for disposing of this point about the erection of the school house on a portion of the property by the Court of Wards whilst in possession, are quite inadequate.

Next it is said that it has not been found that the plaintiff was within 12 years of the institution of the suit in possession of the property. It seems to me quite clear that the plaintiff was not found to be in possession within 12 years of the suit, because the view that is taken is that the plaintiff tried to set up a hat on the land but was resisted and proceedings were taken under S. 145, Criminal P. C., and that these proceedings terminated in favour of the defendant. It is quite impossible to say that an attempt to take possession within 12 years prior to the suit, which, proved unsuccessful, was sufficient possession to support the plaintiff's suit. It is said also that the property was of a nature of which possession could not be enjoyed, that it was really waste land and, therefore, the principles that are laid down as regards waste lands ought to be followed and the possession must be taken to follow the title. There is no finding in this case as to whether this was waste land or not. There were clearly some buildings on the property at the time. It appears to be so from the judgment. These principles as to waste lands cannot apply to cases where buildings have been erected on the property. In any case, the Judge ought to have given the facts from which it could be found that either the plaintiff was in possession within 12 years prior to the suit or that the property was waste or continued to be waste and, therefore, the possession must be taken to go with the title. I think that, although the case has already been once remanded, the judgment of the learned Additional District Judge is not sufficient to dispose of the case and that, therefore, his judgment ought to be set aside and the case must be remanded to the lower appellate Court to have the appeal re-heard. Costs will abide the result of the re-hearing of the appeal.

Newbould, J.—I agree.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 545

CHITTY AND BEACHCROFT, JJ.

Harish Chandra Roy and *others*—Appellants.

v.

Sarat Chandra Bandopadhya and *another*—Respondents.

Appeal No. 3079 of 1915, Decided on 24th April 1917, from appellate decree of Sub-Judge, First Court, Dacca, D/- 11th September 1915.

Civil P. C. (1882), S. 319—No period is fixed for order granting symbolical possession to auction purchaser under S. 319.

An order of Court giving symbolical possession to an auction-purchaser under S. 319, Civil P. C., 1882, on an application by the auction-purchaser made more than three years after the sale is confirmed is not without jurisdiction and a nullity, as such an order can be made by the Court of its own motion, without the intervention in any way of the auction-purchaser, and no period is fixed for such an order under S. 319 of the old Code. [P 546 C 1]

Sarat Chunder Basak and *Prokash Chunder Pakrasi*—for Appellants.

Upendra Lal Roy and *Suresh Chunder Das*—for Respondents.

Judgment.—The only question in this case is one of limitation. It appears that the defendants were the owners of the property in dispute, an 8-anna share in a sikmi taluk. That property was sold for arrears of rent at the instance of the landlord Radhika Mohan Roy on 9th May 1899 and purchased by the decree-holder himself. The sale was confirmed on 20th June 1899. The sale certificate was issued on 6th May 1904. Symbolical possession was given under S. 319, Civil P. C., 1882, on 23rd July 1904. The present plaintiff bought the property from the representative of the decree-holder on 8th June 1906, and filed the present suit to recover posses-

sion on 9th March 1914. If the time be taken to have run from the date of the confirmation of the sale on 20th June 1899 the suit would obviously be out of time. If, on the other hand, it is taken to run from the date of the delivery of possession to the purchaser, i. e. 23rd July 1904, the suit is not barred. The Code of 1882 is applicable to the case. It is admitted that the property was in possession of tenants under the defendants-judgment-debtor. S. 319 was, therefore, the section which applied to the delivery of possession in this case. The purchaser appears to have made an application for delivery of possession but to have made it more than three years after his right to make that application had accrued. He would, therefore, be out of time under Art. 178, Lim. Act 15 of 1877. S. 319, however, does not like S. 318, prescribe that the Court's order shall be made on application by the purchaser. Whether this was an intentional difference in the sections or not it is not necessary to discuss. There is, however, this distinction that under S. 318 the presence of the purchaser would be necessary before he could be put in possession by the Court. It may have been thought therefore necessary that in such a case he must first apply for delivery of possession before the Court could give it to him. Under S. 319 all that has to be done is to affix a copy of the certificate of sale in some conspicuous place on the property and proclaim to the occupant by beat of drum or some other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser. This could be done by the Court of its own motion and without the intervention in any way of the purchaser. In any case it has not been shown us that any period of limitation was fixed by the law as it then stood for an order by the Court under S. 319. If that be so, it cannot be said that the order of the Court dated 23rd July 1904 giving symbolical possession was without jurisdiction. It is conceded by the learned pleader for the appellant that if this view be taken, the point of limitation cannot be successfully pressed. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 546

CHATTERJEE AND WALMSLEY, JJ.

Parasulla Mallick—Defendant—Appellant.

v.

Chandra Kanta Dass—Plaintiff—Respondent.

Appeal No. 34 of 1912, Decided on 31st January 1917, from original decree of Addl. Sub-Judge, Khulna, D/- 26th January 1912.

(a) Contract Act (1872), S. 27—Contract in restraint of trade is void—"Goodwill" illustrated.

Defendant, who used to carry on business as a carrier of passengers by gahana boats between certain stations, agreed to pay to the plaintiff a large sum in consideration of the latter abstaining from carrying on a rival boat business along the same route for a period of three years, and also in consideration of his transferring certain leasehold rights of certain ghats in connexion with the boat business:

Held: (1) that as the main consideration for the contract was the restraint of the plaintiff's rival business in gahana boats, the contract was void under S. 27; (2) that as it was impossible to sever the legal part of the contract from the illegal part, the whole contract was unenforceable; but the defendant should nevertheless pay for the advantages he actually received under the contract in the matter of the leasehold rights; (3) that the contract did not fall within exception 1 to S. 27 as the plaintiff had no goodwill in his rival business. Good-will defined.

[P 551 C 1]

(b) Contract — Liability—Illiterate person.

Per *Chatterjee, J.*—The contents of the written contract not having been fully explained to or understood by the defendant, an illiterate man, it was not binding upon him.

[P 547 C 1]

Bepin Behary Ghose and *Prokash Chandra Mojumdar*—for Appellant.

D. N. Chakrabutty, Jadu Nath Kanjilal and *Jogendra Kumar Dey*—for Respondent.

Chatterjee, J. — I am not quite satisfied that the parties were quite ad idem in respect of the kistbandi agreement. The learned Subordinate Judge says the defendant was in a destitute condition and I find it impossible to believe that he agreed to pay Rs. 1,200 within a fortnight, knowing that if he failed to do so the plaintiff would not only be entitled to realize the whole consideration at once but to resume the working of the gahana boat line. The learned vakil for the respondent wanted to show that about two years after the contract he had a deposit of Rs. 1,500 in the Bank. Even if this could be shown at this stage of the case from a

document outside the record, I do not think it would throw much light on the situation at the time of the kistbandi. On the other hand, this might be due to savings thereafter made from the boat business. I cannot, therefore, believe that the contents of the document were fully explained to or understood by him. The evidence is that the plaintiff read the document audibly. That is quite consistent with the defendant not following the intricacies introduced into the document. I think the defendant placed too much confidence in the Mooktear Ramlal, who played him false. If he was so friendly as he is said to have been, it was his duty to safeguard his interest as well as that of the plaintiff, his rich client. The document shows he did nothing of the kind. It is probable that the real truth has been concealed by both parties and evidence has been adduced by each to prove the case that he made in the pleadings; but taking the facts as they appear on the evidence, I am not satisfied that the defendant fully understood the import and effect of the agreement that he placed his signature on. As regards the goodwill, I agree with my learned colleague that there was none and the main part of the consideration was a myth. As to the abstention of the plaintiff from carrying on the particular business, that could not form a legal consideration.

The next matter that must be considered is that the defendant has derived some advantage under this void agreement and under S. 65, Contract Act, he ought to make compensation for the same. This advantage is the use of the leases taken by the plaintiff, and the defendant should in equity pay to the plaintiff the amounts he paid in respect of the ghats. Now what did the plaintiff pay for the ghat? It is difficult on the evidence to make out the exact amount, but on the whole I think Rs. 1,000 will fully serve the ends of justice. The decree will be for Rs. 1,000 in favour of the plaintiff, with proportionate costs to the parties according to their success and failure in both Courts. The decree is modified accordingly.

Walmsley, J.—This appeal is preferred by Parashulla Mullick, the defendant. He used to carry on business as a carrier of passengers by gahana boat between Bagharhat and Khulna, calling en route at Panighat, Jatrapur, Fakirhat, Mausha and Alaipur. In the autumn of 1316, there was a cyclone which caused him considerable loss, and shortly afterwards the plaintiff, Chandra Kanta Das, set up a rival business. The competition interfered very seriously with Parashulla's profits, and the two rivals quarrelled about the boat business and about other subjects, until in Jaishta 1317 B, S, an arrangement was made between them. By this arrangement Parashulla agreed to buy off the plaintiff for a sum of Rpuees 5,400, and the plaintiff agreed to upgive to Parashulla such settlements as he had obtained in regard to ghats used for embarking and disembarking passengers. The arrangement also embraced all, or most, of the other disputes between the parties but it is not necessary to go into further details. It is common ground that the rivalry in the boat business was adjusted in this way. Lawyers advised the execution of several documents, two of which relate to the boat business. One of them is a kabala executed by the plaintiff in favour of the defendant, and other is a kistbandi bond executed by the defendant by which he promised to pay the plaintiff a sum of Rs. 5,400 by instalments. These two documents were executed on 13 Jaishta 1317, (27th May 1910), and registered on the following day. The instalments set out in the kistbandi bond are Rs. 1,000 on 25 Jaishta 1317 and Rs. 200 on 31 Jaishta 1317, and then an instalment every month until Kartik 1320. The defendant did not pay any instalment, and on 22nd June 1910, the plaintiff instituted the present suit for the recovery of the whole sum due under the bond, in accordance with the stipulation that in default of payment of any one kist the whole sum outstanding should become due.

The defendant, in his written statement, admitted most of the allegations in the plaint, in particular he admitted execution of the kistbandi bond, and he admitted that the sum to be paid by him was Rs. 5,400; but he said that he did not agree to pay the sum in the instalments set out in the bond, but by daily instalments of Rs. 4-8-0, extending over a term of 3½ years: he attributed the insertion of the instalments as set out in the bond to fraud on the part of the plaintiff and he alleged that plaintiff had not transferred to him all th rights which

he agreed to transfer. The learned Subordinate Judge decided that the kistbandi bond as drawn up correctly represented the agreement between the parties, and, subject to one small deduction, he decreed the suit in the plaintiff's favour. The defendant admits that he agreed to pay Rs. 5,400 to the plaintiff, that the payments were to be extended over a period of 3½ years, and that he executed the bond. It is apparent therefore that the onus is on him to show that the bond as executed does not embody the arrangement to which he gave his consent. The learned vakil who appeared for the appellant gave us a highly coloured picture of the difference between the two parties; he painted the plaintiff as a scoundrel scheming to bring the defendant to his knees, and the defendant as too simple to suspect treachery. It is not necessary to deal with all the quarrels which have been going on between the parties, or to consider whether plaintiff has been a scrupulous enemy or not; it is sufficient to say that the defendant's experience in the civil and criminal Courts has been quite enough to teach him wisdom, even if he had no natural shrewdness to help him. There is however one point in favour of the defendant, and that is that he is illiterate, at least he can do no more than scrawl his name.

The arguments set out by the learned vakils are as follows: (1) The kabala and kistbandi were drawn up in terms to which the defendant did not consent; they were not read over to him, and therefore there was no real execution of the bond by him. (2) The plaintiff made false representations that he had rights as lessee to various ghats mentioned in the kabala, not having such rights, and that the consideration, therefore failed. (3) If it be said that the consideration for the bond was the plaintiff undertaking not to carry on a rival boat business, then the agreement was contrary to public policy and therefore void. Looked at from another aspect, the first argument was stated in these terms: there was no agreement for two instalments aggregating Rs. 1,200 to be paid within the month of jaishta, and no agreement that default regarding any one instalment would render the whole sum due, and therefore the suit is premature.

I will deal first with the question of the instalments by which the sum of Rs. 5,400 was to be paid. The defendant's case is that he agreed to pay Rs. 4-8-0 a day, and that he executed the bond because he was induced to believe that this condition had been inserted in it. He says that at the Registration Office he refused to sign the bond because it had not been read over to him, but plaintiff pressed him to sign assuring him that the bond was in accordance with the draft, and telling him that he could verify the fact later. Again he says that he demurred to authorizing the plaintiff to take the bond away from the office after registration, but gave way once more. He does not say, however, that he took any further steps to find out what had been actually written in the bond which he had executed. This evidence, taken by itself, is singular, but when it is compared with that given by the pleader Nakuleswar Bose (P. W. 17) it becomes absolutely incredible. This pleader says that he saw a draft and penned through some words. In cross-examination he says that the words related to a kist of Rs. 1,000 to be paid in Asar, that defendant on hearing the condition said that he could not possibly pay such a large lump sum and that thereupon he (the pleader) crossed out the words about the instalment of Rs. 1,000 and wrote instead that defendant would pay Rs. 4-8-0, a day. If this pleader's evidence is true, the defendant was put on his guard upon the subject, and it is inconceivable that he should execute the bond without being satisfied as to its contents. If it is false—and there is abundant reason for thinking that it is false—the mere fact that a witness is called to give such evidence throws the greatest suspicion upon defendant's story.

At least we may extract from it, whether it be true or false, an admission that on plaintiff's side, to the knowledge of the defendant, there was a desire that there should be a substantial instalment payable at one early date. Positive evidence is given to this effect by the Muktear Ram Lal Sar, and the pleader Ashutosh Biswas, and the latter is corroborated by his rough notes and both by the draft kistbandi. It has been urged that these witnesses have been in league with the plaintiff to mislead the defendant, and that Ram Lal Sar in particular has played the part of a false friend. I feel, however, unable to accept this view.

I do not attach any weight to the dharmabap relationship mentioned by the learned Subordinate Judge; but when a pleader and a muktear are agreed upon a simple question of fact, I think there should be strong reasons given for holding that their evidence is untrue. As I have already said they are supported by the pleader's rough notes, by the draft kistbandi, and by Nakuleswar's statement that he saw an instalment of Rs. 1,000 in the draft bond. Further, we have the Sub-Registrar called by defendant, saying that it was agreed between the parties that the defendant would pay a big sum to the plaitniff within Jaishta of the year of registration. Against this evidence the defendant has very little to offer, and I think the learned Subordinate Judge is right in holding that the witnesses Durga Charan Nag and Kailash Chandra Ghose are not entitled to much weight. Apart from the direct evidence there is the matter of probability to be considered. In the first place it seems extremely unlikely that a creditor would agree to have a large sum like Rs. 5,400, paid in twelve hundred daily instalments, more particularly as the defendant's case is that the bond was not to be accompanied with any security or by any stipulation that for one default—or even several defaults—the whole amount outstanding should become due.

Secondly, the plaintiff had undoubtedly incurred some expense in running the boat business, and it is probable that he would want immediate reimbursement. It may be untrue that he paid a full thousand rupees in cash for the Bagarhat ghats, but he must have paid a considerable sum, for the landlords would be certain to make profit out of the rivalry between plaintiff and defendant. The latter says that he paid them Rs. 250 for the year 1316. So there is nothing improbable in plaintiff's statement that he had paid, if not Rs. 1,000 in cash, at the rate of Rs. 600 for three years. Similarly in regard to the Khulna ghats, the Municipal clerk proves that Hari Nath Das paid as much as Rs. 525 for the period October 1909 to September 1910. These items alone, without taking into consideration the expense of hiring boats and crews, represent an outlay of nearly a thousand rupees. It was natural for the plaintiff to want prompt repayment, and he was in a position to dictate terms. It must be remembered that on defendant's own showing, the plaintiff's first proposal was that the whole sum should be paid in cash. Probability and direct evidence point to the conclusion that in the end the parties agreed on a middle course, that is, substantial payments in the first six months, especially in the first month, followed by easy instalments, and this is the arrangement set out in the bond.

I find, therefore, that the learned Subordinate Judge is right in his view that there is nothing fraudulent about the execution of the kistbandi bond. This finding disposes of the learned vakil's first argument in both its forms. Now, I come to the argument that the consideration for the kabala failed because the plaintiff made false representations as to his rights as lessee. In connexion with this argument much is made of the clause in the kabala which begins with the words: "If there be any mistake or falsity", but the original word, translated, falsity, does not convey the idea of wilful deceit, and the unhappy translation must not be allowed to prejudice the plaintiff. The kabala purports to convey the plaintiff's rights as lessee in (1) the ghats at Khulna, (2) the ghat at Morrelganj, (3) the ghats at Alaipur and Mausha and (4) the ghats at Bagirhat. It also purported to sell the goodwill of the boat business.

We are not concerned with the ghats at Morrelganj. At the two terminal ghats the plaintiff proposed to have a right to collect tolls from other boats as well as the sight to use the ghats for his own passengers. So far as the gahana business is concerned, it seems clear that since the agreement was reached the defendant has been able to carry on his business without any molestation or inconvenience. See, for example, the evidence of defendant's witness Biseshwar Chakravarti (D. W. 5). With regard to the Bagarhat ghats and the right to collect tolls, defendant's own witnesses show that he is collecting some tolls. I refer to the Sub-Registrar and the pleader Nukuleshwar Babu. If these are not all the tolls to which the defendant is entitled under the kabala, the defendant is at fault for leaving the evidence so obscure, and I consider that the plaintiff did put the defendant in possession of all the rights that he conveyed in the ghats at Bagarhat.

The intermediate ghats are Panighat, Jatrapur, Barnipara, Fakirhat, Mausha, and Alaipur. In the kabala the words are: "I have been possessing the river ghats at Alaipur and Mausha," and in the schedule there are mentioned one settlement at the rate of Rs. 2 per annum apparently in respect of Jatrapur and another at the rate of Rs 3.4.0 per annum apparently in respect of Fakirhat. Evidence has been given to the effect that these settlements were really made. It is not necessary to discuss that evidence, because defendant's witness Biseshwar Chakravarti (D. W 5) said, speaking of a trip which he made in Asar 1317: "The ghats of the defendant lay there in the same condition as they had been before." This remark refers to all the ghats first mentioned. The defendant, however, called a clerk in the Public Works Department to prove that the ghats at Alaipur, Mausha, Fakirhat and Jatrapur are under the Public Works Department. In view of the remark just quoted it is clear that the defendant is using the ghats whether they are under the Public Works Department or not; but it seems probable that there are other ghats, for questions were not put to the plaintiff about the lessees under the Public Works Department, and defendant does not say how he came to use the ghats before 1316 without taking a lease from the Department.

There remains the Khulna ghat for consideration. The complaint is that the sublease to Mathur Bajadar prevents the defendant from realising the tolls. Inasmuch as this man Mathur has held a sub-lease under successive lessees including the defendant, it seems impossible that defendant did not know of the sublease, but be that as it may, the learned Subordinate Judge has taken the matter into consideration and deducted from the plaintiff's claim a sum equal to the rent payable by Mathura from Jaishta 13 to the end of Aswin.

On these findings as to the leases held by the plaintiff, and the extent to which the defendant was put in possession, I hold that there was real consideration for the contract, and that the defendant's assent was not procured by any fraud or misrepresentation. Next I come to the effect of S.27, Contract Act, on the agreement between the parties:

"Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void."

Clearly a gahana boat is a lawful business, clearly the plaintiff in the kabala binds himself not to exercise the business for a period of three years. The agreements must therefore be to that extent void," unless it comes under one of the three exceptions mentioned in the section. The first exception is the only one that can be applicable and the learned Subordinate Judge has held that because the kabala purports to sell the good-will of the business that exception does apply. It is true that the good-will is mentioned in the kabala, but was there any good-will in such a business? A distinguished Judge has said that good-will is very easy to describe, very difficult to define. An attempt at definition is to be found in the case of *Trego* v. *Hunt* (1):

"Every positive advantage, . . . as contrasted with the negative advantage of the late partner not carrying on the business himself that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. . . . It is the connexion thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the good-will of a business."

Now, if we take this description and consider whether there was anything connected with plaintiff's business which answers to any part of it, I think we must say that there was nothing. The plaintiff had been running a rival business for a few months only, there is nothing to suggest that he had acquired a name for punctuality, safety or convenience; the only advantage that he had over the defendant was that he had secured the terminal ghats, and could therefore embark and disembark passengers at more central points. This advantage does not, in my opinion, constitute good-will. Another way of considering the matter is to ask what was the advantage for which the defendant was willing to pay Rs. 5,400. The kabala did not convey to him any stock in trade for both parties hired their boats, and the ghats had no fixtures. The leases did not cost as much as Rs. 1,000 a year, even with the panshighat rights included. So it is clear that the defendant was paying for something more than assignment of the leases. Now what he wanted was his old monopoly,

1. (1896) A C 7=65 L J Ch 1.

and I think that the chief item in the consideration for the sum of Rs. 5,400 was the plaintiff's undertaking to abstain from carrying on a boat business for a period of three years. This restraining covenant was the vital point in the agreement, and the reference to good-will is merely the pleader's attempt to circumvent the provisions of S. 27, Contract Act. I hold that the plaintiff has failed to prove that this agreement is allowed by the first exception to S. 27, and that it must be regarded as void "to that extent." The meaning of the last three words I take to be that if the agreement can be broken up into parts, it will be valid in respect of those parts which are not vitiated as being in restraint of trade. In this case however it is impossible to resolve the agreement into its component parts and to say that so much of the sum of Rupees 5,400 was for assignment of the leases, and the balance for the promise to abstain from rivalry. The result is that the whole agreement must be regarded as void. The defendant, however, cannot escape all liability on the ground that the agreement is found to be void. The case is clearly one in which he has received advantage under the agreement, that is, in the matter of the leases. I agree with my learned brother that the compensation that should be paid for this advantage may be fixed at Rs. 1,000, and in consequence that the appeal should be allowed in part.

V.B./R.K. *Appeal party allowed.*

A. I. R. 1918 Calcutta 551

BEACHCROFT AND WALMSLEY, JJ.

Jagannath Mondal and *others*—Judgment-debtors—Petitioners.

v.

Jaladhar Mondal — Decree-holder—Opposite Party.

Civil Rule Nisi No. 858 of 1916, Decided on 26th February 1917, against order of Dist. Judge, Khulna, in Misc. Appeal No. 41 of 1916.

Civil P. C. (1908), S. 47 and O. 47, R. 1—Application falling under S. 47 though described to be under O. 47, R. 1 must be treated as one under S. 47—Appeal held competent.

On an application purporting to be made by the decree-holder certifying satisfaction of the decretal amount and asking for the dismissal of the execution case, the Munsif dismissed the case. Thereafter the decree-holder put in two other petitions questioning the genuineness of the application certifying satisfaction of the decree, and asking that the order passed thereon should be cancelled and the execution case allowed to proceed. The Munsif on an inquiry dismissed both the petitions on the finding that the decretal money had really been paid:

Held: that although the words "O. 47, R. 1" were to be found in the decree holder's petitions and in the order sheet, yet having regard to their substance, they must be treated as application under S. 47, Civil P. C., so that an appeal did lie to the District Judge from the Munsif's order of dismissal. [P 552 C 1]

Manmatha Nath Mukerjee and *Lal Mohan Ghose*—for Petitioners.

Mohendra Nath Roy and *Banku Behari Mullick Chowdhury*—for Opposite Party.

Walmsley, J.—The opposite party obtained a rent decree against the petitioners, and applied for execution by sale of the holding. The holding was advertised for sale on 19th July 1915. On 16th July 1915, however, a petition was filed purporting to be made by the decree-holder, certifying that he had received payment in full and asking for the execution case to be dismissed. On 19th July 1915, the learned Munsif dismissed the case on full satisfaction. On 24th July 1915, the decree holder put in a petition saying that he had not received the money, that the certificate was a forgery, and asking for sanction to be granted under S. 195, Criminal P. C., or a prosecution ordered under S. 476, Criminal P. C. Again on 6th August 1915, the decree-holder put in two petitions asking that the order passed on 19th July should be cancelled and that the execution case should be allowed to proceed. On these petitions the Court held an inquiry into the circumstances, and on 19th February 1916, both petitions were dismissed, on the finding that the money had really been paid. The decree-holder appealed, and the learned District Judge reversed the finding of the Munsif and ordered execution to proceed.

The judgment-debtors obtained this Rule calling on the decree-holder to show cause why the order of the District Judge should not be set aside. On behalf of the petitioners it is urged that the applications of 6th August 1915, must have been made under O. 47 and that no appeal lay against an order rejecting them. It is also said that the only remedies open to the decree-holder were an application for review of judgment, and an appeal against the order dismissing the application for execution on full satisfaction. The decree-

holder did not take the latter alternative and I cannot understand how it would have been possible for him to appeal against an order which prima facie was made with his full consent, with no material on the record by which he could challenge its correctness. It seems to me clear that it was his duty to ask the Court of first instance for an inquiry about the genuineness of the petition filed on 15th July, and that is the step he took. No doubt the words "O. 47, R. 1" are to be found in his application and in the order-sheet, but that is of no moment. We have to look at the substance of his applications. Now he did not allege that the Munsif had made a mistake, he did not offer new and important evidence to be considered with the other materials on which the order was passed, but he went to the root of the matter and attacked the petition of satisfaction which formed the sole basis of the order. I fail to see how an application of this nature can be regarded as an application for a review of judgment. It is one which would have taken the form of a suit but for the provisions of S. 47, Civil P. C., and I regard it as an application under that section. It follows that an appeal did lie to the District Judge. The learned vakil has conceded very properly that having regard to the findings of fact recorded by the learned Judge he cannot press the petitions on the merits. The rule therefore is discharged with costs, five gold mohurs.

Beachcroft, J.—I agree.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 552 (1)

FLETCHER AND NEWBOULD, JJ.

Jatindra Nath Bose and *others*—Defendants—Appellants.

v.

Mahomed Mallik and *others*—Plaintiffs Respondents.

Appeal No. 2648 of 1915, Decided on 7th June 1917, from appellate decree of Addl. Sub-Judge, Nadia, D/- 12th July 1915.

Civil P. C. (1908), S. 11—Decision in rent suit that there is no relationship of landlord and tenant—Suit for khas possession by landlord is barred by res judicata.

In a suit for rent in which the only issue was whether the relationship of landlord and tenant subsisted between the parties, it was found that the plaintiff had failed to prove such relationship. Thereupon the plaintiff brought a suit to recover possession of the land from the defendant on the allegation that the defendant having in the previous rent suit denied the relationship of landlord and tenant, the plaintiff was entitled to recover khas possession:

Held: that the Court was precluded by the estoppel created by the dicision in the rent suit, from finding that the plaintiff was the landlord, so that the plaintiff's suit for khas possession must fail. [P 552 C 2]

Dwarkanath Mitra—for Appellants.

Judgment.—This is an appeal against a decision of the learned Additional Subordinate Judge of Nadia, dated the 12th July 1915, affirming a decision of the Munsif of Ranaghat. The plaintiffs brought a suit to recover possession from the defendants of 1½ bighas of land, alleging that they and the pro forma defendants were the landlords and that as in a previous rent suit the defendants had denied the fact that the plaintiffs were the landlords, the plaintiffs were entitled to recover possession. In this case the learned Subordinate Judge has found that the plaintiffs were the landlords. Against that Dr. Dwarka Nath Mitra says that in the former suit in which the plaintiffs sued for rent the defendants raised one and only one issue, namely, whether the relationship of landlord and tenant existed between the plaintiffs and the defendants. It was found in that case that the plaintiffs had failed to prove such relationship. It is said, therefore, that it was not competent to the learned Subordinate Judge to find in this case that the plaintiffs were the landlords, because he was precluded from doing so by the estoppel created by the decision in the former rent suit. That statement seems to be well founded. The present case is on all fours with the decision of this Court in the case of *Ekabar Sheikh* v. *Hara Bewa* (1). We follow that decision which is binding on us, and reverse the decision of the Lower Courts and direct that the plaintiff's suit be dismissed with costs in all the Courts.

V.B./R.K. *Appeal dismissed.*

1. (1910) 8 I C 660.

A. I. R. 1918 Calcutta 552 (2)

CHATTERJEA AND RICHARDSON, JJ.

Abdul Rashid Khan—Appellant.

v.

Safar Ali and *others*—Respondents.

Appeal No. 1154 of 1915, Decided on 19th July 1917, from the appellate decree of Sub-Judge, Noakhali, D/- 24th February 1915.

(a) Transfer of Property Act (1882), S. 112.—Joining of claim for further rent in suit for ejectment based on stipulation of right to re-enter on default of rent amounts to waiver of forfeiture.

A suit for ejectment, on the ground that under an express convenant in the lease the tenant is liable to be ejected for default in payment of rent, must fail where the plaintiff in the same suit also claims rent for period subsequent to the default in payment of rent which gave him the cause of action for ejectment, as by making such a claim he must be taken to have waived the forfeiture under S. 112 of the Transfer of Property Act. [P 553 C 1]

(b) ContractAct (1872), S74—6¼ Per Cent P. M. as rate of interest on arrears of rent held not penal.

A high rate of interest (6¼ per cent per mensem) payable under a stipulation on arrears of rent of a tenancy not governed by the Bengal Tenancy Act cannot, in the absence of special circumstances, be regarded as penal. [P 553 C 2]

Surendra Nath Guha—for Appellant.

Ram Dayal De and *Biraj Mohan Majumdar*—for Respondents.

Judgment.—This appeal arises out of a suit for ejectment of the defendants from the disputed land, on the ground that the defendants were liable to be ejected under an express convenant in the kabuliyat executed by their predecessor-in-interest, one Amir-ud-din, on the 16th Falgun 1296. It was stipulated in the kabuliyat that the tenant would be liable to ejectment if he failed to pay rent "through wickedness". The learned Subordinate Judge says that there is "no allegation of any wickedness" on the part of the defendant in the plaint. We think that this claim for ejectment must fail on the simple ground that the plaintiff bases his cause of action from 1314 and claims rent for the years 1314 to 1319, *i. e.*, for six years. By claiming rent subsequent to the default in payment of rent which, according to the plaintiff, gave him cause of action for ejectment, the plaintiff must be taken to have waived the forfeiture under S. 112 of the Transfer of Property Act. The appeal must accordingly fail and is dismissed. The respondent has preferred a cross-objection. It is contended that the defendant had not purchased the land covered by the kabuliyat which was executed by Amiruddin in favour of Shona Miah and that it is not found that the plaintiff was in possession continuously for twelve years by receipt of rent from the defendant. The findings, however, on the point are conclusive and we are of opinion that the Court below was right in holding that the relationship of landlord and tenant between the plaintiff and the defendant was made out. The only other contention on behalf of the respondent relates to the question of interest payable on the arrears of rent. The land was described as homestead land in the judgment of the Courts below and is situated in a Municipal town. The Court below has not found any special circumstances upon which we can hold that the interest at the rate of 6¼ per cent per mensem was penal. Under the circumstances we are unable to interfere with the decision of the Court below on the question of interest.

It is contended before us that the land was originally orchard land and that the incidents of the tenancy are covered by the provisions of the Bengal Tenancy Act. This question does not appear to have been raised in the Courts below. We are unable, therefore, to go into it so far as the present case is concerned. The questions as to the character of the land and the nature of the tenancy are, however, left open. The cross-objection is disallowed. We make no order as to costs either in the appeal or in the cross objection.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 553

CHATTERJEA AND RICHARDSON, JJ.

Hamdu Mia and *others*—Appellants.

v.

Ramdhan Dhar and *others*—Respondents.

Appeal No. 1745 of 1915, Decided on 28th August 1917, from appellate decree of Addl. Dist. Judge, Chittagong, D/- 18th April 1913.

(a) Bengal Land Revenue Sales Act (1859), S. 53—Proprietor holding estate benami, making default in payment of revenue and purchasing it when sold—Purchase is subject to all encumbrances.

Where the proprietor of an estate holding benami in the name of another makes default in the payment of revenue and purchases the estate himself when it is sold, he is in the position of a proprietor who has purchased his own estate and under S. 53 his purchase is subject to all the encumbrances existing at the time of the sale. [P 554 C 1]

(b) Bengal Land Revenue Sales Act (1859), S. 53—Adverse possession is encumbrance within S. 53.

Adverse possession is an encumbrance within the meaning of S. 53, and the proprietor of an estate who has lost some lands of his estate by adverse possession for the statutory period can not by falling into arrears of revenue and purchasing the estate at the revenue sale get rid of such adverse possession. [P 554 C 2]

Ram Chandra Mozoomdar and *Jogesh-Chandra Bose*—for Appellants.

Jagesh Chandra Roy, *D. L. Kastgir* and *Tarkeswar Nath Mitter*—for Respondents.

Judgment.—The plaintiff-respondent, as purchaser of an entire estate at a sale held under Act 11 of 1859 in the year 1909, sued to recover possession of the lands in dispute, which formed part of that estate, from the defendants who have been in possession of the lands for more than 12 years from before the date of the sale. It is found that the plaintiff was the proprietor of the estate at the time when the above sale took place, having previously purchased the same from the former owners in the year 1908 in the benami of one Baroda Charan. He defaulted to pay the Government revenue and himself purchased the estate when it was sold in 1909 The plaintiff thus was in the position of a proprietor who had purchased his own estate. The case, therefore, clearly falls under S. 53 of Act 11 of 1859, and his purchase of the estate was "subject to all its incumbrances existing at the time of the sale." The defendants having been in adverse possession for more than 12 years before the sale, the question is whether such adverse possession is an incumbrance within the meaning of S. 53 of the Act. Now it has been held since the days of the Sudder Dewani Adawlat that "adverse possession" is an "incumbrance" within the meaning of S. 37 of the Act. It is contended, however, on behalf of the plaintiff on the authority of certain recent cases *Kumar Kalanund Singh* v. *Syed Sarafat Hussein* (1), *Rahim-ud-din* v. *Bhabangana Debya* (2), *Bilas Chandra* v. *Akshay Kumar Das* (3) that adverse possession against the defaulter, whether for the statutory period or for a lesser period, is not an incumbrance. It is unnecessary to consider the correctness of these decisions in the present case, as those cases arose under S. 54 of the Act relating to the purchase of a share in an estate. Different considerations arise with regard to the purchase of a share of an estate and it has been held in several cases that at a sale of a share under S. 13 of the Act, it is not merely the rights of the recorded proprietor that pass, but the share itself.

As stated above, adverse possession has always been held to be an incumbrance within the meaning of S. 37, and we do not see sufficient reasons for holding that the words have not the same meaning in S. 53. If the respondents' contention is correct, the proprietor of an estate, who has lost some lands of his estate by adverse possession for the statutory period, has only to fall into arrears of revenue and purchase the estate in order to get rid of such adverse possession, although the section (S. 53) expressly lays down that a purchase by the defaulting proprietor himself shall be subject to all incumbrances existing at the date of the sale. It is said that the position of the defendants by virtue of their adverse possession of the lands for 12 years was that of an unrecorded cosharer of the estate, and that their interest passed by the sale at which the plaintiff purchased. But the defendants never held the lands as part of the estate purchased by the plaintiff. They held them as part of another estate and although the lands are found to be part of the plaintiff's estate, the right acquired by defendants to the land must be treated as an incumbrance subject to which the plaintiff purchased the estate. We are not pressed by the contrary view taken in some of the cases, as they were decided with reference to the provisions of S. 54 of the Act. The appeal is accordingly allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance restored with costs here and in the Court below.

V.B./R.K. *Appeal allowed.*

1. (1908) 12 C W N 528.
2. (1909) 1 I C 61.
3. (1912) 14 I C 219.

A. I. R. 1918 Calcutta 554

FLETCHER AND NEWBOULD, JJ.

Abinash Chandra Das and *others*—Appellants.

v.

Hem Kumari Dasi—Respondent.

Appeal No. 156 of 1915, decided on 1st March 1917, against the Order of Sub-J., Nadia, dated 18th March 1915.

(a) Civil P. C. (1908), Sch. 2, Para. 16—Voluntary reference in pending suit—Valid award on, is binding and Court cannot interfere.

A valid award on a voluntary reference in a pending suit is binding and conclusive on all the parties and the Court is not authorised to interfere with any portion of it. [P 555 C 2]

(b) Civil P. C. (1908), S. 148—Award fixing time for payment—Court cannot extend it.

Where in a suit, the matter in dispute is referred to arbitration by agreement of the parties

and an award is duly made by which one of the parties is directed to pay a certain sum to the other party within a specified time and a decree is made thereon, the Court has no power to extend the time fixed by the award for the payment, even on the ground that the case is a hard one. [P 555 C 2]

Manmatha Nath Roy and Upendra Narayan Bagchi—for Appellants.

Hara Prasad Chatterji—for Respondent.

Fletcher, J.—This is an appeal from an order of the learned Subordinate Judge of Nadia, dated the 18th March 1915. The appeal is preferred against an order dismissing an application for execution. The facts are as follows:—Defendant 2 in the month of January 1901 mortgaged a certain property to the plaintiff to secure the sum of Rs. 4,750. A suit was brought on the mortgage and it was decreed for the sum of Rs. 7,000. In execution of that decree the property was put up for sale and purchased by the plaintiff, the mortgagee, for the sum of Rs. 5,800. On attempting to take possession the plaintiff was resisted by the defendant No. 1. on the allegation that she (defendant No. 1) had a lease of the property after the date of the mortgage for a term of 11 years expiring in the year 1322 B. S. So her lease has now wholly expired. The plaintiff then instituted a suit for possession. By agreement between the parties the matter in dispute was referred to arbitration. The arbitrators duly made their award on the 3rd December 1913 and the award was as follows:—

"Our award on the issues considered together is that the plaintiff should get khas possession of the properties in suit by evicting the defendants, unless defendant 1 pays to the plaintiff Rs. 3,600 including costs and interest within six monts from this date."

No money was paid in accordance with the terms of the award within the six months allotted, which expired on the 3rd June 1914. On the 4th June 1914, the sum of Rs. 3,600 was, however, paid into Court. No payment having been mude up to the 3rd June 1914, on the 5th June 1914, the plaintiff applied for possession in accordance with the terms of the award, the award having been filed in Court in the ordinary way and a decree having been passed thereon. The learned Judge of the Court below held that he had power to extend the time fixed by the award, that the payment into Court on the 4th June 1914 of Rs. 3,600 was a good payment and that, therefore, defendant 1 had complied with the terms of the award. It may be noticed in passing that defendant 1 did not pay any portion of the Rs. 3,600 to be plaintiff within the time fixed by the award. The learned Judge held, however, that he had power to extend the period fixed by the award. In my opinion, he had not the power to do so. The statement in Russell on Arbitration which may be taken as a correct statement of the law on the point is to this effect. I read from the Chapter 1, page 307, of the Ninth Edition:

"A valid award on a voluntary reference is a final and conclusive judgment as between the parties respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal both as to fact and law"

and again in the same chapter at page 318 the learned author states.

"Upon an award for the payment of money at a particular time and place, the party who is to pay ought to come and tender the money at the time and place even if the other party be not there to receive it."

It is quite clear that the arbitrators were acting within their powers when they directed that the payment should be made within six months from the date of their award, and that being their judgment, it is binding and conclusive on all the parties and the Court is not authorized to interfere with that portion of the award any more than with any other portion of the award. The learned Judge clearly had no jurisdiction to extend the time on the ground that the case was a hard one. As to whether the case is a hard one, it may be doubted whether it is so. This lady, defendant 1 had a lease for 11 years which has now expired. The right of redemption that was given to her was clearly for the purpose of supporting that lease for 11 years, which she would be deprived of by the plaintiff having purchased in execution of a decree on his mortgage which was executed prior to her lease. But that reason has now ceased to exist. The lease has now come to an end and defendant 1 has enjoyed all the rights that she had under that lease which is not binding as against the plaintiff. I think that the learned Judge was wrong when he extended the time fixed by the award. We, therefore, allow the appeal, set aside the order of the Court below and in lieu thereof direct

that execution do issue on the terms of the award for the purpose of giving khas possession of the properties to the plaintiff. The contesting respondent must pay to the appellant his costs in this Court as well as in the Court below. We assess the hearing fee at three gold mohurs.

Newbould, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 556

FLETCHER AND RICHARDSON, JJ.

Kshirod Gobinda Chowdhury and *others* —Plaintiffs—Appellants.

v.

Rajendra Narain Shaha—Defendant —Respondent.

Appeals Nos. 2955, 3709 and 3710 of 1914, Decided on 12th January 1917, from appellate decrees of Sub-Judge, 1st Court, Pabna and Bogra, D/- 23rd June 1914.

(a) Bengal Tenancy Act (1885), S. 106—Power of civil Court—Competency of civil Court to which case is transferred would be ascertained by Civil P. C.—Appeal from decision of Munsif would therefore lie to subordinate Judge.

On the transfer of a suit by a Revenue Officer under S. 106, Ben. Ten. Act, to a civil Court, the competency of the civil Court would be ascertained under the Civil Procedure Code, and the attributes of the competency of that civil Court, namely, that its decision would be subject to certain rights of appeal would follow from the transfer. Therefore, an appeal from the decision of a Munsif in a suit so transferred can be heard by a Subordinate Judge. [P 556 C 2]

(b) Bengal Tenancy Act S. 50 (2)—Rate of rent—Rent paid at uniform rate for many years—No payment for nine years before suit—Presumption arises that tenant held at that rate since Permanent Settlement.

Where rents are paid at a uniform rate for many years and then there is no payment of rent for eight or nine years just before the suit, the presumption under S. 50 (2), arises that the tenant held at that rent from the time of the Permanent Settlement: 11 *W. R.* 432. *Disc.* and *Foll.* [P 557 C 1]

(c) Bengal Tenancy Act Ss. 4 (3) and 50 (2) —Raiyat presumed to have held at rent not changed since settlement comes within definition of raiyat holding at fixed rate in S. 4 (3).

A raiyat, who by virtue of the presumption under S. 50 (2) is deemed to have held at a rent which has not been changed from the time of the Permanent Settlement, comes within the definition of a raiyat holding at a fixed rate within the meaning of S. 4, sub-S. (3) (a). [P 557 C 2]

Sarat Chandra Roy Chowdhury and *Jogendra Narayan Mojumdar*—for Appellants.

Shib Chandra Palit and *Brojo Lal Chakraburty*—for Respondent.

Fletcher, J.—These are three appeals preferred by the plaintiffs against a decision of the learned Subordinate Judge of Pabna, dated 23rd June 1914, affirming the decision of the Munsif of the same place. The suits were originally instituted under the provisions of S. 106, Ben. Ten. Act. The Revenue Officer acting under proviso 1 of that section transferred the suits to a competent civil Court, the competent civil Court being the Court of the Munsif. From that decision, appeals were preferred to the lower appellate Court and from the decision of the lower appellate Court the plaintiffs have appealed to this Court. The first point that has been urged in these appeals is that the learned Subordinate Judge had no jurisdiction to hear the appeals from the decision of the Munsif in these cases. That seems to me to be an untenable argument. The cases having been transferred under S. 106, Ben. Ten. Act, to a competent civil Court, the competency of the civil Court would be ascertained under the Civil Procedure Code and the attributes of the competency of that civil Court, namely, that its decision would be subject to certain rights of appeal, would follow from the transfer. The argument that has been put forward in these appeals on behalf of the plaintiffs-appellants namely, that there could only be appeals in these cases to the Special Judge, because the suits were instituted before the Settlement Officer, has clearly no foundation on the wording of the Act.

The other point that has been raised is as to whether the tenants could claim the benefit of the presumption arising under S. 50, Ben. Ten. Act. These tenants who have been entered in the Record of Rights as tenants holding at a fixed rate of rent appear to have purchased their holdings from the former tenants. The suits which we are now considering in appeal were brought to rectify the entries that these tenants were holding at a fixed rate of rent. The Record of Rights, was, therefore, clearly in favour of the tenants and, when the matter came on for hearing in the lower appellate Court the Judge made this finding:

"The presumption of S. 103-B (5), is also in defendants' favour and the plaintiff has not been able to rebut it."

Clearly, therefore, the Judge found, amongst other things acting on the presumption under S. 103-B (5), that the

tenants were raiyats. Having found that they were raiyats, he was entitled to address himself to the terms of S. 50 (2). S. 50 (2) enacts that:

"If it is proved in any suit or other proceeding under this Act that either a tenure holder or raiyat and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement."

Now, what appears in these cases is that, for many years prior to the purchase by the defendants, rents had been paid by the tenants at a uniform rate and that, for the eight or nine years that have elapsed since the purchase by the defendants, no payment of rent has been made. The Judge, therefore, found that the rent had not been changed during the 20 years immediately before the institution of the suits. In my opinion, the Judge was clearly entitled to do so. The decision in the case of *Ahmed Ali* v. *Golam Guffoor* (1), is clearly to that effect and, I think, that the following remarks made by Dwarkanath Mitter, J., in the course of his judgment conclude the matter:

"We frequently find that, in dealing with this presumption, the Courts below, instead of addressing themselves to the real question at issue, namely, whether the rent has been changed or not, confine their inquiry to one point, namely, whether one uniform rate has been paid or not. There may be cases in which a raiyat might not have paid his rents for many years prior to the institution of the suit for enhancement; but if there has been no change in the rent payable by him, he is not to be deprived of the presumption which the law has expressly laid down for his benefit. The payment at a uniform rate is one mode of showing that the tenure was held at a uniform rate but what is only a particular mode of proceeding to the solution of a question ought not to be confounded with the question itself."

These remarks seem to me to apply just as much to the terms of the present Act as to the Act of 1859 and the veiw of the learned Judge whose opinion I have cited seems to me to be the only possible view to take upon the words of the section. That being so, the learned Subordinate Judge in these cases was clearly entitled to come to the conclusion as he did that, during the 20 years immediately before the institution of the suits, the defendants and their predecessor-in interest had held at a rent or rate of rent which had not been changed from the time of the Permanent Settlement. Having made that finding under sub-S. (2), of S. 50, by virtue of the presumption contained in sub-S. (1) of the same section, the tenants were deemed to have held at a rate of rent which had not been changed from the time of the Permanent Settlement and, as such, they were not liable to have their rents enhanced. That obviously comes within the definition of a raiyat holding at a fixed rate as mentioned in S. 4, sub S. (3) (a). A tenant so holding is a raiyat holding at a rate of rent that is fixed in perpetuity. That being so, the decision arrived at by the learned Judge of the Court of appeal below is, in my opinion, correct. The present appeals, therefore, fail and ought to be dismissed. The respondents in Appeals Nos. 3709 and 3710 are entitled to their costs in these appeals. There will be no order as to costs in Appeal No. 2955 as the respondent does not appear in that appeal.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1869) 11 W R 432.

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* A. I. R. 1918 Calcutta 557

CHATTERJEA AND NEWBOULD, JJ.

Srimati Syam Peary Dassya and *another*—Defendants—Appellants.

v.

Eastern Mortgage & Agency Co. Ltd., and *others*—Respondents.

Appeals Nos. 495 and 544 of 1914, and Nos. 268 and 275 of 1915, Decided on 3rd April 1917, from original decrees of Sub-Judge, First Court, Dacca, D/- 13th March 1915.

(a) Pardanashin lady—Execution of deed—Mere translating or communicating substance is not sufficient—English mortgage read out and explained and witnessed by reversionary heirs held binding on lady.

In considering the question whether there was intelligent execution of a deed by a pardanashin lady, the circumstance under which the transaction took place should be borne in mind. [P 561 C 1]

The mere translating the deed or communicating the substance thereof to the pardanashin lady is not sufficient. [P 562 C 1]

To make it binding upon her it must be shown that the deed was interpreted and explained to her. [P 562 C 1]

Where a deed of English mortgage written out in English was read out and explained to a pardanashin Hindu widow before she executed it in the presence of her own people, and the reversionary heirs witnessed the execution and were consenting parties to it:

Held: that the deed was binding upon the lady. [P 563 C 2]

(b) Mortgage—Condition restraining alienation does not prevent alienation subject to rights of mortgagee.

The clause restraining alienation of the mortgaged property, which is generally inserted in mortgage bonds in this country, does not prevent alienation subject to the rights of the mortgagee. [P 562 C 1]

(c) Hindu Law — Alienation — Widow — Consent by reversioners raises presumption of legal necessity.

The consent given by the reversioners to a mortgage executed by a Hindu widow raises a presumption of the existence of legal necessity, even where a sum of money is paid to one of the reversioners for obtaining his consent. [P 564 C 2]

(d) Decree—Construction—Charge can be created without specific description of property — Intention is necessary to create charge—T. P. Act, S. 100.

Where the operative part of an ekrarnama executed by a person in whose favour a lady released her claim to a certain share of a property, stated that the lady was to get an annuity from the said share and was entitled to recover it by suit from the share:

Held: that the annuity was made a charge upon the share, even though there was no specification of the property in the schedule attached to the ekrarnama, as the property was easily ascertainable without such schedule [P 565 C 1]

There is no reason why a general description of the property should be held not to constitute a charge if the description, though wide, is not uncertain. [P 566 C 1]

The question whether a charge was or was not created upon a certain property is one of intention. In equity no charge can be created unless there is an intent to charge. [P 566 C 2]

(e) Transfer of Property Act (4 of 1882), S. 58—Mortgage must be of specific immovable property.

Semble.—Difficulty might arise in the case of a mortgage from a general description of the mortgaged property, as a mortgage under S. 58, T. P. Act, must be of "specific immovable property." [P 566 C 2]

* (f) Contract Act (4 of 1872, S. 74—Penalty—Stipulation to pay interest at higher rate on default of payment of lower rate is penalty — Stipulation for certain rate of interest to be reduced if punctually paid—Stipulation for higher rate is not penalty.

A stipulation to pay interest at a higher rate on default of punctual payments of interest at a lower rate is a penalty. But in the converse case, i.e., where the stipulation is for a certain rate of interest which would be reduced to a lower rate, if punctually paid, the stipulation for the higher rate would not be treated as a penalty, although if the question were res integra there is no reason why the stipulation for the higher rate of interest should not be regarded as a penalty in both cases. [P 568 C 1]

(g) Contract Act (Amended by Act 6 of 1899), S. 74—Penalty and liquidated damages—Court has power to give relief of interest—Reasonable compensation for non payment of interest punctually can be awarded.

Section 74, Contract Act, does away with the distinction between penalty and liquidated damages, and under the section, as amended by Act 6 of 1899, the Court has the power to grant relief if the contract contains any stipulation by way of penalty, even where the contract was entered into before the amendment by Act 6 of 1899. [P 568 C 2]

Where a mortgage-deed stipulated for the payment of interest at nine and a half per cent, to be reduced to seven and a half per cent, on punctual payment, but the scheme for liquidation of the mortgage debt, which was a material part of the deed, showed that interest was calculated at seven and a half per cent only:

Held: that as it appeared from the construction of the mortgage-deed taken together with the scheme that the intention of the parties was that interest should be paid at seven and a half per cent, and on default at nine and a half per cent, the mortgagees could not recover interest at more than seven and a half per cent, but that they were entitled to reasonable compensation for non-payment of interest punctually—which compensation would be interest at seven and a half per cent, on the interest which was not punctually paid. [P 568 C 2]

(h) Civil P. C. (1882), O. 34, R. 1—Paramount title cannot be gone into.

In a suit upon a mortgage no question of title paramount to the mortgaged property should be gone into.

Rash Behary Ghose, Sarat Chandra Basak, Basanta Kumar Bose, Bipin Behary Ghose, Surendra Nath Ghosal, Suresh Chandra Das and *Satish Chandra Chowdhury*—for Appellants.

B. C. Mitter, Provash Chandra Mitter and *Ambica Pada Chowdhury*—for Respondents.

Judgment.—These appeals arise out of two suits instituted by the Eastern Mortgage & Agency Company, Limited, on the basis of two separate mortgages executed by one Priomoyee Dasi and Mohini Mohan Das respectively. Appeal No. 495 of 1914 is against the preliminary decree in the suit to enforce the mortgage executed by Priomoyee Dasi and Appeal No. 268 of 1915 is against the final decree in that suit, while Appeal No. 544 of 1914 is against the preliminary decree in the suit to enforce the mortgage executed by Mohini Mohan Das and Appeal No. 275 of 1915 is against the final decree in that suit. The mortgaged properties originally belonged to one Modusudan Das, who died in April 1865 leaving his widow Sham Peary Dasi defendant 1 in the suits and five sons Mohini Mohan, Radhika Mohan, Lal Mohan, Khetra Mohan and Shosi Mohan. Shosi Mohan died unmarried and intestate on 1st October 1865 and his one-fifth share thereupon devolved upon his mother Sham Peary. By an ekrar, dated 29th September 1877

Syam Peary gave up the share inherited by her in favour of her sons, the document being executed in favour of Mohini Mohan who was the executor of the estate, for natural affection and in consideration of his paying an annuity of Rs. 1,800 a year, Mohini Mohan also executing an ekrar in her favour. One of the questions raised in the case is whether the said annuity is a first charge upon the said share. Mohini Mohan, whose original share was increased to a four annas by the surrender by Syam Peary, subsequently acquired the four-annas share of Khetra Mohan so that his total share became 8 annas. The third brother, Lal Mohan, died on 18th December 1885 and his four-annas share was inherited by his widow, Priomoyee. The second brother Radhika Mohan had a four-annas share, but this litigation has nothing to do with that share.

On 22nd September 1890, Mohini Mohan executed a mortgage in favour of the Eastern Mortgage & Agency Company, Limited, (who may be conveniently referred to as the company) for Rupees 2,50,000, mortgaging his eight-annas share and executed a deed of management of the property in favour of Messrs. Garth & Weatherall, through whom the loan was raised. On 7th November 1890 Priomoyee executed a mortgage for Rs. 1,20,000 in favour of the said Company in respect of her four-annas share. The main provisions of the mortgage deed are that the deed is to be construed as an English mortgage as defined by the Transfer of Property Act, 1882, and the mortgagees shall have and exercise all the rights and remedies of an English mortgagee expressly including the power of sale, that the interest is to be at the rate of 9½ per cent. payable half yearly, but that on punctual payment interest would be charged at the rate of 7½ per cent., that until the mortgagees entered into possession the mortgaged properties shall be managed entirely (and without any interference whatever by the mortgagor) by Messrs. Garth & Weatherall so long as they fulfilled the terms and conditions, in the event of the death, resignation or dismissal of either of them by the survivor of them or failing such survivor by another duly qualified manager to be nominated by the mortgagees, the manager to have the fullest powers for the proper management and improvement, including the power to appoint and dismiss all servants and to make settlements with raiyats and farmers and to give leases and to institute and conduct and defend suits and will not be liable to dismissal except for misconduct or neglect of duty proved to the satisfaction of the mortgagees. The mortgagor shall not in any event execute any documents for the sale, mortgage or permanent lease or other alienation of any part of the mortgaged properties without the written concurrence of the mortgagees,

"it being the intention of the parties and being of the essence of the negotiation for the grant of the said loan that the mortgagor shall in no way interfere with the management of the mortgaged premises."

The managers in the first place were to pay the Government revenue and other outgoings, and in the second place to pay to the mortgagees interest at the times stated and in the third, to pay all proper costs and charges for management and realization of rents and auditing and scrutinizing by professional auditors chosen by the mortgagees (if they think necessary) and in the fourth place, to pay Rs. 2,400 to the mortgagor. The managers shall render to the mortgagee such accounts and information and such statements as to rent roll, etc., as may be called for by the mortgagees. If the manager for the time being fails to apply any parts of the rents and profits in the manner provided by the deed the mortgagees may appoint (upon such salary or remuneration and with such powers of managements as they shall think proper) such person as they in their absolute discretion shall think fit to be receiver, and the mortgagees at their absolute discretion may from time to time suspend, remove or dismiss any receiver and appoint another receiver in his place. The power to appoint a receiver shall not prejudice or affect any of the rights or remedies of the mortgagees as mortgagees and they shall not be liable for any loss or misapplication of the rent and profits by reason of any default, neglect or misappropriation of any manager or Receiver, and any Receiver appointed as aforesaid, shall be forthwith discharged by the mortgagees and the property shall be again managed as hereinbefore provided by a manager upon the mortgagor making good the deficiency on default in consequence of which the Receiver was appointed and

upon the mortgagor paying all the expenses incurred in connexion with the appointment and during the employment of the Receiver.

A scheme was prepared for the liquidation of the debts and set out in the schedule, according to which the principal and interest were to be paid off by the year 1317. It is unnecessary to state the provisions of the mortgage bond executed by Mohini Mohan Das except that they were similar. A deed of management was simultaneously executed by Priomoyee giving full powers of management to Messrs. Garth & Weatherall, the terms being similar to those of the deed of management executed by Mohini Mohan Das on 22nd September 1890. Subsequently, a deed of trust was executed by Priomoyee Dasi on 7th April 1897 in favour of Messrs. Garth & Weatherall for the better management of the properties. The property was accordingly managed by Messrs. Garth & Weatherall and for a few years payments were made by them of the principal and interest as provided in the scheme, then the payments became less. The sum of Rs. 2,400 which was to be paid to Priomoyee was paid until the year 1898 and was then stopped. On 10th February 1898 a deed of endowment was executed by Priomoyee in favour of a deity (Pryabullas) by which certain property was delicated to it and on 14th December 1902 by a second deed of endowment certain other properties were dedicated by her to the deity. She died on the next day, 15th December 1902.

Mr. Garth died on 16th June 1904 and on his death the property was managed by Mr. Weatherall. He left for England on 13th April 1908 and obtained a release on 26th November 1908 from Syam Peary Dasi in consideration of Mr. Weatherall undertaking to appoint one Mr. Lockhart as trustee in his place. Mr. Lockhart was allowed to manage her estate and he remained in possession as manager in succession to Mr. Weatherall. Priomoyee died on 15th December 1902 and Mohini Mohan died on 28th December 1896 and thereupon their shares devolved upon Syam Peary, the mother of Mohini Mohan. The suits upon the two mortgages were brought by the Company against Sham Peary as defendant 1 and Motilal Das, son of Khetra Mohun Das and who as the reversionary heir was joined as defendant 2. The suits were decreed by the Court below, and the defendants have appealed to this Court.

The questions raised in the appeal which arises out of the suit upon Priomoyee's mortgage are: 1st, whether there was intelligent execution of the mortgage deed and the deed of management by Priomoyee and had she independent advice in the matter: 2nd, was the deed of mortgage properly attested within the meaning of S. 59, T. P. Act: 3rd, whether there was legal necessity for Rs. 25,000 out of the one lac and twenty thousand raised upon the mortgage: 4th, whether the annuity of Rs. 1,800 a year in favour of Syam Peary is a charge upon the 4 annas share of the mortgaged properties: 5th, whether the stipulation to pay interest at 9 1/2 per cent, in case the interest was not paid punctually, is or is not a penalty: 6th, whether Messrs. Garth & Weatherall were the agents of the mortgagor or the mortgagees and whether it is competent to a mortgagee in this country to nominate and appoint an agent to manage the mortgaged premises for the purpose of relieving himself from the liability to which a mortgagee is subject when he enters into possession of the mortgaged properties. The last three questions are common to both the suits.

The first question for consideration therefore is whether there was intelligent execution of the mortgage deed and the deed of management by Priomoyee and had she independent advice. The mortgage-deed was executed in the presence of Kunja Behary Das, the maternal uncle of the lady and Mohini Mohan Das her brother-in-law, and it was read over and explained to her by Babu Iswar Chandra Ghose, pleader. The document bears an endorsement by Mohini Mohan Das and Khetra Mohan Das the reversioners, who gave their consent stating that the arrangement was necessary.

In considering these transactions the circumstances under which they took place should be borne in mind. Both Priomoyee and Mohini Mohan Das had debts due for very large amounts to Ruplal and Raghunath Das, the amount due by Priomoyee being Rs. 95,000 and that due by Mohini Mohan about Rs. 2,50,000. Mohini Mohan had borrowed Rs. 2,50,000 from the plaintiff company through Messrs. Garth & Weatherall only two

months before and he had to pay a commission of ten per cent. to those gentlemen for raising the loan. He had appointed them as managers of the estate which was mortgaged on certain terms. Ruplal and Raghunath Das had obtained a decree against Priyomoyee and proceedings in execution were pending. She tried to raise money elsewhere but did not succeed. It appears that under these circumstances her uncle Kunja Behary asked Mohini Babu to procure advance of money from the plaintiff company, and Mohini Babu said that he could induce the plaintiff Company to advance money on conditions on which he himself had borrowed money from the Company. Those conditions were, that 10 per cent. of the money borrowed from the Company was to be paid to Messrs. Garth and Weatherall who would manage the estate, the interest payable being 9½ per cent. to be reduced in case of punctual payment to 7½ per cent.

The evidence shows that Priyomoyee then called in her cousin Babu Debendra Nath Das(a pleader),her Dewan, Bhagawan Ghose and Kunja Babu, her maternal uncle and after consulting them settled to borrow money from the plaintiff Company on such conditions. Afterwards Messrs. Garth & Weatherall and Mohini Babu came to the house of Priyomoyee and she offered to borrow Rs. 1,20,000 from the plaintiff Company. Two drafts, one of the mortgage deed and the other of the deed of management, were then sent by Messers. Garth & Weatherall to the lady. They were practically on the same terms as those executed by Mohini Mohan, the only difference being that out of the balance of the profits of the property Rs. 2,400 a year were to be paid to the lady, whereas in the case of Mohini Mohan the balance of the profits was to be divided half and half between him and Messrs. Garth & Weatherall. Mohini Mohan appears to have been a leading banker at Dacca. He was an adult male and mixed in European and Indian societies. If he could not raise the loan on better terms, it is not to be expected that the lady could do so herself. It was under these circumstances that the documents were executed. The drafts were taken to Iswar Babu who was one of the leading pleaders of Dacca and was her legal adviser. He "touched up" the drafts, and interpreted them in Bengali to the lady. We do not think that the case of *Annoda Mohun Rai Chowdhri* v. *Bhuban Mohini Debi* (1) relied upon on behalf of the appellants applies to the present case. In that case the mortgage bond was read out fluently (i. e., without stopping anywhere) to a purdanashin lady and there was no evidence to show that the document was explained to her at all.

In the present case the drafts (which are in English) were interpreted to Priyomoyee by reading 2 to 4 lines at a time, and it took about 3 hours to do so. Ten or twelve days afterwards, the deeds were executed when they were again explained to her by giving out the substance of each of the deeds in Bengali. She was surrounded by her own people. There was, as already stated, her relation Babu Debendra Nath Das (a pleader, banker and zamindar), and Kunja Behary her maternal uncle was also there and these two gentlemen used to look after her affairs. Her old servant, Ganga Narain, was also there. Babu Iswar Chandra Ghose, a pleader of the family, advised her and explained the drafts and the deeds to her, and the reversionary heirs Mohini Mohan and Khetra Mohan were present at the execution of the deeds and were consenting parties to the arrangement. It is true that Babu Iswar Chandra was the pleader of Mr. Garth also, and it is urged that he was not a proper person to advise the lady. It would have been better had some other pleader been engaged for the purpose. But as we have said, the terms were almost the same as those of the deeds executed by the lady's brother-in-law Mohini Mohan. Then, again the lady had only a widow's interest in the estate. Mohini Mohan and Khetra Mohan were the reversionary heirs and it was certainly their interest to protect the estate which would ultimately come to them or to their heirs. They gave their consent and the consent is endorsed on the documents themselves. It is true the lady consented to the draft being adopted on the Pleader Iswar Babu assuring her that the deeds would not prejudice her. But having regard to the fact that her brother-in-law Mohini Mohan had already entered into a similar arrangement, and no better arrangement could be secured elsewhere, the pleader cannot be said to be wrong in saying what he said to the lady. The pleader told the lady that

1. (1901) 28 Cal 516=28 I A 71 (PC).

the properties would come back to her by 1317. That no doubt was the expectation of the parties, but it was nothing more than this, that according to the scheme the debt due would be paid off by 1317, there was no guarantee that she would get back the property if for any miscalculation or untoward circumstances, the debt was not paid off by 1317. We will presently refer to what the lady said in later documents on the point. It is contended, however, that there is nothing to show that the pleader Iswar Babu explained to Priyomoyee, a young pardanashin lady, the position in which she was placing herself, that she could not dismiss Messrs. Garth & Weatherall, however fraudulent their conduct might be, unless the mortgagees were satisfied of such misconduct, that the mortgagees would not be accountable for any loss which might be due to the default or misconduct of Messrs. Garth & Weatherall and that such loss would fall upon herself; there is also nothing to show that the attention of the lady was drawn to the clause in the mortgage bond that a receiver could be appointed with such powers of management as the mortgagees thought proper, nor is there anything to show that the pleador told her that the power of sale and the clause restraining alienation of the property by the mortgagor was void in law.

It is no doubt true that the mere translating deeds or communicating the substance thereof to a purdanashin lady is not sufficient. But the evidence shows, as stated above, that the drafts were interpreted and explained to her by the pleader Iswar Babu. The powers given to Messrs. Garth & Weatherall and the liabilities of the parties concerned were expressly stated in the deeds, and if they were properly interpreted and explained (and there is no reason to think that they were not) the lady became aware of the provisions. The clause restraining alienation of the mortgaged property is generally inserted in mortgage bonds in this country, though of course it does not prevent alienation subject to the rights of the mortgagee. The question of intelligent execution has been raised 24 years after the execution of the deeds. The pleader who explained the deeds to the lady, Kunja Behary, her uncle and the reversionary heirs, Mohini Mohan and Khetra Mohan, are dead. At this distance of time it cannot be expected that the witnesses should remember the details of what the pleader stated to the lady and the witnesses, Debendra Nath and Ganga Narain, do not remember the words which the pleader Iswar Babu used in interpreting the drafts or giving out the substance of deeds and are unable to give the details. But even assuming that the pleader had not drawn the attention of the lady to all the provisions of the deed and to the precise position in which she was placing herself by appointing Messrs. Garth & Weatherall nominated by the mortgagees on the conditions stated in the mortgage deed and the deed of management, we do not think, having regard to the fact that her own brother-in-law Mohini Mohan, had under similar circumstances, to raise money by executing a mortgage and a deed of management on practically the same terms, that the pleader's advice on the matters referred to above would really have made any difference in the result.

No doubt it is difficult to explain an English mortgage specially to a purdanashin lady, and had the deeds of mortgage and management stood alone, there might be force in some of the arguments addressed on behalf of the appellants, and we might have attached more importance to the fact that the lady agreed to the arrangement on her being assured that the estate would come back by 1317. But there are subsequent documents executed by the lady and they leave no room for doubt that she was aware of her position under the deeds. In 1897 she executed a deed of trust (Ex. 7) in favour of Messrs. Garth & Weatherall (by which the deed of management was revoked), in which the deed of mortgage was referred to. The trust deed, which fully set out the powers of management given to those gentlemen and which were more extensive than those given in the deed of management, was interpreted and explained to her by the pleader Iswar Babu and the witness Kalidyal Ghose. This document, however was also in English and is an elaborate one. But then she executed a deed of endowment on 10th February 1908, i. e., about 18 years after the deeds of mortgage and management were executed, there is a recital in it of the circumstances under which deeds of mortgage and management were executed.

Then again, in Ex. 2 (another deed of endowment) executed by the lady on 24th December 1902, that is 12 years after the mortgage, there is also a recital of the arrangement entered into under the deeds of mortgage and management. It is stated in the latter deed that "if no untoward circumstance intervened" the entire debts of her husband would have been liquidated in a short time and under that impression she had placed the management of the properties in the hands of two European gentlemen; but that

"unfortunately on account of various adverse circumstances intervening in the management of the properties"

the allowance granted for her maintenance had been stopped since 1898. It appears, therefore, that although the money payable under the mortgage had not been paid as stipulated in the mortgage deed, and although her own allowance had been stopped for several years, there was no complaint in either of the said two documents that she had executed the deeds of mortgage and management without properly understanding them. On the other hand, they go to show that the lady was fully aware of the arrangement made by the deeds of mortgage and management. These two deeds of endowment were in the Bengali language: There is evidence to show (and the evidence is one-sided, that they were read over and explained to her and she had the advice of her maternal uncle Kunja Behary and her relations and servants when she executed them. Babu Ananda Charan Roy, another leading pleader of Dacca, appears to have been consulted in connexion with the deed of endowment Ex. 11. There is an endorsement on the deed by Khetra Mohan Das, the then sole reversioner, which runs as follows:

"Having learnt and understood the contents of this deed with the advice of my well-wishers and friends and on a full consideration of my personal interests I give my full consent to this gift."

It was attested by the pleaders Iswar Babu and Debendra Babu besides four other pleaders and several other persons, and Ex. 12, the second deed of endowment was also attested by pleaders Debendra Nath and Ananda Chandra, her servant Radha Ballav, her maternal uncle Kunja Behary and several other persons. It is true the lady died the day after she executed the deed of endowment Ex. 12, but no case was made in the Court below that she did not understand the contents of the deed. The lady died in 1902, so that she lived for twelve years after the execution of the mortgage. During all these years the deeds of mortgage and management were never challenged by the lady. On the contrary their validity was recognized by her in the deeds of endowment. Not only is that so, but the defendant 1, Syam Peary Dasya, herself never challenged it before the present suit. Having regard to all these circumstances we are of opinion that the first contention on behalf of the appellants must be overruled. The next question is whether the deed of mortgage was properly attested within the meaning of S. 59, T. P. Act. The deed bears the names of Mohini Mohan Das and Kunja Behary Das as attesting witnesses and there is an attestation clause which runs thus:

"Signed, sealed and delivered by the above named Srimati Priyomoyee Dassi in the presence of Kunja Behary Das and Mohini Mohan Das, and after the deed was read and explained by Babu Iswar Chandra Ghose, pleader, she being identified also by them, Mohini Mohun Das, Kunja Behary Das."

Both Mohini Mohan and Kunja Behary are dead. Babu Debendra Nath Das (pleader) a cousin of Priyomoyee, in whose presence she executed the deed, has been examined on behalf of the plaintiffs. It is true he is not an attesting witness, but he says that both Mohini Mohan and Kunja Behary were present when Priyomoyee affixed her signature on the deed. We are referred to a passage in his cross-examination where he said,

"Priyomoyee was in a south room where we all including Iswar Babu were, while he read Ex 5 and gave out its purport somebody took Ex. 5 inside the south room and she signed it in my presence and in the presence of some others whom I forget."

It is contended on behalf of the appellant that as the witness says that she signed the deed in the presence of "some others" whose names he has forgotten, there is no evidence that she signed it in the presence of Mohini Mohan and Kunja Behary. A few lines after that, however, the witness says

"Mohini Babu and Kunja Babu signed Ex. 5 as its witnesses in the room in which we all sat."

And the witness in his examination-in-chief is positive in his statement that Priyomoyee signed the mortgage bond in

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the presence of Mohini Mohan, Kunja Behary and himself. The words "some others" must, therefore, be taken to refer to some persons other than Mohini Mohan and Kunja Behary. We are also referred to the evidence of Ganga Narain Bose where he stated,

"Kunja Babu and Debendra took the deeds inside the room in which Priyomoyee was, to secure her signature thereon. Priyomoyee signed the mortgage deed at that time..... Iswar Babu, Kunja Babu and Mohini Babu signed the mortgage deed as its attesting witnesses."

It is contended that both the attesting witnesses Kunja and Mohini Mohan cannot be said to have been present when she signed the mortgage deed. But there is the positive evidence of the pleader Debendra Babu, and having regard to the distance of time at which the witnesses were giving their depositions, no better evidence on the point could reasonably be expected. There is no specific plea taken in the written statement that there was no proper attestation of the mortgage deed; but para. 6 thereof in which the defendant put the plaintiff to prove the due execution of the mortgage may cover such a plea. However, having regard to the evidence adduced, we think it sufficiently proved that the mortgage deed was attested by the two witnesses Mohini Mohan and Kunja Behary. The third contention raises the question whether there was legal necessity for the whole amount. Legal necessity to the extent of Rs. 95,000 is admitted, that being the debt which was due under a bond executed by the husband of the lady in favour of Ruplal and Raghunath Das, and the said debt was paid off out of the consideration for the mortgage bond advanced by the plaintiff Company. The only question, therefore, is whether there was necessity for the balance namely Rs. 25,000. The evidence shows that out of one lac and twenty thousand Mr. Garth deducted his commission Rs. 12,000 and paid the balance of Rs. 1,08,000 to Kunja Babu, the uncle of the lady. So there remains Rs. 13,000 to be accounted for. The mortgage deed in reciting the necessity for the loan refers to the debt created by the husband of the lady and

"also certain other moneys due to Sreemuty Syam Peary Dassya, the mother of the late Babu Lal Mohan Das and which are the first charge upon the said estate."

It is contended on behalf of the appellant, first, that it is not shown that it was absolutely necessary for the lady to pay a commission of Rs. 12,000 to Mr. Garth for raising the loan; and secondly, that there were, in fact decrees obtained by Syam Peary which the lady had to pay and they were, in fact, paid out of the consideration. In dealing with the question of legal necessity, however, we must bear in mind that the then reversioners Mohini Mohan and Khetra Mohan gave their full consent to the mortgage. There is an endorsement on the mortgage bond which runs as follows:—

"We, Mohini Mohan Das and Khetra Mohan Das, both having reversionary interest in the estates set out in the schedule above written and being fully cognisant of the terms of the above mortgage deed, hereby notify that we consent to the same as being an arrangement necessary for the saving of the estate from sale and we agree to abide by the terms thereof,"

and the execution of this note was admitted by them before the Registrar. The consent given by the reversioners would certainly raise a presumption of the existence of the necessity [see *Debi Prosad Chowdhry* v. *Golap Bhagat* (2)]. In the recent case, *Hari Kishen Bhagat* v. *Kashi Prasad Singh* (3), the Judicial Committee observed, that

"the requirement of the law that an alienation by a Hindu widow must be proved to have been made by her for valid and legal necessity, (the onus of proving which rests heavily on the alienee) may be fulfilled by proving the consent or concurrence of the reversioners to the transaction, which consent however must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests."

It is pointed out that Rs. 500 was paid to Khetra Mohan for obtaining his consent. But the mere fact that Rs. 500 was paid to one of the reversioners does not, we think, rebut the presumption as to existence of the legal necessity arising from the consent given by reversioners. So far as the payment of Rs. 12,000 to Mr. Garth is concerned, we do not think it can be contended that there was no necessity for such payment. Mohini Mohan, the brother-in-law of the lady, only two months before raised a loan of Rs. 2,50,000 through Messrs. Garth & Weatherall and he had to pay 10 per cent. commission to them. If Mohini Mohan had to pay that commission, it cannot be expected that the lady could raise the loan on payment of commission at a lower rate. The 10 per cent. commission, it must be remembered, included the costs

2. (1913) 40 Cal 721=19 I C 273.
3. A I R 1914 P C 90=42 Cal 876=27 I C 674 =42 I A 64 (P C).

of stamps, registration and other incidental expenses. However that may be, we think that in the circumstances, it cannot be said that there was no necessity for payment of the sum of Rs. 12,000 as commission. Then as to the payment of the decrees of Syam Peary, it is true that the copies of the execution proceedings have not been produced. But the plaintiffs have proved that the records of the execution cases brought by Shyam Peary had been destroyed, and were not in existence. The plaintiffs have also examined Ganga Narain Bose who was in the service of the lady, and he stated that Syam Peary obtained five or six decrees for her maintenance against her sons or their representatives and that she had realized all the debts from Priyomoyee, Rs. 3,300 or 3,400. Rupees 1,500 and 1,600 were paid to Syam Peary in satisfaction of two decrees in his presence out of the moneys borrowed on the mortgage bond. It was the defendant, Syam Peary, to whom these payments are said to have been made. Her servant Radha Bullav was actually present in Court and looking after the case on her behalf. But he was not examined nor any account books produced by her to show that the moneys were not paid to her in satisfaction of her decrees for maintenance. The ekrarnama, Ex. A, dated 29th September 1877, shows that Rs. 150 per month was payable to Syam Peary.

It is more likely that she would proceed against her daughter-in-law and not against her son for realising the said annuity and the deed of endowment, Ex. 11, executed by Priyomoyee states that Syam Peary had obtained decrees for a large sum of money due to her on account of her allowance against Mohini Mohan and others, and was about to recover the money by executing it against herself alone. Having regard to the fact that the moneys due to Shyam Peary were recited in the mortgage bond as "immediate, pressing necessity" and that the reversioners who had full knowledge of the terms gave consent to it as an arrangement necessary for saving the estate from sale, we think the evidence adduced on behalf of the plaintiff is sufficient for proving legal necessity. Then in the release, dated 26th November 1908, executed by Syam Peary herself in favour of Mr. Weatherall, there is an admission that Priyomoyee obtained a loan of Rs. 1,20,000 from the plaintiff. There is similar statement in the agreement executed by her in favour of Mr. Lockhart on the same day. Radha Ballav Das, her am-muktear, who was looking after the case on her behalf, was a witness to the deed of release and the deed was drafted by Babu Ananda Chandra Roy, Pleader, at the instance of the said Radha Ballav. The fact that Rs. 1,08,000 (after deducting the commission to Mr. Garth) was paid to the lady was never challenged during the lifetime of Priyomoyee; on the contrary, it was admitted by her in subsequent documents and lastly by Shyam Peary herself in that deed of release. Having regard to the positive evidence and the circumstances, we think that the Court below is right in holding that there was legal necessity for the entire amount advanced under the mortgage. The next question is whether the annuity agreed upon to be paid to Shyam Peary is a charge upon the share of the estate which she inherited from her son, Soshi Mohan. The ekrarnama executed by Mohini Mohan Das recites that there was some litigation over the said share, that she was intending to institute a regular civil suit for recovery of the share, and that she expressed her willingness to give up her claim to the share on receipt of a monthly allowance of Rs. 150 by executing a ladani to that effect. The operative part of the deed then states as follows :

"You shall receive Rs. 150 net during your lifetime from the aforesaid share, you shall not be able to make a gift, sale, bai, beba, of it. Myself and the succeeding executor shall pay you the aforesaid money every month and if I or they do not pay it, you shall be entitled to recover it my suit from the share left by my aforesaid deceased brother."

It will be seen that the lady was to get the annuity from the aforesaid share and entitled to recover it by suit from the share, and we have no doubt having regard to the terms of the deed, that the annuity was made a charge upon the share. The only reason given by the learned Subordinate Judge for holding otherwise is that the property is not specified in the deed. But the property can be easily ascertained, and that being so, it does not matter that no schedule of property is given in the deed. In the case of *Ramsidh Pande* v. *Balgobind* (4), where the debtor had pledged all her

4. (1887) 9 All. 158.

"wealth and property" to her creditor, it was held that the maxim "*certum est quod certum reddi potest*" applied, overruling the contention that the property was not described by metes and bounds or by name. The description is no doubt wide, but not uncertain. As pointed out by Cotton, L. J., in *Montague* v. *Earl of Sandwich* (5),

"I think it is an established rule, that where the covenant is to charge the real estate, which can be ascertained by existing facts and circumstances, for example if there is a covenant to charge all the real estate which a man has at a particular time, that covenant will itself make a charge. But where the covenant is to charge not all or any definite portion of a man's estate, but only that which is worth £1,000 a year, or which would be sufficient to secure £1,000 a year then from the indefiniteness of the matter referred to there will be no charge unless an instrument is afterwards executed to give effect to the covenant; and it remains simply a covenant to be enforced as against the assets of the covenantor"

In some cases in our Court a general description of property has been held not to constitute a charge; See *Gunoo Singh* v. *Latafut Hossain* (6), *Najibulla Mulla* v. *Nusir Mistri* (7) and *Jagatdhar Narain Prasad* v. *A. M. Brown* (8). But in the first case there was merely a covenant not to alienate any property of the debtor until payment of the money advanced, and there were no expressions to indicate an intention to charge any property. In the second it was observed that a charge can only be created where specific property is mentioned. But as pointed out in the Tagore Lectures, 1876, at p. 172, (foot note).

"But this dictum seems to be based upon a misapprehension of a passage in Sugden's Vendors and Purchasers, to the effect that a covenant to convey and settle lands will not be a specific lien on the lands of the covenantor, a proposition which is deduced by the learned author from the case of *Mornington* v. *Keane* (9), where there was a covenant merely to settle lands of a particular value which, as pointed out by the Lord Chancellor, was a very different thing from a covenant to charge either the whole or a definite portion of a person's estate. But the decision itself may perhaps be supported on the ground that there was no intention on the part of the grantor to create any charge whatever on his property,"

In the third case the bond stated that if the creditor failed to repay the loan the creditor would be entitled to recover the debt by sale of "the Nyagaon Factory" and from "his (the debtor's) person and other properties," and it was held that it was a general admission of liability which was merely that the creditor could recover his debt as provided under the law and created no special lien on the Nyagaon Factory. It is to be observed that the question in all such cases is one of intention. "In equity no charge can be created unless there is an intent to charge." see *Omrao Begum* v. *Secy. of State* (10).

It will further be observed that in all the above three cases the question raised was whether there was a mortgage which, under S. 58, T. P. Act, must be of "specific immovable property," and difficulty in such a case is likely to arise from a general description. In the last two cases noticed above, the learned Judges relied upon the fact that the document was not registered in Book I (which is a register of documents relating to immovable properties) but in Book 4, as showing the intention of the parties not to create any charge. It is unnecessary, however, to discuss this question further, as in the present case the plaintiff admitted the existence of the charge in the mortgage deed itself. In stating the necessity for the loan taken by Priyomoyee, the indenture of mortgage states

"certain other moneys due to Shyam Peary Dasya the mother of the late Babu Lal Mohan Das and which are a first charge upon the said estate."

Then again in the plaint itself there is a clear and distinct admission by the plaintiffs themselves that the annuity was a first charge. In para. 1, of the plaint the plaintiffs refer to the moneys due to Shyam Peary as being "a first charge upon the estate of late Lal Mohan Das." The plaintiffs, therefore, actually took the mortgage subject to the charge. We are accordingly of opinion that the annuity of Rs. 1,800 a year in favour of Shyam Peary is a charge upon the share which she inherited from her son, Lal Mohan, and that the plaintiffs' mortgage is subject to that charge. The fifth question is whether the stipulation to pay interest at 9½ per cent is in the nature of a penalty. The mortgage deed provided that interest at 9½ per cent was to be paid by equal half yearly payments, but that if the interest at the rate of 7½ per cent was paid before the half yearly day appointed for payments of interest, the

5. (1886) 32 Ch D 525=55 L J Ch 925.
6. (1877-78) 3 Cal 336.
7. (1881) 7 Cal 196.
8. (1906) 33 Cal 1133.
9. (1858) 2 De G & J 292=27 L J Ch 791.
10. (1892) 19 Cal 584=19 I A 95 (P. C.).

mortgages shall accept the same in lieu and in satisfaction of interest at 9½ per cent. If the stipulation was to pay interest at 7½ per cent, and on default of payment on a certain date interest was to be paid at 9½ per cent, there is no doubt that it could be treated as a penalty. In the converse case it would not be a penalty according to English law. In *Wallis* v. *Smith* (11) Jessel, M. R., referring to the rule of equity stated by Heath, J., in *Hardy* v. *Martin* (12), viz. that

"It is a well-known rule in equity that if a mortgage covenant be to pay £5 per cent. and if the interest be paid on certain days then to be reduced to £4 per cent, the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay £4 per cent, and if the party do not pay at a certain time, it shall be raised to £5 per cent, then the Court of Chancery will relieve," observed: "It was settled so early as that, I am sorry that it was so settled, because anything more irrational than the doctrine I think can hardly be stated. It entirely depended on form and not on substance."

On behalf of the defendants we were referred to the case of *Union Bank of London* v. *Ingram* (13) when Jessel, M. R., held that a mortgagee in possession is entitled on accounts being taken to charge the mortgagor with the higher rate of interest under a provsio in the mortgage deed for reduction of interest on punctual payment. In the case of *Wallingford* v. *Mutual Society* (14) Lord Hatherley observed (see p. 702):

"The form adopted long since—I do not know whether it is still continued or not—in mortgages was when you wished to reserve in reality interest at 4 per cent., to reserve the interest by contract at 5 per cent. but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made for interest at 5 per cent., to be reduced, in the event of your punctual payment to 4 per cent., but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but relaxation of your contract which you would merit and purchase by paying at a definite and fixed time. If that definite and fixed time were exceeded, then the original contract revived in all its force. Sometimes mortgage deeds being somewhat unskilfully drawn, interest at 4 per cent. was reserved by the contract to be raised to 5 per cent. if there was non-payment at a particular day; and although that brings the case to an extremely fine and nice distinction, it all the better illustrates the rule which has been applied at all times by the Courts, with reference to this question of penalty. If there had been indulgence at any time upon given terms, as long as those terms are observed, the indulgence lasts. When those terms are departed from the indulgence at once fails, and the original contract is revived in full force."

The question appears to have been considered in two cases in this country. In the case of *Kirti Chunder Chatterjee* v. *J. J. Atkinson* (15) a sum of money was borrowed at a certain rate of interest. Subsequently, on a settlement of account between the parties it was agreed that a lower rate of interest would be chargeable on the amount remaining due, if paid within a certain date, but if not so paid, the higher rate originally contracted for would by payable, and it was held that the stipulation for the payment of interest at the higher rate cannot be regarded as a penalty, that being the rate contracted for. Maclean, C. J., observed:

"Then it is said that this provision as to a higher rate of interest by reason of default of payment on 31st March, was a penalty within S. 74, Contract Act. I should have been glad if I could have taken that view; but the authorities are against it. Here the higher rate of interest was only that originally payable under the bond; and the new bargain under the endorsement, was merely a concession to the defendant, of which he failed to take advantage. This is not the case of a lower rate of interest being mentioned in the bond, with a provision that if the debt be not paid, a higher rate shall prevail as from the date of the loan. Here the higher rate was originally contracted for; it cannot then be regarded as a penalty."

In the case of *Kutub ud-din Ahmad* v. *Basir-ud-din* (16), Stanley, C. J., after stating

"that according to the English authorities it is well settled that if a mortgagee stipulate for a higher rate of interest in default of punctual payment, he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate, but that he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in equity as in the nature of a penalty, "observed" this rule is not altogether intelligible."

He referred to the observation of Jessel, M. R., in *Wallis* v. *Smith* (11), quoted above, but he was of opinion that an agreement on the part of a mortgagee to accept on punctual payment interest at a lower rate than the rate agreed to be paid was free from objection, and accordingly upheld the decree of the Court

11. (1882) 21 Ch D 243=47 L T 389.
12. (1783) 1 Bro C C 419n=28 E R 1214.
13. (1881) 16 Ch D 53=50 L J Ch 74.
14. (1880) 5 A C 685=50 L J Q B 49.
15. (1906) 10 C W N 640.
16. (1910) 32 All 448=5 I C 665.

below which awarded the higher rate of interest. Banerji, J., was inclined to hold at the hearing of the appeal that the provision as to interest was an attempt to circumvent the rule of law as to penalties but in the face of English authorities and in the absence of authority in this country to the contrary, agreed with Stanley, C. J.

If the question were res integra, we would have been prepared to hold that there should be no distinction in principle between a stipulation to pay a certain rate of interest to be reduced to a lower rate on punctual payment, and a stipula- to pay a certain rate of interest to be raised to a higher rate in the event of non-payment of the interest punctually : the object being to ensure punctual payment, and not to settle the damage, it would be a penalty whatever might be the form in which the agreement is expressed. But it appears from the cases cited above that in England it is settled law that where there is a contract to pay a higher rate of interest to be reduced to a lower rate on punctual payment, the stipulation to pay the higher rate is not a penalty. In the case of *Union Bank of London* v. *Ingram* (13) Jessel, M. R., allowed the higher rate of interest on default of punctual payment, though the learned Judge himself in the subsequent case observed that

"anything more irrational than the doctrine can hardly be stated. It entirely depended on form and not on substance."

In *Wallingford* v. *Mutual Society* (14) also Lord Hatherley, although referring to the distinction as an "extremely fine and nice distinction," held the stipula- to pay at the reduced rate in the event of punctual payment to be a relaxation of the original contract to pay at a higher rate,

"not taking it by way of penalty at all, but a relaxation of the contract which the debtor would merit and purchase by paying at a definite and fixed time."

The two Indian cases cited above appear to have followed the rule of English law, and Maclean, C. J. held in the case reported as *Kirti Chunder Chatterjee* v. *J. J. Atkinson* (15), that the stipulation to pay the higher rate was the original contract, and therefore, was not a penalty. Now the question is, what was the real contract in the present case. Cl. 1 (3) of the mortgage deed no doubt stipulated for the payment of interest at 9½ per cent. to be reduced to 7½ per cent. on punctual payment, but the scheme for liquidation of the mortgage debt, which is a material part of the deed, shows that interest was calculated at 7½ per cent. only. In construing a document effect should be given to all parts of it. Now taking Cl. 1 (3) together with the scheme it appears that the intention of the parties was that interest should be paid at 7½ per cent., and on default at 9½ per cent.; otherwise we would have expected the calculation of interest in the scheme at 9½ per cent., if that was the "original contract." It is true that interest at 9½ per cent. was paid in the years in which there was default in punctual payment, but that by itself would not affect the rights of the parties under the contract, if the payments were made under a mistake as to their rights under the contract, and the payments made by Messrs. Garth and Weatherall can be of very little value, if any, on the question of intention of the mortgagors themselves

Section 74, Contract Act, does away with the distinction between penalty and liquidated damages and under the section as amended by Act 6 of 1899, the Court has the power to grant relief if the contract contains any stipulation by way of penalty. It is true the contract in the present case was entered into before the amendment, but the amendment does not appear to have made any real change in the law, the only difference being that if the stipulation is penal, relief can now be granted under the provisions of the section and it is not necessary for Courts to resort to their equitable jurisdiction in order to grant relief. The mortgagees, however, are entitled to reasonable compensation for non-payment of interest punctually. But 2 per cent. does not represent the damages which the creditor suffered for non-payment of the interest on the date fixed. The reasonable compensation to which he is entitled would be the interest on 7½ per cent. interest in respect of payments not punctually made. We accordingly hold that the plaintiffs are entitled to interest upon interest at the rate of 7½ per cent. from the date of the bond up to the date which may be fixed for payment. The last question is, whether Messrs. Garth & Weatherall were the agents of the mortgagor or the mortgagees and whether it is competent to a mortgagee in this country to

nominate and appoint an agent to manage the mortgaged properties and at the same time relieve himself from the liability to which a mortgagee is subject when he enters into possession of the mortgaged properties.

We have, therefore, to see whether or not under the terms of the mortgage, Messrs. Garth & Weatherall became agents of the mortgagor or the mortgagees. If they were the agents of the mortgagees, the latter would be bound to account as mortgagees in possession and must bear the loss, if any, caused by Messrs. Garth & Weatherall as if they had actually entered into possession. Mortgage deeds in the English form generally contain an appointment of, or a power for the mortgagee to appoint a person to be receiver of the mortgaged premises, by means of which mortgagees are able to obtain the benefit of possession without its disadvantages. It is contended on behalf of appellant that this practice should not be recognized in this country. It is further contended that having regard to the provisions of the mortgage deed even in England the receiver would be treated as agent of the mortgagee. Lastly, it is contended that whatever the English law may be on the subject, having regard to the deed of mortgage in this case, the mortgagees cannot be heard to say that Messrs. Garth & Weatherall were not their agents. The manner in which mortgagees in England acquired the power of appointing a person to be the receiver of the mortgaged premises was traced by Rigby, L. J, in the case of *Gaskell* v. *Gosling* (17). The learned Judge pointed out that having regard to the exceptional severity with which a mortgagee in possession was treated in a suit for redemption and made to account, the Court favoured any means which would enable the mortgagee to obtain the advantages of possession without its drawbacks, and observed:

"Mortgagees began to insist upon the appointment by the mortgagor of a receiver to receive the income, keep down the interest on incumbrances, and hold the surplus, if any, for the mortgagor, and to stipulate often that the receiver should have extensive powers of management. Presently mortgagees stipulated that they themselves should in place of the mortgagor appoint the receiver to act as the mortgagor's agent. This made no difference in the receiver's position, and imposed no liability on the mortgagee appointing. Though it was the mortgagee who in fact appointed the receiver, yet in making the appointment the mortgagee acted, and it was the object of the parties that he should act, as the agent for the mortgagor. Lord Cranworth in *Jefferys* v. *Dickson* (18) stated the doctrine of the Courts of Equity on the subject to the following effect. The mortgagee, as agent of the mortgagor, appointed a person to receive the income, with directions to keep down the interest of the mortgage and to account for the surplus to the mortgagor as his principal. These directions were supposed to emanate, not from the mortgagee, but from the mortgagor: and the receiver, therefore, in the relation between himself and the mortgagor, stood in the position of a person appointed by an instrument to which the mortgagee was no party. Lord Cranworth in the case referred to was speaking of mortgage of lands; but the same doctrine applies to all kinds of property, being founded, as it is, not upon any considerations peculiar to the law of real property, but upon the contract between the debtor who gives and the creditor who takes the security. Of course the mortgagor cannot of his own will revoke the appointment of a receiver, or that appointment would be useless."

The grounds urged on behalf of the appellant in support of the contention that the practice should not be followed in this country are as follows: In England a landowner has always an attorney at his elbow, and can take care of himself, whereas in this country mortgagors generally are helpless. The power of sale which the mortgagee possesses in England is recognized in this country only in a limited form under S. 69, T. P. Act, and the proviso to that section shows that a receiver in this country except in exceptional cases is an agent of the person appointing him. The law on the subject in England is due to the practice of English conveyances adopted to get rid of the responsibility of mortgagees and the practice itself is not very old. S. 69, T. P., Act goes to negative the xistence of such a practice in this country. In America there is conflict of authority on the question whether a mortgagee who nominates and procures the appointment of a Receiver is responsible for his default: See Jones on Mortgage, Edn. 6, S. 1537 A. Even in England in 1811, in the case of *Hutchinson* v. *Masareene* (19), the trustees were treated as the agents of the mortgagees and the losses caused by the trustees were held to fall upon creditor. That appears to have been the law in England before the practice, to which Rigby, L. J., refers, had grown up.

There is a good deal of force in these arguments. A private Receiver deriving

17. (1896) 1 Q B 669 = 65 L J Q B 435.

18. (1866) 1 Ch 183 = 35 L J Ch 376.
19. (1811) 2 Ball & Beaty 49,

his power from the appointment of a mortgagee is almost unknown to Indian people. (See Woodroffe on Receivers, Ed. 2, p. 167.) No case in which a private Receiver, deriving his power from the appointment of a mortgagee, has come up to the Courts of this country and the question is one of considerable importance and requires careful consideration. We think, however, that it will be unnecessary to decide this question in the present case, if as contended on behalf of the respondent, Messrs. Garth & Weatherall were appointed by the mortgagor and were agents of the mortgagor and acted as such. In support of the contention that under circumstances similar to those of the present case the Receiver is treated as an agent of the mortgagee even in England, reliance is placed on the cases *Vimbos Ltd., In re* (20), *Robinson Printing Co.* v. *Chic Ltd*, (21) and *Deys* v. *Wood* (22). In these cases the appointment of the Receiver was made by the mortgagees and in the deed of mortgage. In the first case powers were given to the Receiver to enter into compromise in the interests of the mortgagees and to sell the mortgaged property or concur in selling it. There was nothing said about the Receiver keeping down the interest, there was no direction to him to pay any surplus over to the mortgagor, and nothing was said about the Receiver being the agent of the mortgagor. It was under these circumstances that Cozens Hardy, J., observed:

"It is remarkable that that power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the Receiver is to be the agent of the mortgagor, who is solely to be responsible for his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the Receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture holders themselves would be answerable for all the faults and omissions of the Receiver."

In the second case debentures gave power to the holders to appoint a Receiver to take possession of the assets, carry on the business, sell the porperty make any arrangements he should think expedient in the interest of the debenture holders and apply in the specified way the moneys received, but they did not provide that the Receiver was to be the agent of the mortgagors. Warrington, J., observed that there is no general rule of law as to the position of the Receiver and referring to the observation of Cranworth, L. C., in *Jeffreys* v. *Dickson* (18), said:

"The Lord Chancellor is there dealing with a Receiver appointed under the ordinary power, that is to say, either by the mortgagor himself in pursuance of provisions in the mortgage deed or by the mortgagee under similar provision, or under the Act then subsisting—namely, Lord Cranworth's Act. In all these cases there was an express provision that the Receiver should be the agent of the mortgagor. See the remarks of Rigby, L. J., in *Gaskell* v. *Gosling* (17)"

and held following *Vimbos Ltd., In re* (20) that the Receiver was not the agent of the mortgagor. In the third case also there was no provision that the Receiver shall be the agent of the mortgagor. He was to have power not only to take possession of the property and to carry on the business, but he was to sell the property comprised in the debentures. He might make any arrangements in the interest of the debenture holders and finally any moneys in his hands were to be applied in satisfaction of the debentures. Scrutton, J., observed:

"If he exercises his power to sell, it must be by virtue of and for the purpose of realizing the charge created by the debentures; the business is carried on for the sole benefit, so far as the provisions of the document are concerned, of the debenture holders, and in my opinion, having regard to all the points I have mentioned, he is their agent."

As pointed out by Farwell, L. J., (in the course of argument in the Court of Appeal), it was not like an ordinary receivership deed which provides for the payment of any surplus, beyond what is necessary to satisfy what is due to the mortgagee to those who may be entitled to it; the proceeds of any assets were apparently payable under it to the debenture holders only. At p. 821, Vaughan Williams, J., observed that the object of the appointment of the Receiver was really the sale and realization of the security to the satisfaction of debenture debts, and the provisions went to show that it was intended that the Receiver should be Receiver on behalf of the mortgagees and not on behalf of the mortgagors. The present case is distinguishable from the above three cases on the following grounds:

20. (1900) 1 Ch 470=69 L J Ch 209.
21. (1905) 2 Ch 123=74 L J Ch 399.
22. (1911) 1 K B 806=80 L J K B 553.

(1) The managers, though nominated by the mortgagees, were not appointed by them; (2) The mortgagees were not parties to the deed of appointment, and the managers were no parties to the deed of mortgage; (3) There was a direction to the managers to keep down the interest and to apply the income as laid down in the deed of mortgage; (4) There was a destination as to the surplus (if any) of the income, (a) in the case of Priyomoyee (after payment of Rs. 2,400 to her) to the managers themselves as part of their remuneration over and above the 15 per cent, and (b) in the case of Mohini Mohan one-half to the managers and the other half to the mortgagor himself; and no portion of the surplus was to go to the mortgagees in either case.

It may be pointed out here that in *Hutchinson* v. *Lord Masereene* (19) cited before us, the trustees were appointed by the creditors who had obtained the power of appointment from Lord Masereene; the latter did not appoint the trustees nor had he any power to remove them and it was accordingly held that the loss occasioned by the default of the trustees should fall upon the creditors who appointed them. In *Gaskell* v. *Gosling* (17) also it appears that it was the trustees of the debenture holders who appointed the Receiver and had the power to remove him without notice to the mortgagors, although the Receiver under the terms of the agreement was to be the agent of the mortgagors who were to be liable for his acts and defaults. We have next to see whether under the deed of mortgage Messrs. Garth & Weatherall became the agents of the mortgagees or of the mortgagor. Now, para. 4 of the mortgage deed contemplates possession by the mortgagor, "until the mortgagees shall enter into and take possession of the mortgaged premises." Para. 6 (2) provides for payment of the Government revenue and other charges by the mortgagor, and the productions of the receipts of payment by the mortgagor to the mortgagees, and para. 7 deals with the management of the property and sets forth the provisions relating to management "until the mortgagees shall enter into and take possession of the mortgaged premises." We will deal with these provisions later on. But in the first place, Messrs. Garth & Weatherall were to manage the mortgaged premises (without any interference by the mortgagor) so long as they fulfilled the terms and conditions, and in the event of their death, resignation or dismissal of either of them, by the survivor of them, or failing such survivor, by another qualified manager who would be nominated by the mortgagees provided that any manager subsequently so appointed by the mortgagees shall, if required by the mortgagor, give security for the proper performance of his duty and management. It thus appears that the first managers (Messrs. Garth & Weatherall), though nominated by the mortgagees, were appointed by the mortgagor.

Messrs. Garth & Weatherall were no parties to the mortgage deed, the indenture being between the mortgagor and the Company (the mortgagees). The mortgagees again were no parties to the deed of appointment which was between the mortgagor and Messrs. Garth & Weatherall. We were referred on behalf of the appellant to Key and Elphinstone's Precedents in Conveyancing, 10th Edn., Vol. 2, p. 81, where the specimen form shows that the appointment is made by the mortgagor with the concurrence of the mortgagee as indicating that the mortgagees are no parties to it, and there is a proviso (see p. 84) that the Receiver shall be deemed to be in all respects the agent of the mortgagor, and that the mortgagee shall not under any circumstances be answerable for any loss or misapplication or default, etc., of the Receiver. But the passage at p. 83 (bottom)

"and the Receiver covenants with the mortgagee and also as a separate covenant with the borrower, ."

and the passage at p. 85,

"in consonance with the permises the borrower with the concurrence of the mortgagee hereby appoints the Receiver."

show that the mortgagee is also a party to the appointment. The form given in Davidson's Precedents and forms at p. 1016 show that the mortgagor, the mortgagee and the Receiver are all parties to the deed of mortgage. That form is one in which the Receiver is appointed by the mortgage deed itself, and the Receiver is therefore a party to it. There are other forms in which the Receiver is appointed by a separate deed, which is more convenient. A form, where the appointment is made by a separate deed contemporaneously with the deed of mortgage, is given at p. 287 of Key and Elphinstone, and that shows that the

parties are (1) the mortgagor, (2) the mortgagee, and (3) the Receiver. See also Prideaux's Precedents, Vol. 1, p. 781, where the appointment is made by the mortgage deed itself and p. 1045, where the appointment is made by a separate deed ; Wood and Jarman's Conveyancing, Vol. 2, pp. 158-159 ; Encyclopaedia of Forms and Precedents, Vol. 9, p. 210 (see p. 912, Cl. 4).

It appears therefore from all the forms that the mortgagee and the Receiver are parties to the deed of mortgage and to the deed of appointment, and the reason why it is stated that the Receiver " is to be deemed the agent of the mortgagee " appears to be that the mortgagee being a party to the deed, a question may arise that he is the agent of the mortgagee. In the present case however such a question does not arise. As already stated, Messrs. Garth & Weatherall are no parties to the mortgage deed, nor are the mortgagees parties to the deed of appointment. Para. 7, Cl. (2), of the deed of mortgage lays down the powers of management conferred upon the managers more fully detailed in the deed of management, which will be presently referred to. The main provisions in the deed, which are relied upon on behalf of the appellant as showing that Messrs. Garth & Weatherall were the agents of the mortgagor, are as follows:

(1) That the managers shall not be liable to dismissal except for misconduct or neglect of duty or of the terms of the deed proved to the satisfaction of the mortgagees. (2) The managers shall at all times render to the mortgagees all such information and accounts as shall be called for and specially for the purpose of any audit or scrutiny which the mortgagees may think necessary at any time. (3) For the purpose of satisfying and informing themselves as to the management of the mortgaged premises or as to the circumstances thereof or for the purpose of any audit or scrutiny, the mortgrgees may from time to time and at any time call for and require to have furnished to them by the managers for the time being a statement of the then existing rent roll of the mortgaged premises and the production of all documents required to verify the same. The provisions relating to the appointment by the mortgagees of a manager in the event of the mortgagor failing to execute powers of attorney or other deeds which might be necessary to enable the manager for the time being to carry on the management, and those relating to the appointment of a Receiver will be dealt with later on.

The first provision referred to above is that the mortgagor shall have no power of dismissal except for misconduct or default proved to the satisfaction of the mortgagees. It does not appear reasonable that the manager should be nominated by the mortgagees and the mortgagor will have no power to dismiss him without the concurrence of the mortgagees, even if he is guilty of misconduct. But apparently the plaintiffs, an English Company, did not agree to advance the loan, except upon the conditions that the mortgaged property would be managed by persons in whom they had confidence. It was not only Priyomoyee, but Mohini Mohan also agreed to have the loan on that condition, which is expressly stated in the deeds. It is true, as observed by Lord Macnaghten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation. Ltd.* (23), "Necessitous men are not truly free men," and that observation applies with much greater force in this country; but at the same time the mortgagees had to safeguard their interest and to see that the estate was managed by persons whom they trusted, in order to ensure the payment of the interest and the principal according to the sliding scale as provided in the bond.

If under these circumstances the mortgagees made it a condition that the estate must be managed by particular persons and the mortgagors agreed to it and acted upon it for about 18 years, it cannot now be urged that the managers must be treated as agents of the mortgagees on the ground that the contract was an unreasonable one. Besides although the managers could not be dismissed even for misconduct without the concurrence of the mortgagees, it does not follow that the mortgagees could arbitrarily refuse to be satisfied even if there was misconduct on the part of the managers. The mortgagor was not given an absolute power of dismissal, but a power reserved to the mortgagor to dismiss the manager at the will of the mortgagor would defeat the very object of the provisions. If the mortgagor had such a power, the manager could be dis-

23. (1904) A C. 323=73 L. J. Ch 526.

missed the very next day. The object being to secure regular payment of the interest and principal as provided in the scheme, the parties agreed to have the estate managed by persons in whom the mortgagees had confidence without interference by the mortgagor, and it was necessary therefore to restrict the power of the mortgagor to dismiss the managers unless the mortgagees were satisfied of such misconduct, and, therefore, with their concurrence. But because their appointment was irrevocable except as provided for in the deed, it does not follow that they ceased to be the agents of the mortgagor: and it is to be observed that the mortgagees had no power of dismissing Messrs. Garth & Weatherall, except as provided in Cl. 6 and in Para. 8, which relates to the appointment of a receiver and which will be dealt with later on.

Under the2nd and 3rd provisions referred to above, Messrs. Garth & Weatherall were bound to render such information and accounts as might be called for by the mortgagees for the purpose of satisfying themselves as to the management or for audit or scrutiny which they may think necessary and to submit statements of rent roll of the estate and documents for verifying the same if so required by the mortgagees. This however appears only for the information of the Company as to how the mortgage estate was being managed and for scrutiny if the company required the account. It does not appear that the managers were to account to the mortgagees in the same manner as an agent is liable to render accounts to his principal and which Messrs. Garth & Wetherall covenanted to render to priyomoyee, as appears from the deed of appointment. The mortgagees in order to protect their interests were interested in seeing that the revenue and other charges were regularly paid, and the rents and profits duly applid in payment of the principal and interest as laid down in the mortgage deed, and in order to satisfy themselves of the same they reserved the power of calling for information and accounts and for auditing the same if thought necessary by them. We do not think it was intended to reserve to the Company any direct control over or power of interfering with the management of estate, but the provisions appear to have been made for the protection of their interest and only as a check to prevent any mismanagement or misapplication by the managers. The mortgagees could not sue Messrs. Garth & Weatherall if the latter refused to account to the former, except through the mortgagor.

On the other hand, the deed of management to which the mortgagees were no parties shows that Messrs. Garth & Weatherall were appointed managers by Priyomoyee. It recites that it was one of the conditions on which the company agreed to advance the loan that she should appoint Messrs. Garth & Weatherall as managers of the estate which was to be managed entirely by them without any interference by her. Those persons were accordingly appointed her managers, attorneys and agents to collect the rents and profits in her name, and the powers of management set forth in the deed were to be exercised in her name and for her benefit but without any interference by her. They were to get a commission of 15 per cent. on the gross collections, which was to cover all charges of management and collections including costs of litigations for realizing rents. They were to keep down interest, pay Rs. 12,600 a year to the mortgagees as provided in the mortgage deed, and Rs. 2,400 a year to the mortgagor (Priyomoyee), and they were to get the balance of the income, if any, as their remuneration in addition to the 15 per cent.

The deed further provided that the managers were faithfully to account to Priyomoyee, keep books of account which shall be open to her inspection, and once every year, if so required, furnish to her a clear statement of the income and expenditure of the estate, but that they were not to be dismissed or removed from the office of manager except with the written consent of the mortgagees. It will be seen therefore that it was Priyomoyee who appointed Messrs. Garth & Weatherall though they were nominated by the mortgagees, and they were to act as her agents and exercise all the powers of management in her name. They were to keep books of account open to her inspection and faithfully to account to her. There was no such covenant with the mortgagees. That being so, the mere fact that Messrs. Garth & Weatherall were, under the terms of the mortgage deed, liable to submit to the mortgagees all such information and accounts as might be called for by them for the purpose of

satisfying themselves as to the proper management of the mortgaged premises or for the purposes of auditing and scrutiny, if thought necessary by them, did not constitute them agents of the mortgagees. As already stated, the mortgagees had no power of dismissing Messrs. Garth & Weatherall, and all that the mortgagees were entitled to get was Rs. 12,600 a year as provided in the mortgage deed, and the balance of the profits, if any, was to go to Messrs. Garth & Weatherall as part of their remuneration and therefore. as agents of the mortgagor. In the case of Mohini Mohan, half of the surplus profits were to go to him and the other half to the managers. The mortgagees were not to get anything over and above Rs. 12,600 a year. Having regard to all the provisions of the deed of mortgage and management we think that Messrs. Garth & Weatherall were the agents of the mortgagors.

There was no provision in the deed of mortgage that Messrs. Garth & Weatherall were to account to Priyomoyee and that is because they were no parties to it. It was necessary, however, to provide in the deed of mortgage that the managers would be liable to submit information and accounts to the mortgagees if required by them, because the latter, in the absence of any authority from the mortgagor, would have no power to call for the same from the managers, and they (the mortgagees) were no parties to the deed of appointment. It is pointed out that it is not expressly stated in the mortgage deed that Messrs. Garth & Weatherall were to be the agents of the mortgagor, but such a statement is necessary where, as in the English cases cited before us, both the mortgagee and the receiver are parties to the deed. Here Messrs. Garth & Weatherall were appointed by Priyomoyee alone by a separate deed of appointment to which the mortgagees were no parties, and all the provisions of the deed show that they were to be agents of hers only. It was unnecessary under these circumstances to make an express statement that they were to be the agents of the mortgagor. Paragraph 8, of the mortgage deed provided that if the manager for the time being failed to apply any part of the rents and profits as provided in the deed, then the mortgagees would be able to appoint any person, upon such salary and remuneration and with such powers of management as they shall think fit to be receiver of the rents and profits of the mortgaged premises and the mortgagees would, at their absolute discretion, be able from time to time to suspend, remove or dismiss any receiver in his place, and that the mortgagees shall not incur any personal liability in respect of or be personally answerable for any loss or misapplication of the rents or profits of the mortgaged premises or any part thereof by reason of any default, neglect or misappropriation of any manager or receiver. It was further provided that

"any receiver appointed as aforesaid shall be forthwith discharged by the mortgagees, and the mortgaged premises shall be again managed as hereinbefore provided by a manager upon the mortgagor making good the deficiency or default in consequence of which the receiver was appointed, and upon the mortgagor paying all the expenses incurred in connexion with the appointment and during the employment of the receiver."

This clause makes clear the distinction between a receiver who could be appointed and dismissed by the mortgagees (though the latter would not be liable for his default or misapplication) and a manager who was to be appointed by the mortgagor and into whose management the estate was to revert on the mortgagors making good the deficiency which led to the appointment of the receiver by the mortgagees. Cl. 6, para. 7, provided for the dismissal of the manager by the mortgagee, if the mortgagor failed to execute powers of attorney or other deeds in order to enable the managers to properly carry on the management. It will be seen that Cl. 8 related to the appointment of a receiver by the mortgagees only in certain events, and only then they could exercise the absolute powers given to them. So long as they fulfilled the conditions, Messrs. Garth & Weatherall could not be removed by the mortgagees. The motgagees, however never appointed a receiver and the provisions relating to the power of the mortgagees to appoint a receiver never came into operation, nor did the contingency contemplated in Cl. 6, para. 7 ever arise. If they had, the questions raised on behalf of the appellant, viz., whether in such a case the receiver should be treated as agent of the mortgagor or the mortgagees and whether the English law on the point should be followed in this country, would have required consideration. As it is, so far a

Messrs. Garth & Weatherall were concerned, we think that they were agents of the mortgagor. It will be observed that Messrs. Garth & Weatherall were to get 15 per cent. on the gross collection as their commission and the remainder of the income (after payment of the amounts specified in the deed of management) by way of remuneration in addition to the said 15 per cent., whereas in England the receiver's commission does not exceed 5 per cent. under the statute, but the mortgagees were to get nothing beyond their principal and interest. It also appears that in some respects the powers given to Messrs. Garth & Weatherall were more extensive than those which a receiver has in England.

It may have been imprudent to appoint them on such terms and with such powers but that cannot affect the construction of the deeds nor make them agents of the mortgagor. The evidence shows that Messrs. Garth & Weatherall were treated and acted as agents of the mortgagors. After the death of Mohini Mohan, Sham Peary made an application for Letters of Administration. Thereupon Messrs. Garth & Weatherall made a petition to the District Judge of Dacca on 13th January 1897: see Ex. B, in which they stated that accounts had been rendered from time to time to Mohini Mohan up to the end of 1301, that Mohini Mohan had been in the habit of taking advances from them and that he had overdrawn rupees 12,844. On account of such advances, and for the reasons stated in the petition, they prayed that a receiver or administrator might be appointed of the moveables and also immovable properties other than those under the management, as the estate was likely to suffer loss and damage if left in the hands of Sham Peary, his heiress. A similar application was made by the Bank of Bengal (Dacca Branch) as a creditor of the deceased for the appointment of a receiver. It appears from the order of the District Judge, dated 29th January 1897, passed upon that petition that Sham Peary in showing cause stated that no adjustment of accounts since the year 1301 had been made with the managers. So the adjustment of accounts up to that year was admitted.

The District Judge appointed the Nazir of his Court as Administrator. The order sheet (O. 7, dated 16th February 1897) shows that accounts were filed by Messrs. Garth & Weatherall, and the Administrator was directed to examine them. All this goes to show that at that time both Sham Peary and Garth & Weatherall proceeded on the footing that the latter were accountable to the mortgagor. If they were the agents of the mortgagees, the mortgagor or his Administrator could not call upon them to account, and the Court could not order such accounts except in a suit for redemption. Then in the deed of endowment, dated 14th December 1902, Priyomoyee distinctly stated that she had placed the management of the properties in the hands of Messrs. Garth & Weatherall. This deed was, as we have seen, attested among others by Debendra Nath Das, Pleader, and Kunja Behary Das, who managed her affairs, and there is no suggestion that she did not understand the document.

Then again in the subsequent deed of endowment, dated 10th February 1898, (which was consented to by the then sole reversioner Khetra Mohan) she made a similar statement. Admittedly her allowance of Rs. 2,400 a year was stopped from the year 1898, and if these gentlemen were the agents of the mortgagees, Priyomoyee would certainly have complained to the Company that her allowance had been stopped or that Messrs. Garth & Weatherall were mismanaging the properties. This shows how the arrangement was understood by the parties. Lastly, in the release executed by Sham Peary herself on 26th November 1908 in favour of Mr. Weatherall, it is stated,

"after looking into and examining the accounts which you have up to this day submitted to me and to my predecessors and upon taking into consideration the effect thereof, upon receipt of the cash tahbil of this day according to the jama-kharach submitted by you and with the advice of well-wishers and persons having knowledge of law I execute in your favour this deed of release in respect of all acts done by you and Mr. Garth, and after his death by you alone."

This unmistakably shows that Messrs. Garth & Weatherall acted as the agents of the mortgagor. The accounts were admittedly submitted up to 1301, and the release by Sham Peary is only consistent with their being the agents of the mortgagor. If they were not the agents of the mortgagor, Sham Peary would not have given a release to Mr Weatherall. It is contended in this Court that no importance should be attached to the deed of release executed by Sham Peary, an

old lady in her dotage. But in her written statement she did not attack the said deed nor plead that it was not binding upon her, and no issue was raised as to the validity thereof. It appears from the evidence that her servant, Radha Bullav Das, attested the deed. ThisRadha Bullav signed her name in the written statement and looked after this litigation on her behalf, and was actually present in Court at the trial and he was not examined. Under these circumstances we are unable to discard the deed of release as being of no value. The deed of release was to be kept in the custody of the Bank of Bengal and was not to operate until a trust deed executed by Mr. Weatherall was to reach the hands of Mr. Lockhart, who was appointed manager in his place. In the agreement executed by Sham Peary in favour of Mr. Lockhart on the same day it was stated,

"I am entitled to take away from him (Mr. Weatherall) the management and possession of the properties",

and that Mr. Weatherall had resigned according to her wishes, and the provisions of that agreement to show that Mr. Lockhart became her agent. Mr Lockhart, it appears, was appointed on new terms by Sham Peary, and he managed the estate as her am-mukhtear, paid moneys to the Company from 1908 to 1910, as shown in the statements annexed to the plaint. The defendant in her written statement (para 22) stated that Mr. Lockhart had been appointed manager by the plaintiff Company without her knowledge and consent, and that he remained as their agent until May 1910, that he had committed various acts of mismanagement and misappropriated large sums of money, and that the plaintiffs, in order to avoid their responsibility to the defendant, had caused a suit for accounts to be instituted against Mr. Lockhart in the name of Mr. Weatherall by suppression of material facts. Mr. Weatherall, it is true, promised to execute a power of attorney in favour Mr. of Lockhart, who had been nominated a trustee by Sham Peary and the Company in the interval pending the execution of the deed of trust by Mr. Weatherall in his favour. Mr. Weatherall did not execute the deed of trust, and the order sheet dated 30th January 1913 shows that Mr. Weatherall instituted a suit against Mr. Lockhart. But the fact remains that Sham Peary did execute a release in favour of Mr. Weatherall and which can only be upon the footing that he was the agent of the mortgagor, and the defendant has not attempted to substantiate the allegation that Mr. Lockhart was appointed manager by the plaintiff Company without her knowledge or consent.

We do not see how Sham Peary, after herself having made the statements which she did in the release referred to above, and given a release to Mr. Weatherall, can say that Messrs. Garth & Weatherall were the agents of the mortgagees, or hold the Company liable for their misconduct, if any. Lastly in the letter, dated 19th September 1909, (Ex. 40) written by Sham Peary to Messrs. Gillander Arbuthnot & Co. (the agents of the mortgagees) there is not a word of complaint against the Company or about any mismanagement by Messrs. Garth & Weatherall. The letter was drafted by the pleader Gagan Chandra Ghose, who says that he explained it to Sham Peary and the letter bears an endorsement to that effect. This gentleman states that he used to write letters, give legal advice and watch whether any property of the estate was going to be ruined on account of the bad management of Messrs. Garth & Weatherall, and he used to get a retainer of Rs. 25 per month from Sham Peary for such services. He, however, says that he never asked Messrs. Garth & Weatherall about their management of the estate nor thought it his duty to ask them anything bearing on the management of the estate. He admits that he saw tabular statements (gross collections, Government revenue, cesses, landlord's rents, establishment charges, net income, amount to be paid for interest, formed the principal headings or columns of such tabular statements) submitted by Messrs. Garth & Weatherall at the place of Sham Peary, that every year such tabular statements used to be submitted to Sham Peary, and that in the columns of interest and principal the amounts due to the Company were mentioned. He says that Messrs. Garth & Weatherall used to send similar statements to the plaintiff Company, but he did not see any statement being sent, he only saw such statements ready to be sent.

He further says that every year auditors from the plaintiff Company used to

come to Dacca to check the management account kept by Messrs. Garth & Weatherall, and gives the name of one of the auditors as Kamikhya Nath Sen. This Kamikhya Nath was the accountant of Messrs. Gillanders and he says that the Company were never in possession and never interfered with the management thereof by Messrs. Garth & Weatherall. He admits that he went to Dacca on several occasions and states the business for which he went there. He was not cross-examined as to whether he had at any time audited the accounts of Messrs. Garth & Weatherall. He was examined on commission in March 1914, while Gagan Chandra Ghose was examined in April 1914. Kali Dyal Ghose, who was the head clerk of Messrs. Garth & Weatherall, says that no member of Gillanders' firm ever came to the firm of Messrs. Garth & Weatherall to make any inquiry about the income and expenditure of the mortgaged estate, and does not remember if any accounts were submitted to them. He says that Messrs. Garth & Weatherall had a power of attorney from the plaintiff Company to look after their interest, but that was three years after the execution of the mortgage deeds. One Jonmeyjoy Dutt, who was in the service of Messrs. Garth & Weatherall as the peshkar of their zamindari office, was examined by the plaintiffs and he says that he does not know if they sent any account to the Company. Mr. Grazebrook of the firm of Messrs. Gillanders Arbuthnot & Co. has deposed that the plaintiff Company had nothing to do with the annual collection or expenditure or the management of the mortgaged properties, that Messrs. Garth & Weatherall were not their agents and no statements were called for by the Company from them.

It appears, therefore, that there is conflict of testimony upon the question whether tabular statements were sent by Messrs. Garth and Weatherall. But even assuming that they did submit tabular statements to the Company, that fact by itself would not constitute them agents of the Company, as the latter were entitled under the terms of the mortgage to get information and accounts from the manager for satisfying themselves as to the management of the mortgaged premises. It is contended that the mortgagees ought to have removed Messrs. Garth and Weatherall when they defaulted in paying the principal and interest as provided in the scheme. But we do not know the reasons why they defaulted, and although the mortgagees had the power under Cl. 8, they were not bound to exercise that power. On the other hand if Messrs. Garth & Weatherall were the agents of the mortgagees it is remarkable that the mortgagor did not complain to the Company about such default although yearly statements were submitted by Messrs. Garth and Weatherall to the mortgagor and although the allowance payable to Priyomoyee herself had been stopped. We have seen that Priyomoyee in the deed of endowment stated that

"unfortunately on account of various adverse circumstances intervening in the management of the properties,"

her allowance had been stopped since 1898. The plaintiffs have produced a large number of decrees to show that rent suits were instituted by Messrs. Garth and Weatherall in the name of the mortgagors and copies of mutation proceedings to show that they got themselves registered as managers for the mortgagors under the Land Registration Act and subsequently as trustees. If Messrs. Garth & Weatherall were the agents of the plaintiff Company the mortgagors would have complained of their mismanagement to the Company; and it is remarkable that throughout the long period from the date of mortgage to the date of the suit there was not a word of complaint to the Company by Priyomoyee, Mohini Mohan, or even by Sham Peary after their death.

It is to be observed that there is no evidence that Messrs. Garth and Weatherall actually mismanaged the estate, or were guilty of misconduct or neglect of duty. It is contended that they must have satisfied themselves before they took over the management that the income was sufficient to meet the payment of Rs. 12,600 a year to the mortgagees and Rs. 2,400 a year to Priyomeyee, besides the 15 per cent, commission for themselves, and even a balance of profits was anticipated, the whole of which was to go to them in the case of Priyomoyee and a moiety of which was to be received by them in the case of Mohini Mohan and that the facts that the payments were made for the first few years as stipulated in the deeds and then became less show

that there was at any rate mismanagement by them in subsequent years. But there was no evidence as to why the payments became less in subsequent years. Debendra Nath Das who managed the 4 annas share of Gobindarani (widow of Radhika Mohan) says that the net income of the share was between Rs. 12,000 and Rs. 13,000. He however managed that share without any remuneration. Then he says that during two years the realization was less on account of a litigation for a chur. We have seen what Priyomoyee herself said in the deed of endowment on the point although her own allowance had been stopped, and having regard to the fact that accounts had admittedly been submitted to Mohini Mohan until 1301, it is very unlikely that the mortgagors would not have complained at any time if there was misappropriation or mismanagement by Messrs. Garth & Weatherall. If they were the agents of the mortgagors, the company would not be responsible even if there was any mismanagement by them but the absence of any complaint on the part of the mortgagor during such a long period has a bearing on the question whether Messrs. Garth & Weatherall acted as agents of mortgagor. There remains only one other point raised in this Court.

Moti Lall Das (the son of Khetra Mohan), who is the reversionary heir, is defendant 2 in the suit, and a contention is raised on his behalf that the arrangement between Sham Peary and Mohini Mohan by which the former gave up the right (which she inherited from her deceased son Sashi Mohan) in favour of the latter in consideration of the maintenance of Rs. 150 a month is not binding upon him (Moti Lall Das) after the death of Sham Peary. The question was not raised in the Court below and in a suit upon the mortgage, no question of title paramount should be gone into. This contention is accordingly disallowed. The result is that the decree of the Court below will be varied in this way. It will be declared that the property mortgaged to the extent of the 4-annas share which Sham Peary inherited from Sashi Mohan is subject to the charge of Rs. 150 a month in her favour. The interest under the deeds of mortgage executed by Priyomoyee and Mohini Mohan respectively will be calculated at the rate of 7½ per cent. together with simple interst at that rate upon the amount of interest which was not punctually paid. The principle of calculation will be according to that adopted in the plaint. The usual mortgage decree will be prepared in each of the suits giving the defendants six months' time from this date (3rd April 1917) for redemption. In all other respects the appeals will be dismissed with three-fourths costs, except that in calculating the costs incurred on account of Court fee, the costs will be proportionate in inverse ratio to the success of each party, and only one hearing fee will be allowed in the appeals against the final decrees.

V.B./R K. *Decrees varied.*

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CHATTERJEA AND NEWBOULD, JJ.

Mahendra Chandra Datta and *others*—Appellants.

v.

Abhoy Charan Sarma and *others*—Respondents.

Appeal No. 88 of 1915, Decided on 22nd February 1917, from original decree of Dist. Judge, Sylhet, D/- 17th December 1914.

(a) Land Acquisition Act (1894), S. 18 (2) (6)—Reference by Collector within 6 weeks of award is within time.

Where before the date of the award, the Collector having passed an order that the party should go to the civil Court, the Mukhtear of the party ceased to take any further part in the proceedings before the Collector and a reference was made more than six weeks after but within six months of the award:

Held: that the reference was within time under S. 18 (2) (6). [P 579 C 1]

(b) Hindu Law—Widow—Sale by, without legal necessity is only voidable—Purchaser can sue for ejectment.

The sale by a Hindu widow without legal necessity or the consent of the reversioners of property inherited from her husband, is not void, but is only voidable at the instance of the reversioners or persons claiming under them. [P 580 C 1]

Obiter.—A purchaser under such a sale is entitled to sue in ejectment. [P 580 C 1]

Sasadhar Roy—for Appellants.

Hemendra Kumar Das—for Respondents.

Judgment.—This appeal arises out of a proceeding under the Land Acquisition Act and the question involved in the appeal is whether the appellant or the respondent should get the compensation awarded by the Collector. A preliminary objection has been taken on behalf of the respondent that the reference under S. 18

was barred by limitation, inasmuch as it was not made within six weeks from the date of the Collector's award. It is contended that, as a Mukhtear appeared at some stage of the proceedings, it must be taken that the appellant was represented before the Collector at the time when the Collector made his award. It appears however that some time before the date of the award, the Collector passed an order that the appellant should go to the civil Court; and it does not appear that the mukhtear took any further part in the proceedings before the Collector. That being so, the appellant was not present or represented before the Collector at the time when he made his award. The reference having been made within six months of the award was within time under S. 18, sub-S. (2), Cl. (b). The preliminary objection is accordingly overruled.

The dispute between the parties relates to compensation for five plots of land, namely, plots Nos 14, 19, 20, 58 and 28. So far as plot No. 28 is concerned, it appears that, after the delivery of possession thereof to the appellants' predecessor, who purchased it at an execution sale, the respondent preferred a claim which was successful and no suit was brought within the period of limitation. The claim, so far as this plot is concerned, was not pressed in argument before the Court below and must accordingly be disallowed. With regard to the remaining four plots the appellant claims to have purchased them in execution of a decree against Bimala Sundari, widow of Dinonath, in respect of debt due by the latter. The respondent, on the other hand, claims title to one-half of them by right of adverse possession, and the other half by virtue of one Baikuntha "having given up the same in his favour." He says that these lands originally belonged to one Jagannath and that, after the death of Jagannath and his widow Annapurna, they were inherited by their daughter's sons Ratanmoni and Banku Behari, that Banku Behari sold his 8 annas to Baikuntha and that it was this Baikuntha who gave up the 8 annas in his favour. So far as Ratanmoni's 8 annas share is concerned, the respondent claims it by right of adverse possession. The learned District Judge has found that neither party has been able to prove his title, and, as the respondent was in possession, he disallowed the claim of the appellant. The learned Judge seems to have proceeded upon the assumption that the properties originally belonged to Jagannath. That however was not the case of the appellant, and there is really no evidence on the side of the respondent to show that the properties originally belonged to Jagannath.

The witnesses who deposed on the point have no personal knowledge about the matter, and we must hold that the respondent has failed to prove that Jagannath was entitled to the lands. But assuming that Jagannath had any title to the lands and that they descended to his daughter's sons, Ratanmoni and Banku Behari, we do not think that the title of the respondent has been made out. As stated above, so far as Banku Behari's share is concerned, all that the respondent said in his written statement in the Court below was that Baikuntha had given up his right in his favour, and that throws considerable doubt upon the evidence adduced by him to prove that there was a purchase of the 8-annas share from Baikuntha. Then, as regards the share of Ratanmoni, the respondent claims his title by adverse possession for over twelve years. He himself in his deposition said that he had been in possession for about eleven or twelve years and one of his witnesses, Dinonath Sarma, said that it was for fourteen or fifteen years But Dinonath is his brother-in law and he went further than the respondent himself as to the period for which the respondent was in possession. As stated above the respondent in his written statement claimed title to Ratanmoni's share by adverse possession for twelve years but adduced evidence to show that he had also purchased Ratanmoni's share. That evidence cannot be accepted and we think that neither the purchase from Ratanmoni nor from Baikuntha has been satisfactorily proved.

The learned Judge relied upon the fact that the respondent was in possession; and it is contended before us that the respondent should be awarded the compensation unless the appellant can show a better title. The learned Judge was of opinion that the properties belonged to Jagannath and that, if the appellant purchased the properties from Annapurna, that purchase was not binding upon the reversionary heirs of Jagannath or per-

sons claiming under him. But, in the first place, it has not been shown that the properties belonged to Jagannath; and, secondly, even if the properties belonged to Jagannath and were inherited by his widow Annapurna, the purchase by the appellant or his vendor from Annapurna is not void. It is only voidable at the instance of the reversioners or persons claiming under them. That is well settled: see *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1). A purchaser from a Hindu widow, although he is not able to show either legal necessity or consent of the reversioner, is entitled to sue in ejectment: see *Kishori Pal* v. *Sheikh Bhushai Bhuiya* (2). We have already found that the respondent has not proved any title derived from the reversioners of Jagannath, assuming that the title belonged to him. That being so, he cannot question the title of the appellant even if he is taken to have purchased from Jagannath's widow Annapurna. He however claims his title through Dinanath and it is not disputed that he purchased the interest of Dinanath at the execution sale.

In any view of the matter, we think that the appellant has proved his title to the four plots and that he is entitled to the compensation in respect of them. The respective values of plot No. 28 and of the other four plots do not appear from the record before us. We accordingly send the case back to the lower Courts in order that the value of plot No. 28 may be ascertained and the compensation awarded in respect of that plot may be given to the respondent Abhoy Charan Sarma out of the five plots, the subject-matter of the appeal, and that the compensation in respect of the other plots Nos. 14, 19, 20 and 58 may be given to the appellant. The parties will get their costs in both the Courts in proportion to their success. We assess the hearing fee in this Court at five gold mohurs.

V.B./R.K. *Appeal allowed.*

1. (1907) 34 Cal 329=34 I A 87 (P C).
2. (1909) 3 I C 78.

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RICHARDSON AND BEACHCROFT, JJ.

Monmotho Nath Laha—Appellant.

v.

Annoda Prosad Roy—Respondent.

Appeal No. 2259 of 1915, Decided on 16th January 1918.

(a) Limitation Act (1908), Art. 134—"Transfer" includes permanent lease.

The word 'transfer' in Art. 134 includes a transfer by way of a permanent lease. [P 581 C 1]

(b) Limitation Act (1908), Art. 134—Suit by shebait to recover debuttar property held under permanent lease is governed by Art. 134.

A suit by a shebait to recover debuttar property held by the defendant under a permanent lease granted by the plaintiff's predecessor is governed by Art. 134 and must be brought within 12 years of the date of the transfer. [P 580 C 2]

(c) Limitation Act (1908), Art. 134—Representation of idol — Limitation runs against shebaits continuously and not against each shebait individually—Religious endowment.

The representation of an idol by the shebait is a continuing representation and limitation runs against the shebaits continuously and not as against each shebait individually as and when he succeeds to the office, the shebaits not being holders of successive life-estates in the management or in the property of the endowment. [P 581 C 2]

Biraj Mohan Mojumdar and *Samarendra Kumar Dutt*—for Appellants.

Mohendra Nath Roy, *Bepin Behari Ghosh* and *Sajani Kanta Sinha*—for Respondents.

Richardson, J.—The present appeal is preferred from the judgment and decree of the Subordinate Judge of Burdwan, dated 28th May 1915, affirming the decree of the Munsif of Burdwan, dated 30th March 1914. The plaintiffs in the suit, who are the appellants before us, are the shebaits of a certain idol and they sue the defendants to recover possession of certain debuttar property held by them under colour of a mokarari lease granted by the father of the plaintiffs, the previous shebait, in the year 1876. The sole question which arises is whether the suit, which was instituted on 14th February 1913, is barred by the provision of Art. 134, Schedule of the Limitation Act 1908. By that article a suit to recover possession of immovable property conveyed or bequeathed in trust or mortgage and afterwards transferred by the trustee or mortgagee for valuable consideration must be brought within 12 years of the date of the transfer. Prima facie the present suit falls within the article and having been brought more than 12 years after the date of the lease to the defendants is out of time. The Courts below have so held.

It has been contended on behalf of the plaintiffs that the transfer to the defendants having taken the form of a lease

the transfer is not a transfer within the meaning of Art. 134 and that article has no application. In support of this contention reliance has been placed upon the cases of *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2). These cases, however, were decided by the Judicial Committee under the Limitation Act, 1877, in Art. 134 of which the word "transferred" was not used. As the article then stood, it applied only to properties "purchased" from the trustee or mortgagee and the period of limitation was 12 years from the date of the "purchase." It was held in *Abhiram Goswami's* case (1) that the word "purchase" did not include a transfer by way of lease, even though the lease was a permanent lease. As to the second of the two cases, if regard be had to the course which it took, it will be found to be in respect of the present law an authority rather in favour of the defendants than in favour of the plaintiffs.

The judgment of this Court which was taken on appeal to the Privy Council was delivered in 1905. [*Ram Kanai Ghose* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (3)]. This Ccurt held that the word "purchased" in Art. 134 of the Act of 1877 was as applicable to a permanent lease, such as a putni lease, as to an absolute conveyance, and in so doing adopted the view taken in an earlier case decided in 1896, the case of *Nilmony Singh* v. *Jagalandhu Roy* (4). On the first hearing of the appeal to the Privy Council, the appeal was dismissed and the decision of this Court was affirmed. An application was, however, subsequently made to their Lordships to review their judgment [*Sri Sri Ishwar Shyam Chandjiu* v. *Ram Kanai Ghose* (5)] and on review the decision of this Court was reversed in 1911 on the ground that it was, as regards the meaning of the word "purchased," inconsistent with *Abhiram Goswami's case* (1) which had been decided by their Lordships in 1909. As Art. 134 is now worded, it is impossible to say that a transfer by way of a permanent lease is not within its scope. Apart from the dates it might seem that the language was altered for the express purpose of avoiding the effect of the ruling in *Abhiram Goswami's* case (1). In fact it was apparently not intended to make any change in the law but only to state more clearly the law as it was at the time understood.

The further point taken, that the plaintiffs had no cause of action till their father died, is also untenable on the authorities. In *Madhu Sudan Mandal* v. *Radhika Prosad Das* (6) the question was treated as concluded by the decision of the Privy Council in *Damodar Das* v. *Lakhan Das* (7). The representation of the idol by the shebaits is a continuing representation, and limitation runs against the idol continuously and not as against each shebait individually as and when he succeeds to the office, the shebaits not being holders of successive life-estates in the management or in the property of the endowments: *Prosunno Kumari Debya* v. *Golab Chand Baboo* (8), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (9). It has next been contended, however, that *Abhiram Gowsami's* case (1) must be taken to have settled what the law was before the Lim. Act, 1908, was passed and that the plaintiffs, therefore, are entitled to say that they have been deprived of a right of suit which they had under the pre-existing law or that in some way they are entitled to treat the present suit as a suit not under Art. 134 but as a suit to which some other Article applies. As the argument is put, in one aspect it is the last point over again, namely, that the plaintiffs had no cause of action till their father died in 1912. Even if this were so, it is obvious that they had no vested right of suit when the Act of 1908 was passed. In another aspect the argument seems to be that their cause of action has at any rate been in some way changed. But if time ran against the idol, no change of substance has occurred in respect of the cause of action. That still depends, as it did before, on the unlawful alienation of the property by the plaintiffs' father and even if the defendants had to prove adverse possession, adverse possession would run against the idol under the old law just as it would

1. (1909) 36 Cal 1003=4 I C 449=36 I A 148.
2. (1911) 38 Cal 526=10 I C 683=38 I A 76 (P C)
3. (1905) 2 C L J 546.
4. (1896) 23 Cal 536.
5. (1910) 14 C W N 244 n.
6. (1912) 16 I C 927.
7. (1910) 37 Cal 885=7 I C 240 (P C).
8. (1874-75) 2 I A 145=14 B L R 450. (P C)
9. (1900) 23 Mad 271=27 I A 69 (P C).

under the new law: *Nilmony Singh* v. *Jagdandhu Roy* (4), *Damodar Das* v. *Lakhan Das* (7). The gist of this part of the argument seems to be that the Article of the Limitation Act applicable would previously have been Art. 144 and not Art. 134. But whether that be so or not, the whole of the contentions based on the change in the law really come to this, that the passing of the Act of 1908 has cut down and made shorter the period of limitation to which the plaintiffs would otherwise have been entitled. In such a state of things the relevant section of the Act, to which we must look, is S. 30. That section provides that.

"notwithstanding any thing herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Limitation Act, 1877, may be instituted within the period of two years next after the passing of this Act or within the period prescribed for such suit by the Limitation Act 1877, whichever period expires first."

The Act of 1908 was passed on 7th August of that year and the period of two years allowed by S. 30 expired before the suit was instituted. There is no other concession to which the plaintiffs are entitled and having regard to the law as it was understood to be in this country up to 1908, there is no hardship. As a last resort, it has been argued that, at any rate, the minor plaintiffs are entitled to an extension of time under the provisions of S 6 of the present Act. It may be doubted whether the provisions of S. 6 control those of S. 30. But the true answer to this argument seems to be that under the law as it now stands it must be taken that the time began to run in 1877 when the lease to the defendants was granted and that under S. 9 of the Act the time having once begun to run no subsequent disability or inability to sue stops it. For the reasons indicated I am of opinion that this appeal fails and must be dismissed with costs.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 582

RICHARDSON AND WALMSLEY, JJ.

Golapdi Meah and *others*—Defendants—Appellants.

v.

Purna Chandra Dutta and *others*—Plaintiffs—Respondents.

Appeal No. 3191 of 1914. Decided on 19th March 1917.

(a) Hindu Law— Joint family— Consent given by karta for transfer of occupancy holding not transferable by custom is binding on other members.

The consent given for the transfer of an occupancy holding not transferable by custom by the karta of a joint Hindu family under which it is held is binding on the other members of the family. [P 582 C 2; P 584 C 1]

The powers of a karta of joint Hindu family include the power to recognize the transfer of a tenancy not transferable without the landlord's consent. [P 583 C 2]

(b) Civil P. C. (1908), O. 41, R. 1 —Respondent wrongly named — Mistake is not fatal.

Where in an appeal the respondent was wrongly named the mistake being due to a clerical error in the decree appealed against:

Held: that the mistake was not fatal. [P 583 C 2]

Rash Behary Ghose and *Probodh Chandra Roy*—for Appellants.

Monmatha Nath Mukerjee—for Respondents.

Richardson, J.—I have read the judgment prepared by my brother Walmsley and concur in it. On the question of the extent of the karta's authority which is raised I had little doubt during the argument that the karta of a joint Hindu family has authority to consent on behalf of the joint family to the transfer of an occupancy holding held by the tenants under the joint family as landlords and not transferable without their consent duly given by themselves or on their behalf.

Walmsley, J.—This is an appeal by defendants 2 to 7 against a judgment of the learned Subordinate Judge of Faridpur, who reversed the decision of the first Court and decreed the plaintiffs' suit. The circumstances are are as follows:

The Dutt family, to which the plaintiffs belong, hold a certain tenure and within that tenure the land in suit was let out to two tenants named Dinu and Menajuddin in 1878. Their interest was that of occupancy raiyats, without the right of transfer except with the consent of their landlords. The Dutt family consisted of three brothers, Khudiram, Mohesh and Kodai. Plaintiff 1, Purna, is the son of Kodai, and plaintiff 2, Soshti, is the son of Mohesh. Khudiram had three sons, Kali Charan, Ram Charan, and Soshi Mohan. Kali Charan is defendant 8 and Soshi Mohan is defendant 9. Kali Charan's wife is Joy Durga Sundari Dasi defendant 1. Some time before 1900 Dinu and Menajuddin borrowed money from Joy Durga and mortgaged the hold-

ing to her. She brought a suit on the mortgage, and in execution of the decree she caused the holding to be put up for sale, and then bought it herself on 24th November 1900. She was put in possession in the following year. On 29th November 1900, she let out the land to defendants 2 to 7, now the appellants, and they paid her a bonus of Rs. 700. On 26th November 1912, Purna instituted the present suit for recovery of khas possession to the extent of his one-third share and his cousin Soshi subsequently joined him as plaintiff. Joy Durga filed one written statement, and defendants 2 to 7 another, but Joy Durga has not joined in the present appeal.

The learned Munsif found that Joy Durga had changed sides after filing her written statement and on the merits of the case he held that the mortgage to Joy Durga was effected with the consent of the plaintiffs and their cosharers, that Soshi Mohan Dutt was karta of the family and that he actually conducted the mortgage suit on behalf of Joy Durga, and consented to her purchase of the holding at the auction sale that, Joy Durga was recognized by the plaintiffs and in particular by Soshi Mohan, the karta, as their tenant, and that she held possession of the land for several years through her bargaits, and latterly through defendants 2 to 7, and that these defendants took settlement from her in good faith and paid her Rs. 700 as nazarana. He also held that apart from the landlord's recognition of Joy Durga, the defendants were entitled to retain possession on the double ground that they are settled raiyats of the village, and that they took settlement from Joy Durga in good faith, believing her to be entitled to admit them to the land. On these findings the plaintiffs' suit was dismissed.

Before the learned Subordinate Judge on appeal it was urged that the Munsif was wrong in holding that Joy Durga's purchase had been recognized, that he had taken an erroneous view of Joy Durga's conduct in the suit; and that the circumstances did not warrant the first Court's view as to the effect of the settlement by Joy Durga. These contentions were upheld. In this Court defendants 2 to 7 are the appellants. A preliminary objection is taken on behalf of the plaintiff Soshti that when the appeal was filed in November 1914 the name of the second plaintiff was given not as Soshti but as Judishtir, and that the mistake was not corrected until July 1916. It appears, however, that in the copy of the lower appellate Court's decree the name was written as Judishtir, and that being so, the mistake was a pardonable clerical error for which the appellants should not be penalized. The main argument advanced on behalf of the appellants is that the consent given to a transfer of an occupancy holding not transferable by the karta of a joint Hindu family is binding on other members of the family; in short that Soshi Mohan's consent to Joy Durga's purchase binds the plaintiffs. There is no dispute about the fact that up to some date later than Joy Durga's purchase and the delivery of possession to her the family was and continued to be a joint Hindu family and that Soshi Mohan was its karta.

The learned Subordinate Judge held that the first Court was wrong about the matter of recognition on four grounds, viz., (a) that the dakhilas, Exs. E and F, purporting to have been granted by Purna to Joy Durga were not genuine, (b) that Purna was a mere boy during his so called acquiescence in Joy Durga's possession; (c) that the presumption arising from the entry of Joy Durga's name in the Record of Rights had been rebutted; and (d) that the acts of a karta in relation to properties that are no joint family properties, does not bind the other members of a family. It is with the last point that we are now concerned. Sir Rash Behari Ghose, on behalf of the appellants, concedes that he cannot refer us to any case in which the power of the karta to recognize a transfer has been affirmed.

On the other hand, there is no decision to the opposite effect. The powers of a karta are described in the case of *Chuckun Lall Singh* v *Poran Chunder Singh* (1), and it seems to me that they must include this power to recognize a transfer. The learned vakil for the plaintiffs seeks to avoid this conclusion by arguing that the holding that was sold belonged to the mortgagors, and that the mortgagee who bought it was not a member of the joint family, and this I think, must be the meaning of the Subordinate Judge's words, "acts in connexion with properties which are not joint family property." The fal-

1. (1868) 9 W R 483.

lacy of the argument, I think, lies in the fact that the rights of the mortgagors, and of the mortgagee, decree-holder auction purchaser, do not exhaust the whole bundle of rights involved in the transaction. There is also the landlord's right to give or withhold his consent to the transfer; this I regard as part of the joint family property, and, as such, I think it comes within the scope of the control exercised by the karta of the joint family. If therefore there has been recognition of the transfer by Soshi Mohan as karta of the family, the plaintiffs are bound by that recognition. The learned Munsif found explicity that there had been such recognition, and this finding is not displaced in the judgment of the lower appellate Court: in fact the correctness of the finding does not seem to have been questioned, and the learned Judge accepted it without discussion.

I have said above that there is no dispute about the family being joint in property. I should mention, however, that in this Court we were asked on behalf of the respondents to note that the kabuliyat of 1878, was in favour of the three sons of Khudiram, and not of a karta, and that Joy Durga alone took a mortgage of the holding. The facts are not of much importance, but the question is not one which we can enter into now, because both the lower Courts find that the family was joint in property. Another argument used for respondents is that the appellants have really changed their case, and that recognition by the karta is a late development; but this argument ignores the important words of para. 9 of the written statement where it is said that Soshi Mohan, "who was karta of the family at the time," settled the amount of nazar to be paid to Joy Durga. This is explicit enough. For the reasons given, I would allow the appeal, set aside the decree of the lower appellate Court, and restore that of the first Court, dismissing the suit with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 584

FLETCHER AND SMITHER, JJ.

Hajra Sardara—Appellant.

v.

Kunja Behari Nag Choudhury—Respondent.

Appeal No. 134 of 1915, Decided on 20th March 1917.

(a) Adverse Possession—Possession by trespasser does not become adverse against lessor till termination of lease.

The possession of a trespasser of land let out on lease does not become adverse as against the lessor until the termination of the lease. [P 585 C 2]

(b) Lessor and Lessee—Trespasser in possession of land—Lessor can eject until shown that his settlement is bona fide by third person entitled to let out land.

The mere fact that a trespasser has been in actual possession of land let out on lease for twenty years is no reason why he should not be ejected from the land by the lessor, unless it is proved that the trespasser had taken a bona fide settlement from a third person whom he believed, in fact, to be the landlord and entitled to let out the land. [P 585 C 2 P 586 C 1]

Dwarka Nath Mitter and *Satindra Nath Mukherjee*—for Appellant.

Rash Behari Ghose, *Mahendra Nath Roy*, *Bipin Behari Ghose, II*, *Biraj Mohan Mozumdar*, *Narindra Chandra Bose*, *Janendra Nath Sirkar* and *Sutyendra Nath Mitter*—for Respondent.

Fletcher, J.—This is an appeal by defendants 1 to 3 from a judgment of the Second District Judge of the 24 Pergannahs, dated 6th January 1915, affirming the decision of the Munsif of Basirhat. The suit was brought by the plaintiff for a declaration of his ganti right to certain chur lands. In kismat patta, there were two portions, the bower patta and the danga patta. The danga patta belonged to a certain number of zamindars and had been divided amongst them. The bower patta belonged to certain zamindars who are now represented by defendants 5 to 53. The first lease that was granted of this property appears to have been in the Bengali year 1268. That lease of the bower patta was granted to one Arun Chaunder Battacharjee. The lease in its terms excluded 321 bighas of land. Arun in his term granted an under-lease to two persons named Jasimuddin and Gorai Mandal on 20th Falgun 1271 B. S., corresponding to same date in March 1865. On 10th April 1901, an intermediate lease was granted to one Dhara Nath Roy Choudhury. Then a rent suit was brought by Dhara Nath to recover rent from Jasimuddin and Gorai Mandal. That suit was decreed and in the sale in execution on 29th July 1902 Dhara Nath Roy purchased the interest of Jasimuddin and Gorai. Dhara Noth Roy surrendered his ijara right in favour of Arun's son, the present defendant 4, on 19th June 1903, and sold his darganti right to one Pramoda Sundari. Then a suit for rent was brought

against Pramoda Sundari in the year 1908 and a decree was passed and defendant 4 purchased the tenure. On 14th July 1909, defendant 4 sold his right, purchased in execution, to the plaintiff. When the plaintiff went to take possession in October or November 1909, he was resisted and the result was that the present suit was started in the month of August 1911.

The first point that was raised in this appeal was as to whether the plaintiff had established that the land sued for in this case was a portion of the land included in the lease to Arun. The question, it strikes me, is eminently a question of fact. But whether it is a question of fact or not, the decisions both of the primary Court and also of the lower Court show conclusively that this land is, in fact, a portion of the land let out to Arun and that the 321 bighas which might have been bower patta originally had, on the date of the leose to Arun, become part of the danga patta. The next argument was on the question of limitation. The appellants before us, according to the findings of both the lower Courts, were for twenty years and upwards in possession of this land and the question that was raised in this appeal was whether the possession of the defendants was adverse as against the lessor during the subsistence of the underlease. If it was not, it is quite clear, on the facts, that the present suit was brought within time. The decisions in this Court on the point are numerous. But the decisions in favour of the appellants when one reads the cases closely are few and they consist, as far as I can see, amongst others, of the decision in the case of *Prosunnomoyi Dasi* v. *Kali Das Roy* (1), a decision of Princep and Field, JJ. That case has frequently not been followed in this Court. In my own experince while forming a number of a Bench of this Court certainly on one occasion that decision was not followed. The other case referred to is the case of *Brindabun Chunder Sircar Chowdhry* v. *Bhoopal Chunder Biswas* (2). That decision also seems to support the argument of the appellants. The other cases that Dr. Dwarka Nath Mitter for the appellants has cited in support of his argument do not, when closely read, support the proposition he put forward, because in every one of those cases the Court was deciding a case where the property had been let out to common tenants and the Court drew attention in the course of its judgment to the difference between a case where the property was let out to common tenants and a case where the property was let out in ijara. I do not think that those other cases cited by Dr. Dwarka Nath Mitter support the proposition that he wished to make. As against that, there is a large body of authority commencing with the case of *Davis* v. *Kazee Abdul Hamid* (3), which is followed by the decision in *Womesh Chunder Goopta* v. *Raj Narain Roy* (4), down to the latest case cited to us, namely, the case of *Kishwar Nath Sahi Dev* v. *Kali Sankar Sahai* (5). All these cases decided clearly that where the property was let out in lease, the possession of a trespasser did not become adverse as against the lessor until the termination of the lease. That I think is not only established by those cases but is also correct in principle. The difficulties of holding that the possession of a trespasser during the continuance of the lease could be adverse as against the lessor are serious, as has been pointed out in more than one judgment. I think that the learned District Judge in the Court of appeal below was clearly right when he held that the plaintiff's suit was not barred by adverse possession. I think, therefore, that the appeal fails and must be dismissed with costs.

The other question is the question raised on the cross objection to the appeal, namely, that on the findings in this case, the learned Judge ought not to have settled a fair and equitable rent as against the appellants but ought to have passed a decree for ejectment. The learned Judge has found that the appellants are trespassers. He has also found that the case, that the defendants set up that they bona fide held the land under a person whom they believed to be the owner thereof, is not a true case. The only reason for which the learned Judge thought that the defendants ought not to be ejected was that they had been in actual possession of the land for some 20 years and that therefore it was not equitable that they should be ejected. But if a person has been in actual possession for

1. (1882) 9 C L R 347.
2. (1872) 17 W R 877.
3. (1867) 8 W R 55.
4. (1868) 10 W R 15.
5. (1906) 10 C W N 343.

20 years and there are no special circumstances such as have been laid down in the cases as to a person taking a settlement bona fide from a person whom he believes to be entitled to the land, the mere fact that he has been there for 20 years is no reason why he should not be ejected. On the contrary it is more reasonable that should be ejected because he has been in possession of another man's property for a considerable number of years. The decree of the lower appellate Court in this respect has been attempted to be supported by Dr. Dwarka Nath Mitter by two decisions of this Court. But neither of those cases clearly applies to the facts of this case. The first case that has been relied upon is the case of *Ishan Chandra Mitter* v. *Raja Ram Ranjan Chakrabutty* (6), and the remarks that are relied on are to be found at p. 138. They run as follows:

"In a case like this where the tenant encroaches not in his charecter as tenant but asserts a hostile title against the entire interests of his landlord, the rule laid down by this Court in the case of *Wali Ahmed* v. *Tota Meah* (7) would be applicable, namely, that if a tenant encroaches on the adjoining waste lands of the landlord, his possession of the lands encroached upon can only commence to be adverse when a title adverse to the landlord is asserted or the landlord becomes aware of the encroachment."

The present case is clearly distinguishable from that rule, because the encroachment in this case was not an encroachment on the adjoining land of the landlord. These lands do not belong to the persons who are the landlords of the other lands said to be held by the defendants. The only other class of cases is that class where a person has taken a bona fide settlement from another person whom he believed to be in fact, the landlord and entitled to let out the land. The learned Judge in the lower appellate Court has found that the case that the defendants set up that they bona fide held the land under a person whom they believed to be the owner thereof was not a true case. The equity that they set up as to long possession which satisfied the learned District Judge is no ground, in my opinion, why they should be permitted to be in possession of the land which the learned Judge of the lower appellate Court has found they are holding possession of as trespassers. I think we ought to allow the cross-objection of the plaintiff-respondent and in lieu of the decree made by the learned Judge settling a fair and equitable rent of the property, we ought to direct that the defendants appellants before us be ejected from the land in suit. The cross-objection is therefore allowed with costs.

Smither, J.—I agree.

V.B./R.K. *Cross-objection allowed.*

6. (1905) 2 C L J 125.
7. (1904) 31 Cal 397.

A. I. R. 1918 Calcutta 586

FLETCHER AND NEWBOULD, JJ.

Digambar Das—Plaintiff—Appellant.

v.

Bisweswar Chowdhury and *others*—Defendants—Respondents.

Appeal No. 2844 of 1915, decided on 14th May 1917, from appellate decree of Dist. J., 24-Parganas, dated 16th January 1915.

(a) Tort—Defamation—Suit for damages against several persons making defamatory statements is not maintainable unless allegations are made by persons acting together.

Where a number of persons make defamatory allegations against the plaintiff, a suit against all of them to recover damages for defamation will not lie, unless it is proved that the defendants made those allegations acting together, as each publication of the libel or slander is a distinct tort and a separate suit would lie against every person uttering and publishing the slander. [P 587 C 1]

(b) Malicious Prosecution—Damages—Mere filing of complaint charging plaintiff with offences is not sufficient.

A mere filing of a petition of complaint charging the plaintiff with criminal offences is not by itself sufficient to support an action against the complainants for damages for malicious prosecution. [P 587 C 1]

Provash Chandra Mitter and *Surendra Madhab Mullick* for *Susil Madhab Mullick*—for Appellant.

Jogesh Chandra Roy and *Sarat Chandra Mukherjee*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff from a judgment of the learned District Judge of the 24 Perganas, affirming the decision of the learned Subordinate Judge of Alipur. The plaintiff brought his suit against 11 defendants to recover damages, first of all, for malicious prosecution and secondly, for defamation. I use the word "defamation" advisedly. The case set up in the plaint was that the plaintiff had been prosecuted before the Deputy Magistrate of Diamond Harbour by reason of the defendants having filed a petition before the learned Magistrate alleging that the plaintiff had been guilty of certain offences. The case of defamation as

argued in this Court and before the learned District Judge is, I am satisfied, a totally different case to that set up in the plaint. It is quite true that in the para. 3 of the plaint the plaintiff states that the defendants are persons living in the same village with the plaintiff and that they in collusion with one another are spreading false imputations against the plaintiff at various places, such as that the plaintiff had been assisting in abducting young women. But it is impossible to imagine that the case set up by the plaintiff was that the 11 persons at one and the same time were at various places making serious allegations against the plaintiff with reference to his having set fire to certain houses and being engaged in abducting girls. As a matter of fact, a suit like that will not lie unless it is proved that the defendants made these allegations acting together, as each publication of the libel or slander was a distinct tort and a separate suit would have to be maintained against every person uttering and publishing the slander. The real truth is that in this inartistic plaint it must be meant that these allegations against the plaintiff have got round the village and he, therefore, suffered in his reputation in the village by reason of these allegations which had become known by the petition of complaint. The learned Subordinate Judge dismissed the suit. The learned District Judge also affirmed that decision on appeal.

First of all, as regards the case of malicious prosecution, the view, that the learned Judge of the lower appellate Court took, was that a mere filing of a petition of complaint would not by itself be sufficient to maintain an action for damages for malicious prosecution. That was the view taken by this Court in the case of *Golap Jan* v. *Bhola Nath Khetry* (1). A similar view has been taken by myself sitting on the Original Side of this Court in the case of *DeRozario* v. *Gulab Chand Anundjee* (2). It is quite clear that we must follow those judgments and hold that the allegations in the plaint in the present case do not disclose any case for which damages for malicious prosecution can be awarded in favour of the plaintiff.

The question of the defamation stands on a different footing. Mr. Mitter on behalf of the appellant has argued that para. 4 the written statement amounts to an admission of the publication of the defamatory statements set out in para. 4 of the plaint and merely adds a plea of justification. I am not satisfied, notwithstanding Mr. Mitter's statement and the knowledge he has of the Vernacular in which the pleadings are drawn, that that is correct. I think that by the written statement it was probably intended to put in issue the question as to whether these defamatory statements had been published and in that view I am fortified by the opinion of the learned Subordinate Judge and also of the learned District Judge. They took a similar view that the written statement did, in fact, put in issue the question as to whether these defamatory statements had ever been published. The view that the learned District Judge took with regard to that was that on that part of the case for damages for slander the plaintiff had brought his suit against the 11 persons not stating which of them uttered and which of them published these slanders, where they were published and how they were published and to whom.

He thought it highly improper in a case like this to allow the plaintiff to amend his plaint and set out the further particulars. I agree with the learned District Judge that if this plaint was amended in the way Mr. Mitter suggested, it would be impossible, now we know that the plaintiff's case is that the defamatory words were uttered and published orally, to find that these 11 persons all at one and the same time acting in concert made publication of identically the same defamatory statements against the plaintiff. I think in that case we would have to split up the case and direct 11 separate trials of these split up suits with regard to the separate publication of each of these separate slanders, because each publication amounts to a separate and independent tort. The plaintiff ought not now, considering that this suit started six years ago in the year 1911, to be allowed to take such a course. Whether the incidents of setting fire to the pile of straw or the assisting in the abduction of young girls are forgotten incidents or not I do not know. But it is quite possible that after such a length of time the plaintiff Digambar Das has

1 (1911) 38 Cal 880=11 I C 311.
2 (1910) 37 Cal 358=6 I C 877.

been restored by his continued good conduct to the confidence of his friends and the general public. I think that this case ought not to be sent back for retrial at this period. The present appeal, therefore, fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 588

TEUNON AND CHAUDHURI, JJ.

Mahomed Ibrahim— Accused— Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 806 of 1916, Decided on 5th February 1917.

(a) Evidence Act (1872), Ss. 25 and 26 — Statement by accused in presence of Excise Officers— Police Officers present in same house—Statement is inadmissible.

A statement made by an accused person, arrested on a charge of unlawful possession of opium, to Excise Officers in a room of a house in a different part of which two police servants, who had accompanied the Excise Officers and assisted in the arrest, were present, should for the purposes of S. 26 be regarded as made while in police custody and is therefore inadmissible in evidence.

[P 589 C 2, P 590 C 1]

(b) Evidence Act (1872), S. 25— Whether Excise officers are Police Officers—*Quaere*.

Quaere.—Whether Excise Officers who have large powers of search, arrest and detention, are to be regarded as Police Officers within S. 25.

[P 589 C 2]

(c) Criminal Trial— Evidence — Examination and cross examination in batches prolonging trial is not desirable.

Examination and cross-examination of witnesses by batches in the Court of the Presidency Magistrate on various dates at intervals, thereby prolonging the trial, is not desirable.

[P 590 C 2]

Norton, K. N. Choudhuri, Monmatha Nath Mukerjee, Probodh Chandra Chatterjee and *Bibhuti Bhusan Saha* — for Appellant.

S. P. Sinha, A. Sinha and *Dasarathi Sanyal*—for the Crown.

Judgment.—In this case the appellant, Muhammad Ibrahim or Ibrahim Pahalwan, was placed on his trial with six others before 4th Presidency Magistrate on charges of unlawful possession of opium under S. 9, Act 1 of 1878. All were convicted and sentenced and the present accused, who received an appealable sentence, has appealed.

The case for the prosecution is that in concert with certain informers certain Excise Officers arranged to give to the appellant a quantity of cocaine in exchange for a corresponding quantity of opium to be obtained from him. For the purpose of carrying through the transaction a house, No. 1, Eden Hospital Lane, was hired. In this house behind the hall there are two rooms with an inter-communicating door. At the bottom of this door there are two holes, one a semicircular hole measuring $2\frac{1}{2}$ by $1\frac{1}{2}$ inches at the meeting of the two-halves, and one a larger triangular hole caused by the decay of the wood work against the door post on the west. There are also doors leading from each room into the hall in front and into corridors at the back and sides. To this house on the morning of 14th August a Mr. Pogose, a Sub-Inspector of Excise, took 25 ounces of cocaine obtained from the Excise Superintendent Raha. With an excise peon Sebrati, Pogose placed himself in the southern room, and to the northern room were brought by the informers the appellant Ibrahim and another accused Rafiq. This was at about 5 a. m. The cocaine was shown to Ibrahim, who then left to fetch the opium. He returned without it at abount 11 a. m. and it was then arranged that he should bring it in the evening. At about 7 p.m. the same day, Excise Inspector Hossain stationed himself in the southern room. At or soon after 8, the seven accused came with the opium and, on a signal given, Pogose, two Sergeants of police and the excise peons raided the house, and arrested the accused. One was captured in the northern room, five as they rushed into the adjoining room, and Ibrahim the appellant as he tried to make his escape through the hall. The opium brought by the accused to, and seized in, the northern room in a variety of packages was found to weigh just under 31 seers. The case of the appellant is that he knows nothing of the opium, that he was arrested when walking along Eden Hospital Road as an innocent passerby, and was hustled into the house in question. He further says that on the morning of 14th August he was in Burdwan and that this case has been falsely brought against him because he has incurred the displeasure of Excise Officer, Pogose.

We may first examine the defence evidence. In support of the appellant's allegation that on the morning of 14th he was absent at Burdwan, two witnesses have been examined, a doctor named Atul Kumar Bose and a pleader, named Azizur

Rahaman. Their story is that the appellant was staying at the house of a friend named Monajat Ali and that the doctor treated him for diarrhoea from 12th to 14th and on each day gave him a prescription. The pleader says that on 14th he received from the appellant a sum of Rs. 5 as subscription to a Mahomedan association. Now the appellant is not a member of the association, and this is the only subscription the pleader realized in the course of the year 1916. The receipt and the counterfoil do not agree and the Treasurer's cash book has not been produced. The prescriptions again are on loose pieces of paper and not on pages from the doctor's printed prescription book. The doctor is the family doctor both of appellant's friend Monajat Ali and of the pleader Azizur Rahaman. Monajat Ali has not been examined. The doctor does not explain why on 30th October he should have asked another doctor (S. K. Sen) to countersign a certificate which the defence does not produce. We are satisfied that both these witnesses have given false evidence.

In explanation of his presence in Eden Hospital Road on the night and at the time in question appellant says that feeling uneasy after his return by an afternoon train to Calcutta he went to his family doctor, got a prescription and was arrested when on his way home. In support of these explanations are examined the doctor, Sham Chand Baral, one Rajani Kumar Dutt, and Sub Inspector Hansen, then of the Bowbazar Thana, to which thana the appellant was taken under arrest at about 9 p. m. The doctor says that between 7-30 and 8 p. m. the appellant came to his house and obtained from him a prescription for Rubini's Essence of Camphor (Ex. D). Hansen says that at the thana between 10-30 and 11 p. m. and before appellant's release on bail he was shown Ex. D by the appellant and at the latter's request placed his initials upon it. Rajani Dutt says he saw the appellant's arrest by a Police Sergeant at a point on Eden Hospital Road a little to the east of its junction with Eden Hospital Lane. He is a chance witness and is a friend of, and has had business dealings with, the appellant. The doctor's prescription again is on a piece of paper, loose or taken from a book without counterfoils. The doctor has no diary and no register. For a well-known article such as Rubini's Essence of Camphor no prescription is necessary, and the doctor has to say that there was nothing serious the matter with the appellant, a well-to-do man, who has been his patient for three or four years.

Hansen's conduct on his own showing is peculiar. The accused were brought to the thana at about 9. The charge was entered, and the Excise Officers and others of their party left at 10-15. About 10-30 the appellant, he says, showed him Ex. D. He does not explain why he returned it to appellant instead of retaining it and entering it in his register. He was examined on 22nd November and when recalled for cross-examination on 20th November, says for the first time, that before initialling Ex. D he took his superior officer Inspector Rai's permission. It is one of the complaints of the defence that their application, made on 1st December, for a subpoena upon Rai was refused. It is said that the statement regarding Rai made by Hansen on 20th November came as a surprise to the defence, but, if true, it should not have been a surprise to the appellant and we are of opinion that the application made at that stage was properly refused. We may further notice that the appellant has not explained why he said nothing of Ex. D to the superior Excise Officers Raha and Platts who found him under arrest at No. 1, Eden Hospital Lane, at about 9 p. m. We are satisfied that these three defence witnesses have also given false evidence. We may now examine the evidence adduced by the prosecution. At the outset, we may say that the Magistrate has improperly admitted in evidence certain incriminating statements said to have been made by the appellant to Messrs. Platts and Raha. It has been contended on behalf of the appellants that the Excise Officers who have large powers of search, arrest and detention, are to be regarded as Police Officers within the meaning of S. 25, Evidence Act. We need not decide this question, as it is the case for the prosecution that two Police Sergeants accompanied the Excise Officers, assisted in the arrest of the appellant, and were in the house as part of the force in charge of the prisoners at the time when the statements are said to have been made. Though these Police Officers were not in the room with the appellant, Raha, Platts and the excise peons, yet in our opinion when making a statement in that room, the appellant is

to be regarded as in police custody for the purposes of S. 26, Evidence Act. The statements are therefore inadmissible.

Of the prosecution witnesses, Sergeant McCreedie and Sergeant Gibbons (examined nominally as a Court witness) attempt to support the defence. Gibbons says that he arrested the appellant on the Eden Hospital Road 3 or 4 yards to the east of the junction with Eden Hospital Lane. Both say that the appellant struggled and was hustled by them into the house No. 1 and there in the house was taken charge of by the Excise Officers. The two sergeants have hopelessly contradicted one another, and have also in the course of their depositions contradicted themselves. McCreedie has further contradicted his own previous statement taken from him in the presence of Gibbons by Raha on 31st October and admitted by McCreedie to have been correctly recorded. It is inconceivable also that if their story has been true, appellant would not have given his account of his arrest to Mr Platts and it is clear that he did not do so. The two Police Sergeants are, it would seem, taking advantage of the fact that by mistake one of the informers was arrested by some one of the party, and we are satisfied that, for reasons best known to themselves, they also are deposing falsely. The other prosecution witnesses, Pogose, Hossain and Sebrati, fully bear out the prosecution case as already set out. They are corroborated by the seizure of the opium and by the capture (which is beyond dispute) of the six other accused. They are further corroborated by Raha as to the 25 ounces of cocaine and by Raha and Platts who at about 9 p. m. found all the accused including the appellant under arrest within the house. It is urged that through the hole or holes to which reference has been made the witnesses, Pogose in the morning, Hossain in the evening could not have seen the appellant as they say they did. Here the defence relies on the evidence of the planmaker, Manna, who says that through the middle hole he could see into the adjoining room to a distance of only 3½ feet and could see a man sitting in the room only up to the waist. No doubt, to see into the adjoining room, both he and the Excise Officers had to stretch themselves on the floor and this they say they did. Pogose does not say he confined himself to the middle hole and it may well be that being younger men they were able to adjust themselves better than Manna. We have no doubt on their evidence that the opium in question was taken to the house by the appellant in pursuance of the arrangement of which the officers speak and that he was arrested in the hall by Hossain as he was attempting to make his escape.

In conclusion, we should say that we view with grave concern the manner in which the proceedings before the Magistrate were protracted. The hearing began on 12th September and did not conclude until 7th December. In the course of these three months or so on as many as 10 different dates, at intervals of 5 to 13 days, witnesses were examined or cross-examined by batches, in whole or part. We have already animadverted on the evils attendant on this method of trial and we invite the special attention of the Magistrate to the judgment of this Court in the case of *Meredith* v. *Sanjibani Dassi* (1). Lastly, we should say that Superintendent Raha would, in our opinion, have been better advised if after the commencement of the trial he had refrained from taking a statement from the witness McCreedie on 31st October. For the reasons already given, we dismiss this appeal and affirm the conviction of and sentence upon the appellant, who will be now called upon to surrender to his bail and undergo the unexpired portion of this sentence.

V.B /R.K. *Appeal dismissed.*

1. (1915) 42 Cal 313=28 I C 1000.

A. I. R. 1918 Calcutta 590

RICHARDSON AND WALMSLEY, JJ.

Probhat Chandra Shome and *others*—Defendants—Appellants.

v.

Shashadhar Kumar Ghose—Plaintiff—Respondent.

Appeal No. 2853 of 1915, Decided on 19th April 1917, from the appellate decree of Sub-Judge, Dacca, D./ 19th April 1915.

(a) Civil P. C. (1908), S. 100—Finding as to undue influence is one of fact and cannot be challenged in second appeal.

The finding of a lower appellate Court that one of the parties to a suit for cancellation of a document executed it under undue influence is a finding on the merits and is, therefore, not open to question in second appeal, whether there is some evidence, however untrustworthy, to show that pressure was put upon that party and that

the other party in whose favour the document was executed obtained an unfair advantage. [P 594 C 2; P 595 C 1]

(b) Registration Act. S 34—Deed presented for after period of limitation—Registration held not invalid.

The registration of a deed is not invalid and ineffectual merely because the deed was presented for registration by the grantee without the consent of the grantor after the expiry of the period limited for the purpose, and the delay was accounted for by the production of a false certificate of the illness of the grantor [P 594 C 2]

(c) Contract Act (1872), S 23—Public policy—Case—Compoundable and non-compoundable offences—Summons only for compoundable offence—Agreement to compound whether valid

Quaere.—Whether an agreement for the compromise of a criminal case is void as being opposed to public policy, where the case was initiated by a complaint alleging compoundable and non-compoundable offences but the Magistrate issued summons only in respect of the compoundable offence. [P 592 C 1]

Mohendra Nath Roy and *Upendra Lal Roy*—for Appellants.

Rash Behary Ghose, *Satya Charan Sinha*—for Respondents.

FACTS material will appear from the following judgment of the Court of first appeal:

"This appeal arises out of a suit to cancel a document. The admitted facts of the case are as follows."

Many disputes were going on between the parties On 4th November 1912 the plaintiff filed a complaint before the Magistrate charging defendants 1 and 2 of his relations with offences under Ss. 143, 447, 426 and 352, I. P. C. and on the following day, defendant 1 and a Mahomedan filed a similar complaint charging the plaintiff, his son-in-law, and some others with offences under Ss. 144, 147, 379, 504, 323 and 352, I. P. C. Summonses were issued by the Magistrate in both cases under S. 426 only. After some adjournments, the parties entered into a compromise recorded in a separate deed and registered it. Both the criminal cases were dismissed for non-appearanne and all the accused acquitted. The plaintiff's case now is that he only partially executed the document under coercion and undue influence caused by the pressure of the criminal prosecution, specially as his son-in-law was implicated as an accused, and as the latter was to have appeared at the B. A. examination that year: that the compromise to stifle a criminal prosecution was invalid and that there was no legal registration of the document.

The defendants 1 and 3 only appeared and contested the suit in the lower Court. The lower Court has decreed the suit, cancelling the document but awarding no costs to the plaintiff. The defendants have preferred this appeal. The plaintiff has preferred a cross appeal as to costs. The points for decision in this appeal are: (1) Whether the deed of compromise which had the effect of dropping the criminal cases was valid in law? (2) Whether the document was validly registered? Has the Civil Court jurisdiction to consider the point? (3) Whether the document was induced by undue influence or coercion? Is it binding on the plaintiff? Was it fully executed? Whether the parties acted upon the compromise? Whether the plaintiff is entitled to the costs of the lower Court? (4) The other points are not of much importance and need not be considered.

Finding.—(1). It has already been observed that the Magistrate issued summons under S. 426 only of the I. P. C. which is a compoundable offence. It is argued by the appellants' pleader that the deed compounding the offence under S. 426 is perfectly legal. On the respondent's side it is argued that the competency of the parties to compound a criminal case should be judged not only from the particular section of the Indian Penal Code under which the Magistrate issues summons in the first instances, but from the offences alleged in the petition initiating the case, because it is quite open to the Magistrate to alter the charge at any time and try the accused under the non-compoundable offences mentioned in the original petition. The appellants' pleader has cited the following cases in support of his contention, namely, *Amir Khan* v. *Amir Jan* (1), *Mahomed Ismail* v. *Faizuddi* (2), *Rai Charan Purkait* v. *Amrita Lal Gain* (3). The respondent's pleader contends that the last case rather goes in his favour, for the criminal case ought to have been treated by the Magistrate as a warrant case and the accused should have been called upon to answer the graver charges of a non-compoundable character. The respondent's pleader also contends that the principles laid down in the case of *Fanindra Nath Chatterji* v. *Emperor* (4) apply here and that the petition of

1. (1899) 3 C W N 5.
2. (1899) 3 C W N 548.
3. (1910) 5 I C 98.
4. (1909) 36 Cal 67.

complaint and the complainant's statement on oath (vide Ex. 1) should determine the character of the case, as to whether the stifling of such a prosecution would be opposed to public policy. The cases reported as *Kailash Chunder Pal* v. *Joynuddi* (5) and *Bishu Shaik* v. *Saber Mollah* (6) are also quoted in support of the above view.

I have fully considered the arguments of both sides and I think that the question whether an agreement to stifle a criminal case is opposed to public policy or not, does not depend on the procedure the Magistrate chooses to adopt for reasons of his own. That question depends on the original intention of the complainant as disclosed in his petition and first examination on oath. That should form the determining factor as to whether an agreement dropping such a prosecution would be opposed to public policy or not. I accordingly hold that the deed is unlawful, and I find this point against the appellants.

(2). As to the registration of the document, it is evident that there were grave irregularities. It is clear that the plaintiff did not appear before the Sub-Registrar within 4 months of the execution as required by S. 34, Registration Act. The plaintiff did not show cause for the the delay in his appearance and in fact he had no business to do so, because he was not willing to register the deed. The opposite party showed cause by producing a medical certificate of the plaintiff's illness. The Sub-Registrar forwarded the same to the Registrar, who accepted it and condoned the delay. I do not think that the proviso to S. 34, contemplates any such thing. That section evidently applies to the case of an executant who is desirous of having a document registered and who has been delayed and shows sufficient cause for the same. That section and proviso does not apply where one party wants to force the opposite party to register a document. The procedure in such a case is laid down in S. 36, Registration Act.

The appellant's pleader contends that the Civil Court has no authority to question the discretion exercised by the District Registrar. He relies upon the cases of *Durga Singh* v. *Mathura Das* (7) and *Gokulbhoy Mulchand* v. *Tullokchand Harnath* (8) in support of his contention. But the facts of those cases are different. In the present case, the order of the District Registrar was obtained by fraud on the strength of a false medical certificate. The certificate is vague and it refers to the illness in Chaitra or Baisack. The plaintiff was not at all ill after that and he could have easily attended the Sub-Registrar's office within due date if he had liked. The illness referred to in the petition Exhibit 1F clearly refers to the plaintiff's indisposition on that date only and not on any previous date. The principle laid down in the cases of *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal* (9), *Baij Nath Tewari* v. *Sheo Sahoy Bhaout* (10), and *Broja Gopal Mukherjee* v. *Abinash Chandra Biswas* (11), cited by the respondent's pleader, I think, applies to the facts of the present suit. I do not think that the irregularity in the present case, which was substantially due to the false medical certificate, is cured by S. 87, Registration Act. There is another grave defect in the procedure of the Sub-Registrar. The document in dispute contains a map. The map is undoubtedly a part of the document. Under S. 21 (4) Registration Act, the document could not have been registered unless it was accompanied by a true copy of the map. Under S. 62, Chapter 13 of the Registration Rules, the copy of the map requires to be signed by all the executants. If the map attached to the deed Exhibit F be supposed to be the original, it appears that it is not signed by all the parties. The plaintiff has not signed it at all. The map being a part of the document itself, there was thus no complete execution by the plaintiff. If the map be supposed to be the copy required by S. 21 (4), Registration Act, it transgresses the provisions of S. 62 of the Registration Rules. In any case, the document should not have been admitted to registration.

I called for and inspected the register of the Registration Office and examined the map attached to the book. It bears the signatures of all the executants, although the plaintiff denies his own signature. It is, therefore, likely that the Sub-Registrar by mistake retained the original and returned the copy to the parties. But

5. (1901) 5 C W N 252.
6. (1902) 29 Cal 409.
7. (1884) 6 All 46.
8. (1897) 21 Bom 69.
9. (1902) 29 Cal 654.
10. (1891) 18 Cal 556
11. (1910) 5 I C 127.

as I have observed before, the document should not have been registered unless the copy was signed by all the applicants. I think that according to the principle laid down in the case of *Jambu Parshad* v. *Muhammad Nawab Aftab Ali Khan* (12), the registration is invalid in the present case. I think that the Civil Court has jurisdiction to make such a declaration. I accordingly find this point against the appellants. (3) The appellants' pleader contends that there being no issue on this question the point cannot be considered. But the lower Court has considered the matter and the point is covered by issue 1 fixed by the Munsif. No doubt the issue as framed is wide but it is not vague. The case of coercion and undue influence is set up in the plaint and denied in the written statement. The appellants have therefore not been prejudiced by the lower Court not fixing a separate issue on the point.

The case of coercion is not made out. There is no evidence that the complaint lodged by defendant 1 was false and was thus an act forbidden by the Penal Code. As to the case of undue influence defendant 1 appears to have been in a position to dominate the will of the plaintiff. The plaintiff's son-in-law was implicated as an accused. The said son-in-law was to have appeared in the B. A. examination in that year. He came on a casual visit to his father-in-law's house and his being implicated in the criminal case was no doubt a cause for sore distress to the plaintiff. If the son-in-law had not been implicated, the plaintiff would never have agreed to the compromise. Then again defendant 1 filed a petition and insisted on the personal attendance of the son-in-law. Defendant 1 would not be satisfied by the appearance of the son-in-law through a mukhtear although the Magistrate proceeded in the first instance under S. 426, I. P. C. All this must have weighed greatly on the plaintiff's mind. And then the defendants did not accept the draft compromise prepared on the plaintiff's side. They insisted on their own draft in its entirety. They gave no quarter. The plaintiff's friends had no option but to urge the plaintiff to accept the defendants' draft. Although the plaintiff has not produced his draft it is clear that there must have been considerable difference in the two drafts, otherwise the defendants would not have insisted with such tenacity upon the acceptance of their own draft.

It is however incumbent on the plaintiff to prove that the defendants obtained an unfair advantage over the plaintiff by the transaction. There is no doubt no detailed evidence on this point but there is some evidence on the plaintiff's side. The map attached to the deed would go to show that the plaintiff has been put into a disadvantageous position. The plaintiff has been obliged to give up most of the valuable lands which were in his possession before without an adequate or a fair compensation. The map would also show that roughly the plaintiff has been obliged to give up a large area. The oral evidence under the circumstances on the plaintiff's side as to the unfairness of the transaction is sufficient to shift the onus on the defendants, who have not adduced any evidence to discharge it. Besides it is apparent that the plaintiff took the earliest opportunity of repudiating the transaction. Had it been a fair one the plaintiff would not have behaved himself in that way. I therefore think that the transaction is not binding on the plaintiff. As to the allegation that the compromise was acted upon, I have to observe that the defendants did not remove the eastern huts till after the registration was effected. The service of summons in this suit was effected on the eastern plinth. The defendants' witnesses have deposed contrary to the written statement. The plaintiff is 8 annas owner of Madan Sing's bari and the fact of his cutting trees in that bari cannot be held to be an acceptance of the terms of the deed. I therefore think that there has been no acceptance on the part of the plaintiff of the terms of the deed and thus it is quite open to him to bring this suit.

I have already observed that the plaintiff did not sign the map which is part of the document itself. The defendants have adduced no evidence to show that the plaintiff actually signed the original map retained in the registration office. The deed including the map was written in duplicate. The defence evidence shows that all the parties signed both the documents and both the maps at the same time and place.but the said evidence is

12. A I R 1914 P C 16=28 I C 422=37 All 49= 42 I A 22 (P C).

false. The map in plaintiff's possession was filed in the Court below, and has also been filed here. There is no signature of any party in the said map. The allegation in the plaint that the deed was only partially executed thus seems to be true. Such a deed cannot, therefore, stand even if it is legally valid and duly registered. I find this point in favour of the respondent. (4) I think that the order of the lower Court as to costs is right. It is accordingly ordered that this appeal be dismissed with costs and interest at 6 per cent. per annum from this date till realization. The cross-appeal is also dismissed.

Richardson, J.— This is an appeal from the judgment and decree of the Subordinate Judge, Dacca, dated 19th April 1915, confirming the decree of the Munsif of Munshiganj. The suit was brought by the plaintiff, Shashadhar Kumar Ghose, for the cancellation of an agreement dated 22nd Magh 1319 (4th February 1913). It appears that the plaintiff and the defendants are co-owners of certain properties. Something occurred early in November 1912, which led the parties to file complaints against each other in the criminal Court. The agreement in question, which is an agreement for the partition of the common properties, is expressed to have been made for the purpose of putting an end to all disputes between the parties and for the purpose of settling or compromising the criminal cases which had been instituted and were still pending at the time. The Courts below have concurred in setting aside the agreement on three grounds. They have held, firstly, that the agreement is opposed to public policy as being an agreement to stifle criminal prosecutions and, therefore, void under S. 23, Contract Act: secondly, that the Registering Officer had no jurisdiction to register the agreement, and thirdly, that the agreement was obtained by the exercise of undue influence.

There is room for considerable doubt as to the correctness of those conclusions. On the question of the agreement being opposed to public policy, the decision of this Court in *Muhammad Ismail* v. *Samad Ali Bhuyan* (13), and its bearing on the view of the law taken in the Courts below would at least require consideration On the question of registration again, I am quite unable to follow the reasoning of those Courts and am satisfied in my own mind that they were wrong in supposing that the agreement was not validly and effectually registered. It is unnecessary, however, to examine these questions in detail because on the remaining question, the question of undue influence, while I doubt very much whether I should have reached the same result on the merits, the merits are not open in second appeal and the jurisdiction of this Court to interfere is limited. The learned Subordinate Judge, at any rate, seems to have found that the implication of the plaintiff's son-in-law in the criminal proceedings caused the plaintiff much distress of mind and placed defendant 1 in a position to dominate the plaintiff's will, and further that the defendants obtained an unfair advantage over the plaintiff. I have considered whether there is a sufficient finding that the defendants or any of them actually brought pressure to bear on the plaintiff. It appears that the plaintiff's son-in-law was due to appear in the B. A. examination of the Calcutta University and that defendant 1 filed a petition in the criminal case which he had instituted and in which the son-in-law was an accused, objecting to the latter appearing through a pleader and insisting upon his personal appearance. The Subordinate Judge lays stress upon that and upon the defendants refusing to consider any modification at all of the agreement which they offered to the plaintiff. According to the Subordinate Judge they issued a sort of ultimatum. If the offer was not accepted in its entirety the criminal case would be proceeded with. I do not know whether I should have taken the same view of the evidence.

The case is one somewhat near the line. It bears a strong resemblance to the case of *Gobardhan Das* v. *Jai Kishen Das* (14). That case was decided by the Allahabad High Court under the old S. 16, Contract Act, but according to the commentators is still good law under the section as it now stands: Pollock and Mulla's Contract Act, Edn. 2 p. 79. It came before the Court as a first appeal and the merits were open. Here, as I have said, the merits are not open and I cannot say either that there is no finding that the plaintiff was subjected to pressure

13. (1916) 32 I C 227.

14. (1900) 22 All 224.

or that there is no evidence at all on which that finding or the finding that an unfair advantage was obtained can be supported. That being so, the present appeal fails, but, in my opinion, the suit does not redound to the plaintiff's credit. He and his son-in-law were acquitted in the criminal proceedings and though the plaintiff may have got the worst of the bargain, I have a strong impression that if the plaintiff had been a man of sensitive honesty the suit would not have been brought. I propose, therefore, that the appeal should be dismissed without costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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CHATTERJEA AND SMITHER, JJ.

Sasi Kanta Acharjee Bahadur—Defendant—Appellant.

v.

Kunja Mohan Moitra and *another*—Plaintiff and Defendant—Respondents.

Appeals Nos. 3261 and 2133 of 1915, Decided on 25th May 1917, from appellate decrees of Addl. District Judge, Rajshahi, D/ 25th May 1915.

(a) Riparian Rights—River changing course—Old course is to be taken to have become private property.

When a river has changed its course, its old dry course (in the absence of special circumstances) must be taken to have become private property, and the owner of the soil is entitled to bheels or ponds, gulfs or damoores in which water remains but which do not communicate with the river except in the time of floods. (1864) W. R 108, *Foll.* [P 595 C 2]

(b) Riparian Rights — Fishery — Fishing rights in sheets of water adjacent to river.

The owner of a fishing right in a river has no title to fish in sheets of water adjacent to the river with which the river communicates only in the time of flood, unless those sheets are part of land in the bed of the river itself. [P 595 C 2]

Jogesh Chandra Roy and *Bhupendra Chandra Guha*—for Appellant.

Dwarka Nath Chakervarty and *Hira Lal Sanyal* and *Phanindra Lal Maitra* for *Girija Prosanna Sanyal*—for Respondents.

S. A. No. 3261 *of* 1915.

Judgment.—This appeal arises out of a suit relating to a jalkar in certain kopras or sheets of water which once formed the bed of the river Mahananda. The plaintiffs claim them as part of their putni. They allege that these kopras have no connection with the present river Mahananda. The defendant claims them as part of his jalkar in the Mahananda river. The Courts below have concurred in decreeing the suit. The defendant has appealed to this Court. It is found that the kopras lie within the plaintiffs' putni. It is also found that the river has completely changed its course and moved many miles away from the kopras, which are now surrounded by culturable lands. The defendants, however, claim a right to the kopras on the ground that they are connected with the river at certain seasons of the year. But the learned Subordinate Judge finds:

"It is clearly the flood water of the mighty Pudda which inundated the entire country that gets into them and rehabilitates the connexion."

Several cases have been cited in argument before us. In an early case on the point, *Grey* v. *Anund Mohun Moitro* (1) the rule of law is thus stated:

"If the river simply changed its course, and there is nothing to modify the conclusion which the Court ought to draw from that simple fact the old dry course of the river must be taken to have become private property. And as incident to and part of the same, the owner of the soil is entitled to all bheels or ponds, gulfs or damoores in which water remains, but which do not communicate with the river except in the time of floods."

The recent case of *Sarat Chandra Singh* v. *Chandra Mohan Bandhopadhya* (2) shows that a grant of fishery right in a river does not give to the grantee title to fish in sheets of water adjacent to the river with which the river communicates only in the time of flood. Reliance is placed on behalf of the appellant on the cases of *Ahmadi Begum* v. *Mohesy Taranath Ghosh* (3) and *Jogendra Narayan Roy* v. *Crowford* (4). But in these cases the jalkars were part of, and in the bed of, the river itself. In *Jogendra Narayan Roy's* case (4) Maclean, C. J., referred to the finding of the learned District Judge namely:

"five or six years ago, the channel in dispute was part of the bed of the river; it lies in chur land, which is annually submerged and in the rains, the current through this channel is strong enough to cut away the bank. When floods go down, the channel continues for a time to be connected with the river, but the connexion may dry up in the hot wheather. The damoos is still so far a part of the river system that it may in a single year form a new mouth or channel of connexion with the river, as it did in 1309. In such circumstances I consider that it is in effect still an arm of the river and that the plaintiff, who has also all the general rights of fishery in that part of the Ganges, is entitled to the fishery of the disputed channel."

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1. (1864) W R 108.
2. (1910) 7 I C 140.
3. (1913) 21 I C 233.
4. (1905) 32 Cal 1141

and held that

"the disputed water then having been part of the bed of the river and the plaintiff having fishery rights in the adjacent Ganges and the two being connected, a long current of authority would appear to establish that the plaintiff is entitled to the fishery rights he now claims."

In *Ahmadi Begum's* case (3) the bheels were no doubt at a distance of some miles from the dry weather stream of the Ganges. But Jenkins, C. J., pointed out:

"When the annual rains are established this dry weather stream extends on its southern side as far as that which the defendants describe as the southern high bank of the Ganges, thus covering the bheels in suit which lie to the north of the bank."

Then again he said:

"To change from a stream, a mile or so in width, to an expense of water 10 miles across is remarkable, but it is nothing unusual in this part of the river Ganges; it is of regular annual occurrence. Nor is the increase in volume so transient as to be negligible for the purpose of considering whether the flood stream is a part of the river; it lasts each year for a couple of months and notwithstanding its expanse, there is a current in it from west to east, though naturally not a strong one. This increase of the volume of water, extending as far as the southern high bank, is not an inundation, it is the normal flood stream of the Ganges and an integral part of the river."

It was clearly found in that case that the bheels lay between the banks of the Ganges and the bed of the river and the case of *Rama Nath* v. *Ishan Chandra Benerjee* (5) and the other cases relied upon on behalf of the appellant were distinguished on the ground that in none of them the bheel was actually in the bed of the river over which the claimant had jalkar rights. The case of *Jogendra Narayan Roy* v. *Crawford* (4) was referred to as showing that jalkar rights extend to waters in the river-bed, though they are not connected with the waters of the flowing stream throughout the year. The learned Chief Justice further observed:

"Each case must depend on its own peculiar circumstances. Where the right of fishery is in a river, then the Court has to be satisfied on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river. In this case I think it may fairly and reasonably be said that the bheels in suit are throughout the year a part of the river Ganges. They certainly are such during a part of each year and they lie in that which throughout has been and still continues to be a part of the river-bed."

In the same case Mookerjee, J., also observed:

"It is indisputable upon the evidence that from year to year during the rains, the river attains a breadth which varies from 8 to 10 miles and this state of things continues during a period of at least two months. There is no room for suggestion that this is an accidental phenomenon, a flood or an inundation, a temporary overflow due to extraordinary rains or some similar exceptional causes."

Referring to the principle that a grant of fishery right in a river does not give to the grantee a title to fish in sheets of water adjacent to the river with which the river communicates in the time of floods, he remarked:

"This principle however has no application to jalkars situated in the bed of the river itself; the grantee of a fishery right in the river is entitled to fish in all waters comprised within the banks of the river, and the circumstance that a particular sheet of water may, during a part of the year, be disconnected from the flowing stream or permanent current, does not affect the rights of the grantee."

In the recent case of *Srinath Roy* v. *Dinabandhu Sen* (6) decided by the Judicial Committee, their Lordships held:

"It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant."

In the present case, as has already been stated, the river Mahananda entirely changed its course and moved many miles away from the kopras. These kopras are completely isolated and are not part of the bed of the river. There is no connexion with the river except when the whole country is inundated by the flood water of another river. It is contended on behalf of the appellant that the case should be remanded for a clear finding as to whether the kopras are situated within the banks of the river. We think it unnecessary to do so having regard to the facts found. The river Mahananda is a small river. It has moved many miles away and it was not the case of the defendants that the kopras lie in the bed of the river. Their case was that the kopras are connected with the river at certain seasons of the year, but we have seen that the connexion is caused by the inundation of another river Padma. The appeal fails and is dismissed with costs.

S. A. No. 2133 *of* 1915.—It appears that there was an agreement between the plaintiff Lalit and the defendant on 3rd June 1909 in respect of the jalkar in this case. It was agreed that

5. 2 Seves 463.

6. A I R 1914 P C 48=42 Cal 489=42 I A 221 =25 I C 467 (P C).

"the estate of Maharajs Kumar Sasi Kant Acharya will be entitled to fishery rights in the river Mahananda beyond the boundary line referred to in para. 1 and so long as either mouth of the said river Mahananda remains open to navigation by country fishery boats."

But the river having changed its course so completely, the provisions of the agreement cannot apply to these kopras. The learned District Judge observes:

"It is an unfortunate thing that it was almost about the date of the signing of the document that the river went away, but this cannot affect the question of the actual terms of the deed."

We are of opinion that the Courts below have taken the right view and the appeal must accordingly be dismissed with costs.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 597

FLETCHER AND RICHARDSON, JJ.

Ram Kumar Chackerbutty and *another* —Defendants—Appellants.

v.

Birendra Kishore Manikya Bahadur —Plaintiff—Respondent.

Appeals Nos. 3444 of 1913 and 34, 35 and 36 of 1914, Decided on 11th January 1917, from the appellate decrees of Dist. Judge, Noakhali, D/- 27th June 1913.

(a) Record of Rights—Entry in, is presumed to be correct — Bengal Tenancy Act (1885), S. 103 (B).

An entry in a Record of Rights is not conclusive, but it is an entry to which by statute the presumption attaches that it is correct unless and until the contrary is proved by legal evidence. [P 597 C 1]

(b) Civil P. C. (1908), S. 100—Entry in Record of Rights—Rebuttal of presumption of correctness is question of fact.

The question whether the presumption of correctness attaching to an entry in a Record of Rights has been rebutted or not is a matter within the competence of a final Court of fact and is incapable of being reviewed by a Court having the limited jurisdiction that the High Court has in hearing a second appeal. [P 597 C 2]

Upendra Kumar Ray —for Appellant.

Dwarkanath Chackerbutty, *Romesh Chandra Sen* and *Birendra Kumar Das* —for Respondents.

Fletcher, J.—These appeals are preferred by the defendants against the judgment of the learned District Judge of Noakhali, dated 27th June 1913 reversing the decision of the Munsif of the Second Court at Feni. The plaintiff brought the suits out of which these appeals have arisen to recover rents from the defendants as his tenants after declaration of his title to the lands. Rents were asked for a period extending from Agrahan 1314 to Kartick 1317 B. S. In their written statements the defendants set up three pleas; first of all, that they held the lands as Niskar lands, secondly, that, if they were not Niskar, their possession had been adverse to the plaintiff since 27th Agrahan 1290 T. E. and thirdly, that the plaintiff's suits were barred by limitation. The third plea obviously has reference to the amounts of rents sued for between Agrahan 1314 and Kartick 1317 B. S The adverse title set up was from a specific date, 27th Agrahan 1290 T. E. The cases came on for trial. The Munsif found that none of the lands was Niskar. He, however, found that the suits were barred by limitation and by adverse possession from an assertion of the defendants' right during the publication of the Record of Rights. That case was not pleaded anywhere in the written statement. The adverse possession that was pleaded was said to have run from 27th Agrahan 1290 T. E. On appeal to the lower appellate Court, the learned District Judge set aside the decision of the Munsif and assessed rents in favour of the plaintiff. The learned Judge had this evidence before him. He had the Record of Rights in which the defendants were stated to be settled raiyats with liability to have the rents assessed.

That Record of Rights had been duly published in the manner required by law. The learned Judge was competent to act upon that as the final Court of fact. The question he had to consider was whether the evidence that had been produced rebutted the presumption contained in that record. It is quite obvious, although the learned Judge dealt with the matter in a somewhat summary manner in his judgment, that he came to the conclusion that the evidence that had been adduced on behalf of the defendants did not rebut the presumption contained in Record of Rights. That was a matter obviously within the competence of a final Court of fact. In my opinion it is a matter incapable of being reviewed by a Court having a limited jurisdiction that this Court has in hearing a second appeal. Whether, if the matter had been open to us, we should come to the same conclusion as the learned District Judge has come is not a matter we have to consider. The learned District Judge having come to the conclusion that he should act upon the Re-

1. (1912) 15 I C 64.

cord of Rights, we are not competent in hearing in second appeal to review that decision. I think in the result the present appeals fail and must be dismissed with costs.

Richardson, J. — As the decision in *Aman Gazi* v. *Maharaja Birendra Kishore Manikya Bahadur* (1), to which I was a party, has been so much referred to, I must add a few words. Having listened with an entirely open mind to the argument addressed to us by the learned pleader for the appellant before us, I am still of opinion that the decision is correct in principle. An entry in a Record of Rights is not conclusive but it is an entry to which by Statute the presumption attaches that it is correct unless and until the contrary is proved by legal evidence. In these cases the entries necessarily imply that the landlord, the respondent Maharaja, was entitled when the Records of Rights was finally published to have a fair rent assessed on the land held under him by the appellant-tenants. At the time, therefore, the possession of the tenants was prima facie a possession which was subject to the liability to pay rent. Whatever adverse claim the tenants had previously set up, the landlord then succeeded in obtaining an authoritative declaration importing that the claim was unfounded. Prima facie again the subsequent possession of the tenants was a possession consistent with the entries. It was, of course, open to the tenants to show that the entries were wrong when they were made or that by reason of something which had since happened, coupled perhaps with what had happened before, they had ceased to to represent the true state of things. But the burden was on the tenants to displace the entries and the results flowing from them. As I gather from the judgment of the Court below the learned Judge was of opinion that the tenants had not succeeded in rebutting the statutory presumption or in showing that the entries no longer represented the true state of the facts. The questions which arose in that connexion were essentially questions of fact and there appears to be no ground for disturbing in second appeal the conclusions arrived at by the learned District Judge. Indeed very little attempt seems to have been made in the Courts below to show that the entry was wrong. According to the trial Court the tenants had not shown any title to hold the land rent-free. In the appellate Court no attempt or little attempt seems to have been made to contest this finding. The tenants seem to have relied on the fact that, before the final publication of the Record of Rights, they had asserted a claim to hold the land rent free. Their learned pleader stated that the assertion was made not before but during the course of the proceedings in connexion with the preparation of the Record of Rights. It is clear, as it seems to me, that the learned Judge was entitled on the question of fact to hold that the mere fact that this adverse claim had been made was not sufficient to show that the entry in the finally published record was wrong. Apparently, no prescriptive title to hold the land rent-free, acquired prior to the Record of Rights, was established to the satisfaction of either of the Courts below.

The case of *Birendra Kisore Manikya Bahadur* v. *Nazir Mahommad* (2) and *Birendra Kisore Manikya Bahadur* v. *Kailas Chandra Sarkar* (3), to which our attention was invited, were cases in which it was held in the Courts below that the entry in the Record of Rights was rebutted. There is therefore no conflict between our decision in the present case and the decisions arrived at in those cases. For these reasons I agree that these appeals should be dismissed with costs.

V.B./R.K. *Appeals dismissed.*

2. (1915) 30 I C 917.
3. (1915) 30 I C 937.

A. I. R. 1918 Calcutta 598

SANDERSON, C. J. AND MOOKERJI, J.

Ketokey Charan Banerji and *others*—Debtors—Petitioners.

v.

Sarat Kumari Debi—Creditor—Opposite Party.

In the matter of Appeal No. 87 of 1914, Decided on 9th January 1917.

(a) Practice—Costs—Costs awarded against nominal party in insolvency proceedings instituted at instance of real party can be recovered from real party Insolvency.

Proceedings for the adjudication of the petitioners in insolvency, instituted in the Original Side of High Court by certain persons in the name of a lady, were dismissed with costs against the lady by an order of the Court, and an appeal against the order preferred in the name of the lady was also dismissed with costs by the appellate Court:

Held: on a substantive application of the petitioners to the appellate Court that the real people who put forward the lady to institute the proceedings for the adjudication in insolvency should be made to pay the costs of the proceedings awarded against the lady and taxed by the Taxing Officer, although those persons were not present when the taxation of costs took place on notice to the lady, and although one of them did not live or carry on business within the limits of the Original Side of the High Court. [P 600 C 2]

(b) Civil P. C. (5 of 1908), S. 151—High Court in its appellate insolvency jurisdiction has inherent power to award costs—Insolvency.

The High Court in its Appellate Insolvency Jurisdiction has ample inherent power to make an order in regard to the costs of the proceedings for adjudication in insolvency, where it is satisfied upon the facts of the case that the proceedings have been an abuse of the process of the Court. [P 599 C 2]

N. Sarkar—for Petitioners.

H. D. Bose—for Opposite Party.

Sanderson, C. J.—In this case there was a firm consisting of certain persons Ketokey Charan Banerjee, Apurna Chunder Banerjee, Keshini Charan Banerjee, Gyanada Churn Banerjee and Nagendra Nath Banerjee, who as I understand, it has been found, had certain interest in the firm. The business was carried on under the style of A. C. Chatterjee & Co. The first four of the abovementioned persons were adjudicated insolvents upon the application of one Sarat Kumari Debi who is the wife of one Surendra Nath Banerjee and it has been found that Surendra Nath Banerjee and Nagendra Nath Banerjee were joint in business. The basis of the application for the adjudication in insolvency was that certain shares in the business had been assigned to an individual whose name was Dinonath Mukerjee and the order of adjudication was made upon that allegation. After two or three investigations, it was found that the assignment to Dinonath was an assignment to him as a benamidar for Nagendra Nath Banerjee and Surendra Nath Banerjee. It has also been found by this Court that Sarat Kumari Debi was not a real creditor of the firm at all but that she was put forward merely as a blind for Nagendra Nath Banerjee and Surendra Nath Banerjee, so that the real position was this that Nagendra Nath Banerjee and Surendra Nath Banerjee were in reality presenting the petition for the adjudication in insolvency based upon an assignment which was apparently made to a third person but was in reality made to themselves, and then having got that adjudication they were putting forward Sarat Kumari as a creditor whereas they were themselves in reality making a claim as creditors in the adjudication. It should further be added that upon the application of the petitioners, Greaves, J. by an order dated 4th August 1916 annulled the adjudication order. The Court of appeal having held that the application of Sarat Kumari Debi was not the application of a bona fide creditor of the firm, and her claim having consequently been dismissed with costs, the petitioner now comes before the Court asking for an order that the real people behind Sarat Kumari Debi should be made to pay the costs of the proceedings connected with the claim of Sarat Kumari Debi as a creditor in the insolvency, and this application is based upon the allegation that the proceedings by Nagendra Nath Banerjee and Surendra Nath Banerjee in the name of Sarat Kumari Debi were an abuse of the process of the Court.

The first point taken by the learned counsel who showed cause against this Rule was that this Court had no jurisdiction to make the order. The section of the Civil Procedure Code to which our attention was drawn was S. 151, which provides as follows:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of jusiice or to prevent abuse of the process of the Court."

As regards the inherent power of the Court to deal with an abuse of the process of the Court there is authority to be found in the case of *Jointee Chunder Sein* v. *Anundo Lall Doss* (1). I need not refer to the facts of that case, but it is an authority for saying that this Court has ample power to make an order with regard to the costs of the proceedings, where it is satisfied upon the facts of the case that the proceedings have been an abuse of the process of the Court: and in my judgment there is no doubt that on the facts of this case we have jurisdiction to make the order asked for if we think it proper so to do.

The next point raised is that inasmuch as Nagendra Nath Banerjee lived outside the jurisdiction of the original side of this Court and he did not carry on busi-

1. (1870) 14 W R O C 1.

ness within the limits of the original jurisdiction of this Court, we could not now make any order as against him, it being admitted that Surendra Nath Banerjee was within the jurisdiction of this Court. As regards Nagendra Nath Banerjee in my judgment the position is this: This Court has held that in reality he was one of the two persons who came to the Court for the purpose of making use of the process of the Court, and if we come to the conclusion on the facts of the case that not only did he make use of the process of the Court but also that he abused the process of the Court, I have no doubt that this Court has jurisdiction to make an order not only in his case but also in the case of Surendra Nath Banerjee.

The third point that was raised by the learned counsel, Mr. Bose, was that on the facts of the case no order as to costs ought to be made. In my judgment this rule should be made absolute. I think that I have already stated the facts sufficiently to show that from the beginning to the end the proceedings instituted by Nagendra Nath Banerjee and Surendra Nath Banerjee were an abuse of the process of the Court. In the first instance, as I have already said, they put forward an assignment which purported to be made to a third person as a basis of the insolvency proceedings, whereas it has been found as a fact that the assignment was in reality made to these two. They then put forward the lady Sarat Kumari Debi, who was the wife of Surendra Nath Banerjee, as a bona fide creditor, whereas it has been found as a fact that she was not a bona fide creditor; and for the purpose of my judgment and to make the statement of facts quite clear, I propose to read what was said by my learned brother Mookerjee J., on the hearing of the appeal as follows:

"The essence of the matter is that her account opens with two sums, Rs. 2,487-8-6 and Rupees 14,233-13-6 respectively; in respect of one of these sums, the lady was a benamidar of her husband, while in respect of the other she was a benamidar of her brother in-law. True it is that there is no evidence of the source of the subsequent advances, but in the absence of tangible proof, we cannot assume that those sums belonged rather to her husband than to her brother-in-law. There is further a significant admission by Nagendra Nath Banerjee that he and his brother, Surendra Nath Banerjee, are joint, and this account may lend some support to a possible theory that both the brothers used the name of the respondent as their benamidar. But whatever the real state of affairs may be, one cardinal fact is established beyond controversy, namely, that the respondent is not a creditor of the insolvents. How much of the sum which stands in her name is her husband's money and how much thereof is her brother-in-law's money, we do not know; but if she be not a creditor of the insolvents, as I hold she is not, the conclusion is irresistible that her name must be removed from the category of the creditors of the insolvents in these proceedings."

I ought to have said that Sarat Kumari Debi is a pardanashin lady with, as I understand, no property of her own. Now, under those circumstances I think in such proceedings as these, when they have failed in consequence of the decision of this Court, and when, if the costs are taxed, there are no means of getting them paid by Sarat Kumari Debi, she having no property, and when we find that the real people behind her were first of all her husband, and secondly, her brother in-law, who have used her name in connexion with these proceedings, it would be most unjust if we were prevented from making a proper order as to costs. In my judgment there has been an abuse of the prccess of the Court. Consequently the costs which have been taxed with respect to this matter, which I understand, amount to Rs. 1,872, should be recovered from Nagendra Nath Banerjee and Surendra Nath Banerjee. There is one final point taken by the learned counsel, and that was that his client was not present when the taxation of the costs took place. It is, however, admitted that notice was given to Sarat Kumari Debi of the fact that the taxation of the costs was going to take place, and if either of his clients had desired (she being the wife of one and the sister-in-law of the other, and the facts must have been known to them) to dispute any item of the taxation, they should have appeared through their attorney to investigate the costs. I do not think in this case any further taxation of costs ought to take place.

My learned brother Mookerjee, J., reminds me that there was one other point to which I have not referred, and that was this: It was contended by Mr. Bose that inasmuch as the appeal was heard by a Bench constituted by myself, by Woodroffe J., and Mookerjee, J., this matter could not be disposed of by the Bench constituted as at present by my learned brother Mookerjee, J., and myself. there is nothing in that contention for this reason. This is not a question of re-

view of the judgment which was passed by us sitting together with Woodroffe, J., This is a substantive application made to us to-day, and in my judgment there cannot be any doubt that the Bench as at present constituted has full jurisdiction to deal with this matter. It would probably have been more convenient if the application could have been made to the Bench when Woodroffe, J., was sitting with us, and we could have been glad to have had his assistance, but I have no doubt that the Bench as at present constituted has full jurisdiction to deal with the matter. The rule is made absolute with costs.

Mookerjee, J.—I agree.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 601 (1)

TEUNON AND NEWBOULD, JJ.

Giridhari Lal Serowgi—Defendant—Appellant.

v.

Altaf Ali Chowdhury and *others* — Plaintiffs—Respondents.

Appeal No. 21 of 1917, Decided on 19th March 1918, against order of Sub-Judge, Third Court, 24 Pergannas, D/- 13th January 1917.

Civil P. C. (1908), O. 21, R. 66—Appeal against order settling terms of sale proclamation does not lie.

An appeal against an order settling the terms of a sale proclamation, under O. 21, R. 66, with a view to the sale of a property in execution of a decree obtained on a mortgage does not lie.

[P 601 C 2]

Gunoda Charan Sen—for Appellant.

Sarat Chandra Roy Chowdhury and *Bansari Lal Sarkar*—for Respondents.

Judgment.—This appeal is against an order settling the terms of a sale proclamation to be issued with a view to the sale of certain properties in execution of a decree obtained on a mortgage. The appellant before us was the judgment-debtor No. 2 in that decree inasmuch as at the time when the suit was brought and the decree was obtained, he held the position of a puisne mortgagee. It appears that there were certain prior mortgagees known as the Roys. The fact that the sale is to take place subject to the incumbrance of the Roys, has been set out, we are informed, in the sale proclamation. But the appellant before us says that since the decree he has acquired the interest of the Roys and he desires that that fact should also be noted in the sale proclamation. It has also been stated before us that since the decree under execution, he has also been appointed by this Court the receiver in a suit brought by the mortgagors against the Roys, and he has further, it is stated, acquired the interest of the mortgagors. His contention that these facts should also be stated in the proclamation are, however, not pressed before us. The statement in the sale proclamation that the sale is to take place subject to the incumbrance of the Roys, in our opinion, should be sufficient to protect the interest of the present appellant. There is thus no substance in this appeal, and apart from that, it is well settled by the various decisions of this Court that against an order such as this, no appeal in fact lies. This appeal is, therefore, dismissed with costs. We assess the hearing fee at three gold mohurs. The connected Rule No. 101 of 1917 is discharged without costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 601 (2)

RICHARDSON AND WALMSLEY, JJ.

Gobinda Chandra Ghose Biswas and *others*—Plaintiffs—Appellants.

v.

Nandadulal Sut — Defendant — Respondent.

Appeal No. 310 of 1916, Decided on 7th March 1918, from appellate decree of Sub-Judge, Second Court, Tipperah, D/- 23rd September 1915.

Ejectment — Notice — Licensee is not entitled to notice.

In order to maintain a suit for the ejectment of a licensee, a notice to quit is not necessary even where the licensee has erected huts upon the land.

[P 602 C 1]

Upendra Kumar Roy—for Appellants.

Nitish Chandra Lahiry Roy for *Arun Kumar Ghose*—for Respondent.

Richardson, J.—This appeal arises out of a suit brought by the plaintiffs for the purpose of ejecting the defendant from certain homestead land in his possession. The case for the plaintiffs was that the defendant was a licensee and was not entitled to any notice to quit. The plaintiffs nevertheless alleged that they had served a notice to quit. The defence raised by the defendant was that he was in possession of the land as the plaintiffs' tenant. Both the Courts below have concurred in finding that there is no relationship of landlord and tenant between the parties. Apparently when

the defendant obtained possession, there was some talk of a lease being granted to him but the negotiations came to nothing. The first Court further found that the notice to quit had been served and decreed the suit allowing the defendants two months' time to remove the huts which he had erected. There is nothing to show that these huts were in any sense of the term permanent structures. In the lower appellate Court the learned Subordinate Judge, though, as I have said, he concurred with the Munsif that the defendant was not a tenant, nevertheless held that he was entitled to a notice to quit and that no notice had been served. In my opinion on the facts found the defendant is a mere licensee and in the words of Lord Ellenborough in *Doe d. Knight* v. *Quigley* (1).

" If this was a tenure of any sort it was a tenancy at sufferance and a notice to quit was unnecessary. "

Whether therefore any notice to quit was served or not, I agree with the learned Munsif that the plaintiffs are entitled to possession of the land. In the circumstances I am of opinion that the judgment and decree of the Subordinate Judge should be discharged and the decree of the Munsif restored, with this modification that the time allowed for removing the huts should be extended for a period of two months from the date of the arrival of the record in the trial Court. We make no order as to costs. Let the record be sent down as soon as possible.

Walmsley, J.—I agree.

V.B./R.K. *Record sent down.*

1. (1810) 2 Camp 505=11 R R 780.

A. I. R. 1918 Calcutta 602

BEACHCROFT AND WALMSLEY, JJ.

Jagabandhu Pal Chowdhury and *others* —Appellants.

v.

Haladhar Pal Choudhury and *others* —Respondents.

Appeal No. 587 of 1915, Decided on 22nd June 1917, against order of 2nd Sub-Judge, Dacca, D/- 12th July 1915.

(a) Guardians and Wards Act (1890), S. 30 —Transfer of minor's interest in decree by certificated guardian without leave of Court —Judgment debtor cannot question validity of transfer—Civil P. C. O. 32, R. 7.

A judgment-debtor cannot question the validity of the transfer of a minor's interest in the decree, made by his certificated guardian without the leave of the District Judge, so as to prevent its execution by the transferee. [P 603 C 2 P 604 C 1]

(b) Decree—Execution—Mortgage decree —Judgment assignee—Right to execute decree.

A judgment-debtor assignee of a mortgage decree can execute it by putting up the mortgaged property to sale. 12 *I C* 70 *Foll* [P 604 C 1]

(c) Transfer of Property Act, S. 60—One of several mortgagors purchasing mortgagee's interest—Equity of redemption is not split up.

The purchase by one of several mortgagors of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debts so as to enable them to redeem their own shares in the mortgaged property. [P 604 C 2]

(d) Mortgage — Decree — Ekrarnama by 14 persons dividing among themselves responsibility for mortgage debt—Eight actually interested in mortgaged property—Part payment by some—Mortgagee obtaing decree—Decree purchased by some of the mortgagors —Application for execution by sale—Mortgagors purchasing decree could sell property only for balance on deduction of share of debts due from them.

By an ekrarnama 14 persons divided between themselves responsibility for a mortgage-debt but only eight of them were actually interested in the mortgaged property. After part payment of the mortgage-debt by some of the persons, the mortgagee sued on his mortgage and got a decree, which was purchased by some of the mortgagors, who then applied for execution by sale of the mortgaged property:

Held: that the equities existing between the parties by reason of the ekrarnama could not be worked out in execution proceedings, even though some of the persons liable for the mortgage debt had individually paid off the shares of the debt due from them; but that the mortgagors who purchased the mortgage decree could not be allowed to sell the mortgaged property for the whole of the decretal debt, but only for the balance on deduction of the shares of the debt due from them. [P 604 C 2]

Dwarka Nath Chakravarty; *Hemchandra Sen* and *Prakash Chandra Pakrashi* - for Appellants.

Mohendra Nath Roy, *Rajendra Chandra Guha* and *Sasadhar Roy*—for Respondents.

Beachcroft, J.—This is an appeal by the judgment debtors against an order of the Subordinate Judge dismissing their objection and ordering execution to proceed in execution proceedings on a mortgage decree. On 23rd August 1894, 14 persons took a patni lease in the names of four of their number paying a salami of Rs. 39,000. Partly for the purpose of raising the necessary funds money had been borrowed by different combinations of these persons. In one of these transactions a mortgage bond for Rs. 12,000 was executed on 17th August 1894 by 10 of the 14 persons,

though it was expressly stated in the mortgage bond that two of the ten had no interest in the property mortgaged. on 29th August 1894 the 14 persons executed an ekrarnama, in which it was stated that the parties wished to settle their shares and make arrangements for the re-payment of the debts so as to avoid disputes in future. The interests in the patni allocated to individuals were set out in a schedule and the individuals were arranged in two groups; one group of six having 5 1/2 annas and the other of eight having 10 1/2 annas in the patni. The ekrarnama set out in what proportion the debts were to be borne by the two groups. In short, the 5 1/2 annas co-sharers took the liability for Rs. 15,500 and the 10 1/2 annas co-sharers the liability for the rest of the debts amounting to Rs. 30,000. The liability for the Rs. 12,000 borrowed on the mortgage was divided Rs. 4,000 to the 5 1/2 annas and Rs. 8,000 to the 10 1/2 annas co-sharers.

The position with reference to the mortgage was now somewhat peculiar. Although all 14 persons had agreed among themselves to be liable for the debt, the individuals in each group being liable for the amount due from the group in proportion to their shares in the patni, only eight persons were actually interested in the mortgaged property. These eight had 9 1/3 annas in the patni; two others, who joined in the mortgage without having any interest in the mortgaged property, had 4 1/2 annas in the patni; the other four who did not join in the mortgage had 2 1/4 annas in the patni.

Various sums were subsequently paid bp five of the persons and the payments were endorsed on the mortgage bond, but though it is stated on behalf of the appellants that they claim to have paid even more than their shares according to the ekrarnama, the figures have not been worked out so as to enable us to say whether that claim is justified or not.

In course of time the mortgagees sued on their mortgage and on 12th March 1908 got a decree, the amount then due being upwards of Rs. 20,000. On 7th February 1912 mortgagees sold their rights for Rs. 18,000 to Haladhar, one of the original 14 persons, and the representatives of Rajkishore, another of the original 14. Haladhar and Rajkishore were two of the mortgagors, Rajkishor's interest in the patni being 1 1/4 annas out of the 5 1/2 annas group and Haladhar's 2 annas out of the 10½-annas group.

The present application for execution was made by the purchasers of the mortgagee's interest on 31st March 1914. Objections to the execution were made on behalf of the present appellants, who represent Jugalkishor, who had an one-anna share in the patni out of the 5½ annas, and Krishna, Mangal, Gangadhar and Jagabandhu, who had 3-annas out of the 10½-annas. The objection petitions contained a number of objections, but those urged before the Subordinate Judge appear to have been the following: (1) limitation: (2) that the Rs. 18,000 had been paid on behalf of all the debtors and accepted in full satisfaction of the decree: (3) that under O. 21, R. 16, Civil P. C., one of the judgment-debtors could not execute the purchased decree against the other judgment-debtors: (4) that the equities existing between the parties by reason of ekrarnama should be worked out in the execution proceeding and not by separate suit: (5) that as the transfer included transfer of the interest of a minor made by the certificated guardian without the permission of the District Judge the transfer was inoperative. The Subordinate Judge decided against all these contentions. The points now urged on behalf of appellants are: (1) that the transfer of the minor's share is invalid therefore the transferees cannot execute the decree as a whole, and as the extent of the minor's interest is unknown the decree is incapable of execution: (2) that the rights and liabilities of the parties can be worked out in the execution proceedings: (3) that the present decree-holders being interested in a portion of the equity of redemption there ought to be an apportionment of the debt between the property held by them and the property held by other judgment-debtors: (4) that the purchase by some of the debtors was really a discharge of the debt as contemplated by the ekrarnama. The first point taken depends on the effect of the transfer of a minor's interest by a certificated guardian without the leave of the District Judge. S. 30, Act 8 of 1890, provides that such a transfer is voidable, not void, at the instance of any other person, i. e., in addition to the minor, affected by the transfer. In my opinion the objectors cannot question

the validity of the transfer. They may be affected by action taken by the transferee subsequently to the transfer but they are not affected by the transfer itself.

The fourth point would appear to have been presented to the Subordinate Judge in a somewhat different light to that in which it has been put before us, viz., on the footing that the objectors had contributed to the purchase money, the purchase being made on behalf of all the judgment-debtors. We have not been referred to any portion of the oral evidence, and the ekrarnama on which reliance was placed to support the argument does not contain any provision as to the effect of a purchase of the mortgage by some of the debtors, though there is a provision that a cosharer who pays the debt of another cosharer in anticipation of a suit will obtain the share in the patni of the defaulting cosharer. This clause is evidently not sufficient to establish the contention put forward, assuming for the sake of argument that the ekrarnama may be referred to, to work out the equities between the parties. A somewhat similar point which might perhaps have been advanced, though in fact it was not, is that the purchase was in substance, though not in form, a redemption of the mortgage and that the right of the transferees were those possessed by one of several mortgagors who redeems the mortgage. The point in essence differs from that based on O. 21, R. 16, which was taken before the Subordinate Judge, and which the learned pleader for the appellants expressly abandoned before us. But there is authority in *Laldhari Singh* v. *Manager, Bhabatpura Estate* (1) that a judgment-debtor assignee of a mortgage decree can execute it by putting up the mortgaged property to sale. For the third point the learned pleader for the appellants admits that he can show no authority.

His argument is that this is the converse of the case contemplated by S. 60, T. P. Act, and that as a mortgagor is entitled to redeem his own share when the mortgagee has acquired the share of a mortgagor, the same rule applies when a mortgagor has acquired the interest of the mortgagee. He argues that the rule is founded on the union in the same person of the interest of the mortgagee and of one or more of the mortgagors, and as it applies when the mortgagor acquires the interest of a mortgagor it ought to apply also in the converse case. But the rule is not founded on the union of the two interests in one person, but on a result which follows that union in the case where the mortgagee purchases the interest of a mortgagor but not in the converse case, namely, that the mortgagee has by his purchase split up his security. The purchase by a mortgagor of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debt.

There remains the question whether the equities between the parties can be worked out in the execution proceedings or only by separate suit. What the appellants are in effect claiming is that they have individually paid off the shares of the debt due from them in accordance with the terms of the ekrarnama and that their share in the mortgaged property ought to be released from sale, or that they should be made liable individually only for such amounts by which their payments fall short of the amounts due in proportion to their shares in the patni. This obviously cannot be done. I have already pointed out that by the ekrarnama all fourteen persons divided between themselves the responsibility for the mortgage debt, but that the persons interested in the mortgaged property only had 9-1/4 annas in the patni. Supposing every one of the persons interested in the mortgaged property had paid up his share of the mortgage debt as allocated in the ekrarnama, a very large portion of the mortgage debt would still remain unsatisfied, and for that portion of the debt the mortgaged property as a whole and not the shares of the individual members must remain the security; by no process of reasoning could the balance of the debt be thrown on the share rather than on another. And if it is sought to bring all the debts referred to in the ekrarnama into the account, that obviously cannot be done in this execution proceeding as it would bring in persons who were not parties to the suit. I am, therefore, of opinion that the appeal should be dismissed.

There is, however, an order which we can make and which I think we ought to make, concerned as we are with seeing that formalities of procedure should not be allowed to obscure substantial justice between the parties. As already men-

1. (1911) 12 I C 70.

tioned, various payments were made on the mortgage; one was of Rs. 2,057 made in respect of Raj Kishor's share of the debt on 6th Aswin 1302. Nothing has been paid in respect of what is admittedly Haladhar's share of the debt. His original share would be two annas out of 10½ annas, i. e., 4/21 of Rs. 8,000. By now it will have amounted to a very much larger sum. Raj Kishor by his payment of Rs. 2,057 may or may not have paid the full amount due for his share, which was originally 5/22 of Rs. 4,000. A large portion of the judgment-debt is, therefore, due from the decree-holders themselves. They cannot be allowed to sell the property for the whole debt, which is largerly swollen because they have failed to carry out their own undertakings. It must be taken that they have paid to themselves the amount due from themselves. A calculation must be made of the amount due in respect of the shares of Raj Kishor and Haladhar on the footing above indicated, and the amounts so found must be deducted from the sum for which execution is levied, satisfaction for those amounts being entered. The parties to this appeal will bear their own costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 605 (1)

FLETCHER AND RICHARDSON, JJ.

Mohini Mohan Guha and *others* — Plaintiffs—Appellants.

v.

Jhanda Mia Chowkidar and *others*—Defendants—Respondents.

Appeal No. 2519 of 1915, Decided on 26th February 1917, from appellate decree of Dist. Judge, Chittagong, D/- 29th July 1914.

Land tenure—Noabad Taluk—Uncultivated land—Interest of tenure holder is not permanent and heritable.

The interest of a tenure-holder with regard to uncultivated land of Noabad taluk is not permanent and heritable. Therefore a tank in a Noabad taluk, which is more or less silted up, and a portion of the waste land, can be settled by Government with a person other than the original tenure-holder. [P 605 C 2]

Mohendra Nath Roy and *Khitish Chanda Sen*—for Appellants.

Jogesh Chandra Roy and *Chandra Sekhar Sen*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs from a decision of the learned District Judge of Chittagong, dated 29th July 1915, reversing the decision of the Munsif of South Ranjan. The plaintiffs brought the suit to recover possession of a share in the tank. The first Court decreed the suit. The lower appellate Court has reversed that decision and dismissed the suit. Two points have been argued in this appeal. First of all, the learned Judge has found as a fact that defendant 4 obtained a settlement from the Government of this tank. It is said that that was a new case and, therefore, the learned Judge of the lower appellate Court was not entitled to find that case in favour of defendant 4. I do not think that that is so That case seems to have been set up at the outset and the statements of the Munsif in his judgment, though perhaps not so clear, go to warrant the fact.

The other point that has been raised is that this land forms a part of what is known as Noabad land. It is said that the Government could only settle the land with the original tenure-holders, that is, that an interest in a Noabad Taluk is permanent and heritable and that the only thing that is liable to be varied is the amount of the revenue payable to the Government. It is admitted that the authorities show that, at any rate, with regard to uncultivated lands, that rule does not apply. In this case the land is clearly uncultivated. It was a tank which is now more or less silted up and a portion of waste land. There is nothing in the authorities to show that it is necessary for the Government to settle this uncultivated land with the tenure-holders under the Noabad Taluk. The appeal, therefore, fails and is dismissed with cost.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 605 (2)

RICHARDSON AND WALMSLEY, JJ.

Biswanath Bhattacharjee — Decree-holder—Appellant.

v.

Sameswar Sarma Baruah—Judgment-Debtor—Respondent.

Appeal No. 121 of 1916, Decided on 19th April 1917, from order of Dist. Judge, Assam, D/- 4th March 1916.

(a) Decree—Construction — Suit on hand note — Instalment decree — Decree-holder held entitled to appropriate payment to-

wards interest first and credit balance towards principal.

An instalment decree made in a suit upon a hand note ran as follows: "It is ordered that the defendants do pay to the plaintiff the sum of Rs. 2,888-8-0 with interest thereon at the rate of 12 per cent. per annum * *. The amount decreed * * to be paid in yearly instalments of Rs. 600 payable on 15th July each year * * *."

Held: that under the decree interest was payable yearly and for the purpose of the decree the year must be taken to end on 14th July, and that the plaintiff was, therefore, at liberty, in the absence of any express or implied appropriation by the judgment-debtor, to appropriate, out of each payment as it was made, a sum sufficient to satisfy the interest due at the date of the payment towards the satisfaction of the interest and to credit the balance only towards the principal. [P 607 C 1; P 606 C 2]

(b) Debtor and Creditor - Payment of debt — No appropriation made — Creditor can apply payment towards interest in the first instance—Rule applies to decree providing for payment of interest.

In the absence of any appropriation by the debtor, it is open to the creditor to apply the payments made by the debtor in the first instance toward- the interest and the balance only towards the principal. [P 606 C 2]

There is no reason why this rule should not apply to a decree when there is an express provision for the payment of interest in the decree, whether the decree be an instalment decree or a decree of an ordinary kind. [P 607 C 2]

(c) Debtor and Creditor—Payment of debt —Interest due—Creditor can pay himself his interest.

If money is paid by a debtor when there is interest due to the creditor, unless the contract or decree provides to the contrary or the money is otherwise specially appropriated by the debtor, the creditor has a right to pay himself his interest. [P 607 C 2]

(d) Contract Act (1872), S. 60 - Applicability of—Interest payable under express stipulation or provision becomes debt accessory to principal debt—Debtor and Creditor.

When interest is payable under an express stipulation or provision, the interest becomes a debt accessory to the principal debt and S. 60, Contract Act, is applicable. [P 607 C 2]

Nitish Chandra Lahiri and *N. C. Bardalai*—for Appellant.

Narendra Kumar Bose—for Respondent.

Richardson, J.—The case as it seems to me is really a simple one. It relates to an instalment decree, dated 21st December 1908. The decree is founded on a judgment in these terms:

"Defendant admits the claim but prays for an order to pay by instalments. Plaintiff will get a decree with costs for the amount claimed to be paid in yearly instalments of Rs. 600 (six hundred) payable on 15th July each year with interest at 12 per cent. In default of any instalment the whole amount will be payable."

The decree itself runs as follows:

"*It is ordered that* the defendant do pay to the plaintiff *the sum* of Rs. 2,888-8-0 *with interest thereon at the rate of* 12 *per cent. per annum*, with the costs of the suit. The amount decreed with costs to be paid in yearly instalment of Rs. 600 (six hundred) payable on 15th July each year. In default of any instalment the whole amount will be payable."

In the decree the words underlined (italicised) are printed and it may be that the printed form of which use was made is not as suitable for an instalment decree or for a decree of the ordinary kind. But reading the judgment and the decree together the meaning seems clear. The amount decreed excluding the costs is Rs. 2,888-8-0 with interest at 12 per cent. per annum. The decree makes it clear that the interest is payable yearly and for the present purpose the year must be taken to end on 14th July. No doubt the payment of interest on interest is not directed, but on every 15th July the decree holder became entitled to the interest accrued due on the amount of his claim or the balance of that amount.

The judgment-debtor regularly paid Rs. 600 and the question is now one of accounting. The judgment-debtor did not expressly or impliedly appropriate these payments to principal. The plaintiff, therefore, contends that he was at liberty to appropriate out of each payment as it was made sufficient to satisfy the interest due at the date of the payment, and to credit the balance only to principal. The judgment debtor, on the other hand, contends that the plaintiff was obliged to allocate the whole of each periodical payment to principal and to take nothing for interest so long as there was any principal due. So far as I can see there is nothing in the decree which entitles the defendant to have the account taken on that footing. Interest was expressly made payable by the decree. The amount decreed comprised the principal debt and the debt annually due on account of interest. On general principles, in the absence at any rate of any appropriation by the debtor it was open to the creditor to divide each sum of Rs. 600 between principal and interest, as he did, and to make up his account accordingly. In other words the case falls within the general rule which the Courts have long recognized. "It is usual," said the Sadar Diwani Adalat in 1827 [*Goverdhun Das* v. *Waris Ali* (1)

1. 4 Select Reports 380.

"till the whole account of interest is paid to carry any sums received to the amount of interest and not of principal."

The case was cited before the Privy Council in *Bamundoss Mookerjea* v. *Umeish Chandra Race* (2). Judgment was delivered by Sir William Maule who said this :

"Their Lordships during the argument in this case intimated their opinion on the main question, namely, whether the payment made should be ascribed exclusively to principal and no part of them to interest: expressing their opinion that the course adopted was the ordinary one, and that the construction of this instrument is one which does not point out any other, namely, that the payments should be applied in the first instance to interest, and to principal only so far as those payments exceed the interest due. That is the main point in question and their Lordships entertained no doubt at all about it."

The rule was again applied by the Privy Council in *Luchmeswar Singh Bahadur* v. *Syad Lutf Ali* (3). The head-note is as follows :

"Where payment was made upon a bond, the amount paid being less than the interest due held the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree."

The report states that when the appeal was opened, their Lordships intimated that unless the learned counsel could satisfy them that there had been an appropriation at the time of payment to the payment of the principal, the creditor had a right to consider it as a payment on account of the interest. It seems to have been argued (as it has been argued before us in the present case) that the result of adopting the rule was virtually to allow the creditor compound instead of simple interest. Their Lordships delivered a short judgment but took occasion expressly to observe that "there has been no calculation so as to give compound interest." Reference may also be made to the decision of Sir Willam Markby and Romesh Chandra Mitra, JJ., in *Gooroo Doss Dutt* v. *Ooma Churn Roy* (4) and to the decision of the Allahabad High Court in *Maharaja of Benares* v. *Har Narain Singh* (5). The rule is so well established that but for the respect due to the Court below and to my learned brother, I should hardly have thought it necessary to cite authority at all. Most of the cases relate to bonds containing an express stipulation for the payment of interest, but in *Gooroo Dutt's* case (4) the rule was applied to payments on account of a decretal debt. Nor is there any reason why the rule should not apply when there is an express provision for the payment of interest in a decree whether the decree may be an instalment decree or a decree of the ordinary kind. Take for instance a decree for Rs. 1,000 with interest at five per cent. per annum. If at the end of a year a sum of Rs. 100 is realized the judgment-debtor would be entitled to appropriate Rs. 50 for the interest due.

As to the argument that the rule virtually allows compound interest, it may be that when the amounts paid on account are regularly paid and are always sufficient to satisfy the interest due, so that the interest is never in arrears, the result as regards the total amount paid is the same as allowing compound interest, or as though the instalments paid were credited to principal and the interest due were added to principal. But this would not always be so. For instance, if nothing be paid on a debt carrying simple interest due for the first year would not be added to principal, for two years, the interest so too if the amount paid on account be less than the interest due, the balance of the interest would not be added to principal. The point is that when the money is paid there is interest due to the creditor and unless the contract or decree provides to the contrary, or the money is otherwise specially appropriated by the debtor, the creditor has a right to pay himself his interest.

The principle underlying the rule appears to be this, that when interest is payable under an express stipulation or provision, the interest becomes a debt accessory to the principal debt and S. 60, Contrct Act, is applicable (Pollock and Mulla's Contract Act, Edn. 2, p. 260). One point remains. On 28th July 1909, the decree-holder filed an application praying "that the decree may be amended in conformity with the judgment." The application does not state in what respect the decree was not in conformity with the judgment. The judgment-debtor presented a counter-petition, in para. 4 of which he stated

"that if the Court passes orders for payment of interest on the whole sum decreed along with the instalment of Rs. 600, the defendant will not

2. (1854-57) 6 M I A 289 (P C).
3. (1872) 8 Ben L R 110 (P C).
4. (1874) 22 W R 525.
5. (1906) 28 All 25.

be in a position to pay the same, and if the defendant in that case fails to pay the kist, the plaintiff, no doubt, will not let him off easily."

The learned Subordinate Judge before whom the matter came contented himself with saying that he was not inclined to amend the decree as too much time had elapsed. It is suggested that what the decree holder asked for by way of amendment was a direction that the judgment-debtor should pay on each 15th July not only the sum of Rs. 600 but also the interest due to date, and that this request showed that he meant to allocate each payment of Rs. 600 in its entirety to principal. In my opinion no such declaration of intention can be extracted from the petitions and the order of the Subordinate Judge. The fact, if it be a fact, that plaintiff wanted the instalments increased from Rs. 600 to Rs. 600 and interest due is no proof of any intention on his part, if he received instalments of Rs. 600 only, to allocate the whole to principal. The Courts below decided in favour of the defendant. It may be that their sympathy was with him but for the reasons indicated their orders should, in my opinion be discharged. The certificate of full satisfaction of the decretal debt granted by the first Court must be set aside and an order drawn up stating the amount still due on the basis above indicated. As regards costs, I do not myself see any reason for departing from the usual rule, but as my learned brother thinks differently, I do not press the point. The appeal will, therefore, be allowed without costs.

Walmsley, J.—This appeal has caused me much difficulty, and if it were necessary to state a general rule as to the manner of calculating interest on an ordinary decree for money, I fear I could not agree with my learned brother. The case of *Gooroo Doss Dutt* v. *Ooma Churn Roy* (4) deals with the question, but with all deference to the learned Judges, I doubt whether their statement "of the rule usually adopted in this country" is correct at the present day. Moreover, I think that a method of calculation which has the practical effect of allowing compound interest cannot be distinguished from compound interest, and should be acknowledged as such. In the present case, however, the plaint and the written statement with the judgment passed thereon, supplemented by the decree-holder's petition for amendment with the debtor's petition in reply, make it plain that the arrangement between the parties was that the amount due under the decree should continue to bear interest at the rate stipulated in the handnote in the same manner as if the debt were still due under the handnote and not under the decree, and that the only relief granted to the debtor was that he should pay off the debt in regular instalments, instead of becoming liable immediately to execution proceedings for the entire amount due under the decree. There is no uncertainty about the manner in which by custom and authority, interest would be calculated under the handnote. I therefore, agree that the appeals should be allowed, but without any order as to costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 608

CHATTERJEA AND SMITHER, JJ.

Jafar Ali and *another*—Defendants—Appellants.

v.

Har Gobinda Sarma —Plaintiff—Respondent.

Appeal No. 3200 of 1915, decided on 18th May 1917, from appellate decree of Sub-Judge, Chittagong, D/- 15th March 1915.

Civil P. C. (1908), O. 1, R. 10 and S. 107—H and J. claiming each to be sole landlord sued tenant for rent—Both suits tried together—H party defendant to J's suit—No appeal preferred in J's suit—H appealing—Decree in J's suit is not res judicata and J should be added as party to appeal.

H. brought two different suits for rent against a tenant claiming each to be the sole landlord. *H.* was a party defendant to the suit of *J.* Both suits were tried together as analogous and the trial Court found that *H* was entitled to a ten annas share and *J.* was entitled to the remaining six annas share of the rent. No appeal was preferred in the suit of *H.* But *H* preferred anappeal against the decree in his suit and on appeal the appellate Court held that *H.* alone had a right to the entire rent and *J* had no right to any portion of the rent. On second appeal by the tenant:

Held: that the decree in *J.*'s suit did not operate as res judicata upon the question of *H.*'s right to the rent but that under the provisions of O. 1, R. 10, read with S. 107, Civil P. C., *J.*, who though not a party in form to the suit brought by *H.* in substance contested the suit, should be made a party to the appeal in *H.*'s suit and the appeal be heard and determined in his presence. [P 609 C 2]

Khitish Chandra Sen—for Appellants.

Jotish Chandra Sarkar—for Respondent.

Judgment.—This appeal arises out of a suit for the years 1272 to 1274 M. S. brought by the plaintiff Har Gobinda Sarma against the tenants Jafar Ali and others. The plaintiff claimed to be the sole landlord and as such, claimed the entire rent of the holding. There was another suit brought by one Jagat Chandra Chakravarti against the same tenants and for the same period. The two suits were tried together as analogous. The same evidence was recorded in both the cases and the two suits were disposed of by the same judgment by Court of first instance, although there were two separate decrees in the two suits. The Court of first instance held that Har Gobinda was entitled to a 10-annas share of the rent and Jagat Chandra the plaintiff in the other suit was entitled to the remaining 6 annas share of rent. It ought to be mentioned that Har Gobinda was party defendant to the suit of Jagat Chandra. There was no appeal preferred against the decree passed in the suit instituted by Jagat Chandra. Har Gobinda preferred an appeal against the decree of the Court of first instance in this suit and on appeal the lower appellate Court held that Har Gobinda alone had right to the entire rent and that Jagat Chandra had no right to any portion of the rent. In that view a decree for the entire rent was passed in favour of Har Gobinda. The result was that as against the tenant defendants there was a decree for 16-annas rent payable to Har Gobinda and another decree for 6 annas share of the rent in favour of Jagat Chandra. The tenant, defendants have appealed to this Court in the suit brought against them by Har Gobinda.

It is contended that the question whether Har Gobinda is entitled to the 16 annas of rent or only to a 10-annas share thereof, is res judicata by the decree in Jagat Chandra's suit to which Har Gobind was a party and in which it was held that Jagat Chandra had a 6-annas share in the rent. We do not think that that decree operates as res judicata upon the question of Har Gobinda's right to the rent. It is true that he was a party to the suit brought by Jagat Chandra, but he had preferred an appeal in his suit and the object of the appeal was to get rid of the adjudication of the Court of first instance that he had only a 10-annas share of the landlord's interest. If however the decree of the lower appellate Court in the suit brought by Har Gobinda and the decree of the Court of first instance in the suit by Jagat Chandra are allowed to stand, the result would be that the tenant defendants would be liable for the 6-annas share of the rent twice over. Under these peculiar circumstances the proper course would have been to add Jagat Chandra to the appeal which was preferred to the lower appellate Court by Har Gobinda under the provisions of O. 1, R. 10, read with S. 107, Civil P. C. It is true that Jagat Chandra was not made a party to the suit brought by Har Gobinda; but although he was not a party in form, in substance he contested the suit. As the learned Munsif points out, the real contest in these cases is between the plaintiffs in the two cases, both of whom say that they are the landlords. There is no question of adducing any further evidence on behalf of Jagat Chandra because the evidence in both the suits was the same and the two suits were tried together. We think, therefore that Jagat Chandra cannot be prejudiced by being added as a party to the appeal in the suit brought by Har Gobind and that in order to effectually and completely dispose of the matters in controversy between the parties, this course should be adopted.

We accordingly set aside the decree of the lower appellate Court and send the case back to that Court with the direction that Jagat Chandra be made a party to the appeal and the appeal be heard and determined in his presence. We express no opinion whatever on the merits of the case as between parties. Costs will abide the result.

V.B./R.K. *Case remanded.*

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* A. I. R. 1918 Calcutta 609

SANDERSON, C. J. AND CHATTERJEA, J.

Mahomed Umar and *another*—Defendants—Appellants.

v.

Mt. Man Koer—(Plaintiff) and *others*—Defendants—Respondents.

Letters Patent Appeal No. 123 of 1915, Decided on 4th April 1917, against decree of Mullick, J., D/- 8th July 1915, in appeal from appellate Decree No. 2661 of 1913.

*** (a) Hindu Law—Widow — Re-marriage —She forfeits interest in property granted for maintenance.**

A Hindu widow on her remarriage, although such remarriage is permissible and legal accord-

ing to the custom of the caste to which she belongs, forfeits her interest in the property allotted to her by a family arrangement based upon her right to maintenance out of the interest which her deceased husband had in the ancestral estate. [P 613 C 2, P 615 C 2]

* (b) **Hindu Widow's Remarriage Act (1856), S. 2—Forfeiture of widow's interest on remarriage—No change is introduced in Hindu Law.**

It would make no difference in her position whether S. 2, Act 15 of 1856 does or does not apply to her case, as that section has not introduced any change in the Hindu law so far as it relates to the forfeiture of a widow's interest on her re-marriage. [P 613 C 2, P 615 C 2]

(c) **Deed—Construction of — To ascertain intention of parties Court can look at position of affairs at time of execution of document.**

For the purpose of construing a document the Court has to look at the whole of the document and consider all its terms one with the other, and for the purpose of ascertaining the intention of the parties the Court is also entitled to look at the position of affairs at the time when the document was entered into and also at the position of the parties who executed the document. [P 612 C 2]

(d) **Deed—Construction of — Expressions used capable of two constructions—One consistent with law to which parties are subject should be adopted.**

Per *Chatterjea, J.*—If the expressions used in a deed are capable of two constructions, that construction should be adopted which is consistent with the law to which the parties are subject. [P 615 C 1]

Panchanan Ghose—for Appellant.

Satya Charan Sinha — for Respondents.

Sanderson, C. J.—In this case the suit was brought by the plaintiff asking for several reliefs, mainly for a declaration that she was entitled to a certain house and for possession and for arrears of rent. Defendant 1 is the tenant of the house; defendant 2 is a person who purchased the house on 22nd March 1911 from defendants 3 and 4, the daughter and grandson of one Har Lal Bhagat. The first Court gave the plaintiff a decree for arrears of rent only. That Court would have awarded a decree for possession of the property to the plaintiff but for the fact that the requisite notice had not been served.

The first appellate Court reversed that decision on the ground that the plaintiff had obtained whatever right she had to the house in question by way of maintenance, and that she being a Hindu widow and having married again had forfeited that right, and consequently, it gave a decree in favour of the defendants. Mullick, J., sitting alone to hear the second appeal, reversed the decision of the first appellate Court and confirmed the decree of the learned Munsif, and he came to the conclusion that the interest which the plaintiff had in the house was that of an absolute proprietor, but that as the plaintiff had not appealed from the Munsif's judgment, her title must be taken to be for life only, that she had not obtained her interest in that house by way of maintenance and that her re-marriage did not consequently result in forfeiture. As there was no cross appeal he could do not more than confirm the decree of the first Court. Consequently, the plaintiff obtained merely a decree for arrears of rent. Now, the question which is before us in this case depends upon the construction of an agreement in writing which was entered into on 19th August 1907 by three individuals, the plaintiff, the lady called Mt. Bifo, and the defendant Mt. Jago. For the purpose of construing this document it is necessary to consider the position of the parties at the time when that agreement was made. That position was this: One Har Lal Bhagat had died on 16th April 1906. He had had two sons, and one daughter Mt. Jago. Both his sons Thakur Ram and Kishen Ram died during his lifetime, and he left surviving him his daughter Mt. Jago. There were also living the widow of Thakur Ram, Mt. Bifo, and the widow of the second son, Mt. Man Koer, the present plaintiff. Apparently, these three women after Har Lal's death were living together and had been carrying on a shop which had been the joint property of the Hindu family. That was the position at the time when this agreement was entered into.

Now, on the one hand, it is alleged on behalf of the defendants that the interest of the plaintiff in the house in question was merely given to her under a family arrangement, in order that she might maintain herself out of the profits of that house, and that consequently, when she married again, as undoubtedly she did between the dates, 19th August 1907 and 22nd March 1911—the exact date is not ascertained—she lost her right to maintenance and therefore lost all interest in this house. On the other hand, stated shortly, the plaintiff's case is that she did not obtain her interest in the house by way of maintenance but that under a family arrangement she got an absolute

right in it, and that her interest in the family house at all events would subsist as long as she, the plaintiff, lived and as long as the defendant Mt. Jago lived. Now the agreement came into existence in this way: Apparently there was a dispute between the parties. The exact nature of the dispute is not specified, but it is stated in the agreement that

"Various kinds of differences have arisen between us the declarants, and there is likelihood of quarrels occurring."

Then the agreement recited that

"this gave rise to the reflection as to what was the extent of the property on which there were liabilities amounting by accounts to Rs. 1,852-8-0, and in a case of disputes occurring there would be further loss in costs of litigation, and eventually there would be no other result besides loss and waste of the properties belonging to the estate of the late Hara Lal Bhagat alias Hassani Bhagat."

Consequently, the parties apparently agreed to refer their differences to certain arbitrators whose names are stated in the agreement, and to abide by the result of their award. The arbitrators made their award and this agreement was entered by the three declarants, whose names I have mentioned, for the purpose of carrying out the effect of the award. Apparently, there were three houses of the value of Rs. 3,100 and the stock of the shop was of the approximate value of Rs. 1,100. The agreement recites that Har Lal Bhagat died on the date I have mentioned, leaving him surviving the three declarants, his heirs, so that from the date of his death the declarants became and continued to be joint possessors of the entire property and shop and moveable and immovable property and were carrying on the business of the shop. The plaintiff relies upon that part of the agreement as well as other parts of it for the purpose of showing that this interest which the plaintiff undoubtedly obtained, whatever the extent of it was, was not by way of maintenance of the plaintiff, and she points to the word 'heirs' in the clause which I have just read. I shall have to say more about it later on. Then it recites that

"in consideration of the above reflection it was thought advisable for a settlement to refer the matter to a panch of fellow castemen and those who are respectable and trustworthy, and whatever settlement they make in respect of the estate, shop and liabilities be and do remain binding on us, the three declarants."

Then it recites that the panch has come to the conclusion that the value of the estate of the deceased person was ascertained to amount to Rs. 4,200 and the liabilities of the shop were proved to amount to Rs. 1,852-8-0. It then proceeds to apportion the shares, and I may state it quite generally. The principle upon which the property was to be divided, if I may use that as a neutral word for the present, was that each was to get a third. The surviving daughter was to have possession of the more valuable house and was to take over the business and the liabilities attached thereto and she would have power to sell some of the property apportioned to her, in order to meet the liabilities. The agreement goes on to state that

"property of the value of Rs 782-8-0 be given to each of the two declarants, Mt. Bifo and Mt. Man Koer—"

these are the two daughters-in-law—

"so that they may maintain themselves from the profits of their respective properties and one may not have any concern with the other, whereby quarrels and animosities may be averted, and the ancestral estate of Har Lal Bhagat may not be ruined."

That is a portion of the agreement upon which the defendant very strongly relies, because he says it shows what the real intention of the parties was. He says, this was an ancestral property, and the object of the agreement was that the ancestral property should not be ruined in useless litigation and that the shares which the two daughters-in-law were to obtain were for the purpose of maintaining themselves without having recourse to the daughter, so that friction in future might be avoided. Then the agreement recites that

"the ancestor had three houses, one the dwelling house with shop valued at Rs. 1,800, the second house valued at Rs. 1,200 and the third house valued at Rs 100 and the stock existing in the shop valued at Rs. 1,100, of which we, the declarants, have all been from the date of the death of the said ancestor, and are, joint in possession up to the present time, and similarly Rs. 1,815-8-0 the liabilities, are justly chargeable to and payable by us three declarants."

That is a clause upon which the plaintiff's vakil strongly relies. He says it shows that the three declarants had been jointly interested in the property, that they had been jointly carrying on the business, that they had been treated as in equality and consequently they were being treated in equality in this distribution of the assets, and that that being so the clause was not consistent with the interest of the plaintiff in the house being

merely for the purpose of maintenance. On the other hand it is urged by the defendant that that is a clause which does not hurt the defendant's case, because the parties had obviously been carrying on the business together and this is not a declaration of their strict liability to debts according to law, but having regard to justice and equity, inasmuch as they had been carrying on the business together since the death of the ancestor, it would be right to say that the liabilities were justly chargeable to each of the three declarants. Then comes the operative part of the agreement. First of all, it begins by saying:

"Now of our own free will and accord while sound of mind and understanding without coercion, instigation or unlawful pressure by anybody, we the declarants have partitioned between us the properties above mentioned and hereunder described according to our respective shares in accordance with the direction and decision of the panches, and we the declarants have become separate possessor thereof. From this date one of us, the declarants, has not any sort of concern with another of us the declarants nor shall we have any in the future. If contrary to this, any of the parties take any action or make any claim against any of the parties, that shall be altogether invalid and void. We the declarants have acquired full right and authority in respect of the property apportioned to us respectively, so that each may take whatever she thinks fit and proper with respect thereto without consulting and without reference to another."

I draw attention to those words because they are important for the purpose of ascertaining the real intention of the parties. Then the last clause to which I need refer in this agreement is Cl. 10, which sets out the method by which the award of the arbitrators is to be carried out, and it says,

"Of the estate of the said ancestor there are three houses of different values, consequently we have got a house and by refund of the excess",

that is an inartistic way of expressing the intention of the parties; I understand the meaning of that is, that as each of the three ladies was to get a house, and the houses being of different values, as one of them must get a house more valuable than the other, she would have to make up the difference in value by payment of money to the other or others, so that the shares might be equalized.

"Thus the first house with shop, the value of which is approximately Rs, 1,800, and the stock ensting in the shop, the value of which is Rs. 1,100, the aggregate value of the house with shop amounting to Rs. 2,900, has been taken by me, Mt. Jago Kuar, for my rateable share and for payment of debts to creditors, so Rs, 265, the amount which is in excess of my, Mt. Jago Kuar's share, has bean made good by me in cash to Mt. Bifo Kuar., the declarant. Now we the declarants Nos. 2 and 3 have not and shall not have any sort of claim and lien in respect of the house and the properties existing in the shop against me, Mt. Jogo Kuar, or my heirs and successors."

That deals with the share of the daughter. Now, I come to the important part which deals with the share of the plaintiff:

"The house of which the approximate value is. Rs. 1,200 is apportioned to the share of me Mts Man Kuar' (i. e., the present plaintiff) and a the share of Mt. Man Kuar amounts to Rs' 782-8-0 and the value of the said house is Rs' 1,200, so by this calculation I have made good Rs. 417-8-0 in cash to Mt. Jago Kuar (i, e.. the daughter), now we the declarants Nos. 1 and 2 have not any claim in respect of the said house against Mt. Man Kuar or her heirs and successors."

That, as I have said, is the plaintiff's share. Then comes Bifo's share:

"The share of me, Mt. Bifo Kuar, amounts t Rs, 782-8-0. Consequently I have received Rs. 265 in cash from Mt. Jago Kuar as per details . . . . And I have received Rs, 417-8-0 from Mt. Man Kuar."

That must be the particular sum which the plaintiff has alleged to have paid to the defendant daughter, and which obviously by this arrangement passed from the defendant daughter to Mt. Bifo, so in this way the three shares of these ladies were equalized. Then it concludes by saying:

"None of us have any concern with any other. If anything be done contrary to this, it shall be altogether invalid and void."

That is the agreement. Now we have to ascertain what was the real intention of the parties. There is no doubt that for the purpose of construing the document we have to look at the whole of the document and consider all its terms one with the other: and for the purpose of ascertaining the intention of the parties we are also entitled to look at the position of affairs at the time when the document was entered into and also at the position of the parties who executed the document and having regard to such a document as this, I cannot do better than quote a passage, which was referred to this morning, in the case of *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) that no doubt refers to a testamentary document but in my opinion, it is equally applicable to the construction of an agreement such as we have now before us.

The passage is as follows:

1. (1854-57) 6 M I A 526 = 4 W R 114 (P C).

"The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware is there any difference between the one law and the other as to the materials from which the intention is to be collected."

And in construing the terms of a document it has been pointed out in the case of *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (2) that,

"deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense is not to be so much regarded as the real meaning of the parties which the transaction discloses."

If any further authority were needed, I might refer to the case of *Sreemutty Rajutty Dossee* v. *Sibchunder Mullick* (3) (which again is reported in the same Volume at p. 1, the passage being at p. 23), where it is said by the Judicial Committee of the Privy Council:

"You must look at the words of the deed with reference to the parties who use them and the grant must be consistent with that consistent with the interests of those who make the grant."

That being so, I have first of all to consider the position of the parties: the plaintiff was the widow of a man who had been a member of a joint Hindu family governed by the Mitakshara Law. Her husband, therefore had an interest in his father's property since he was born and when he died, that property of the plaintiff's husband passed to his father subject to his widow's right of maintenance and when the husband's father died, as he died in this case leaving the defendant daughter surviving him, the property passed to the defendant daughter again subject to the right of the widow to maintenance. Now that being the position of the parties, I have to consider what was the intention of the parties when this agreement was entered into. Having given due consideration to the arguments which were advanced on the one side and on the other, I have come to the conclusion that the intention was first of all to get rid of what was apparently a constant source of friction among the three women living together and trying to carry on a joint business in the same premises. That was the first intention. The second intention was that the two daughters-in-law or rather the daughter-in-law, the plaintiff, I need not say two daughters-in-law, because I am only concerned with one, the plaintiff, should have certain property, in order that she might maintain herself out of the profits of that property; and this agreement was entered into upon the basis of the plaintiff's right to maintenance which existed in her according to the Hindu law. I think the word "heirs" in this agreement, having regard to the other provisions of it, was not used in the strict legal sense but rather as a word implying person interested in the estate.

That being the true constuction of the document, the question then arises, did the plaintiff by her re-marriage forfeit her interest in the house? The position of the plaintiff in this respect was this; she belonged to a caste which by custom allowed the re-marriage of a widow. But that in itself would not prevent her from forfeiting her right to maintenance out of her deceased husband's property, and the case of *Rasul Jehan Begum* v. *Ram Surun Singh* (4) was referred to where the headnote is to the following effect:

"A Hindu widow on re-marriage forfeits the estate inherited from her former husband although according to custom prevailing in her caste a re-marriage is permissible."

That case, it is to be noted, deals with the estate which is inherited by a widow from her former husband. This is not a case of inheritance: and as I have already pointed out in my opinion this is an agreement which is based upon the widow's right to maintenance which is a charge upon the property of her deceased husband. It is not disputed that but for this agreement she would forfeit that right on her re-marriage. In my judgment inasmuch as I have come to the conclusion that this agreement was based upon the plaintiff's right to maintenance out of her deceased husband's property, and that the provisions contained in it were intended to secure the efficient carrying out of that right, I am of opinion that the plaintiff when she was married again forfeited her interest in the house in question. There is another argument which has been brought forward, and I must deal with that. It is said that the property, in which the plaintiff by reason of this agreement obtained an interest, was not that of her deceased husband, and that is one of the grounds on which the learned Judge, who decided the case in favour of the plaintiff,

2. (1854-57) 6 M I A 393=18 W R 81 note (P C).
3. (1854-57) 6 M I A 1=19 E R 1 (P C).
4. (1895) 22 Cal 589.

relied. The answer to it is that which I have already given, and that is this: The deceased husband having had an interest in the ancestrel property out of which she would be maintained during her life, the obligation to maintain her out of that property continued after his death, when the property passed by survivorship, and as I have already mentioned, the property passed to defendant 3 subject to the plaintiff's right of maintenance, and part of that property was the subject-matter of the agreement. It has been argued that S. 2 Act 15 of 1856 does not apply to this case, because of the facts which I have already mentioned. I do not think that it much matters whether this Act applies or not, because it has been admitted during the coure of the argument that this section is practically a statement of the Hindu law as it existed apart from the Act, so far as it related to the forfeiture of a widow's interest on her re-marriage under the circumstances mentioned.

I ought to say before concluding my judgment in deference to the learned Judge that he had not the translation of the agreement before him when he gave his judgment, and therefore he had not the advantage which we have had in this Court, and as far as he knew, the agreement did not make any specific reference to maintenance. Whereas it turns out, when we look at the translation of the agreement, that as I have already explained in the beginning of my judgment the object specifically mentioned in this arrangement was that the plaintiff and the other daughter-in-law might maintain themselves from the profits of their respective properties. For these reasons I think that the learned Judge's judgment cannot stand. But inasmuch as the plaintiff has paid the sum of Rs. 417-8-0 in respect of this property for the purpose of equalizing the shares as they are called in the agreement, it will be wholly inequitable to allow the defendants to deprive the plaintiff of the house in question, unless the defendants or some of them refund the sum of Rs. 417-8-0 to the plaintiff.

Chatterjea, J. — The main contention in this case turns upon the construction of the ekrarnama. It states that in accordance with the decision of panch each of the three parties was to get a specific property: Mt. Jago Kuar, the daughter, was to get the dwelling-house and the shop together with the stock of the shop, and she was to pay the debts due from the shop. It was provided that she would be competent to part with some of the property allotted to her and thus pay the debts to creditors, or she could pay the same with her own funds. Then dealing with the two daughters-in-law it stated that each would get property of the value of Rs. 782-8-0, so that

"they may maintain themselves from the profits of their respective properties, one not having any concern with theother, whereby quarrels and animosities may be averted and the ancestral estate of Har Lal Bhagat alias Hassani Bhagat may not be ruined."

The object of the arrangement, therefore, was to provide maintenance for the parties and that the ancestral estate of Har Lal might be preserved. There was, no doubt, the word "heirs" used with reference to all the three parties; but I think the word was used in the sense of "persons interested" in the estate left by the deceased. The daughter-in-law were entitled only to maintenance but they were living as members of the family and carrying on the shop. The panch, it is true, directed that the property should be divided into three equal shares, the two daughters-in-law and the daughter each getting a share. That by itself does not show that the property allotted to plaintiff was given to her otherwise than by way of maintenance, because specific properties are sometimes given to persons entitled to maintenance to be enjoyed by them in lieu of cash payments. The parties had, no doubt become separate possessors but that was the arrangement made in order to avoid disputes. The ekrar then says,

"We the declarants have acquired full right and authority in respect of the property apportioned to us respectively, so that each may take whatever she thinks fit and proper with respect thereto, without consulting and without reference to another, wherewith any other of the parties or her heirs shall not have any sort of concern or have any lien."

This clause should, I think, be read in connexion with the passage which I have already set out, and which appears to me to be the object of the ekrar, namely, that the parties might maintain themselves from the profits of the property, and that the ancestral property might not be ruined. I think the clause must be limited to the purpose of the arrangement, which was that each party should have separate

possession and enjoyment of the property allotted to her for maintenance. The word "heirs" was used, but it seems to me that the word was here used in the sense of "successors." Mt. Jago, the heiress of Har Lal, herself had no absolute right, and it is not disputed and cannot be disputed that she could not confer an absolute right. In construing the document we should bear in mind the position of the party making the grant and of the person taking it. If the expressions used in the deed, relied upon on behalf of the respondent, are capable of both constructions, that construcrion should be adopted which is consistent with the law to which the parties are subject. As I have said, a daughter herself has no absolute right, and a daughter-in-law has a right to maintenance only; and I do not think that we ought to construe the words in the document so as to hold that the daughter intended to give an absolute right to the daughters-in-law.

In any case the plaintiff cannot be said to have obtained the property independent of her right to maintenance, and an absolute right in the sense of a right accruing to her not as widow of Kishen Ram and not by way of maintenance, but independently of her position as such widow, could not have been intended to be conferred on her. It was contended before us on behalf of the plaintiff that the plaintiff's husband having predeceased his father, his interest in the estate passed by survivorship to the father and, therefore, was no longer the property of her husband which was liable for her maintenance: and that being so, she had no interest in her husband's estate which she would forfeit by her re-marriage. This contention is clearly erroneous. Her husband had an interest in the property (which was ancestral property), out of which she was entitled to be maintained during his life, and the obligation to maintain her out of that property continued after his death, whether it passed by inheritance or by survivorship. This being so, there is no doubt that the property that the plaintiff obtained under the document was by way of maintenance out of the property of her deceased husband in the hands of Mt. Jago.

The plaintiff, no doubt, paid Rs. 417/8 for equalizing the share in respect of the house which had been allotted to her, the value of which was Rs. 1,200. The parties agreed that each would get property valued at Rs. 782. To that extent the property must be taken to be the property given by way of maintenance, but the remaining portion of the property representing Rs. 417 8-0 which had been paid by the plaintiff did not constitute such property. The question whether S. 2, Act 15 of 1856 is inapplicapable to this case, because, the plaintiff, according to custom of the caste to which she belongs, could have re-married independently of the Act, is of no practical importance, as on the general principles of Hindu law, a widow, whose re-marriage may be legal according to the custom of the caste to which she belongs, would forfeit any interest which she had in her husband's estate, on her re-marriage. I think, therefore, that the plaintiff forfeited her interest in the property to the extent to which she obtained it by way of maintenance. (Case adjourned till 4th April for final order).

Sanderson, C. J.—It appears that defendant 2 purchased one-third only of the entire house and that the suit is with reference to the said one-third only, upon the plaintiff and defendants 1 and 2 consenting and upon defendant 2 depositing within three months from to-day one-third of Rs. 417-8-0, namely, Rs. 139-2-8 in the Court of first instance for payment to the plaintiff, the suit will be dismissed. If the said sum is not paid within the said three months, the appeal will be dismissed. No order as to costs in all Courts,

Chatterjea, J.— I agree in the order proposed by the learned Chief Justice to-day.

V.B./R K. *Appeal allowed.*

A. I. R. 1918 Calcutta 615

MOOKERJEE AND WALMSLEY, JJ.

Behari Lall Ghose and *others*—Defendants—Appellants.

v.

Sindhubala Dassi—Plaintiff—Respondent.

Appeal No. 1916, of 1915, Decided on 4th May 1917, from appellate decree of Dist. Judge, Birbhum, D/- 3rd May 1915.

(a) Landlord and Tenant—Gift of non-transferable holding without landlord's consent—Gift is binding on heirs of donors.

A gift of a non-transferable occupancy holding made by a raiyat without the landlord's consent is binding upon his heirs, as by the gift the pro-

perty ceases to form part of the estate of the donor so that his heirs cannot claim it as an inheritance. [P 618 C 1]

(b) **Transfer of Property Act (1882), S. 126—Rescission—Right of rescission in case of of gift is circumscribed by same sort of circumstances as would operate to invalidate contract—Contract Act, S. 16.**

Although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, while in a gift there is no such consideration, yet the right of rescission in the case of a gift (on the part of the grantor) is circumscribed by the same sort of circumstances such as fraud, mistake, coercion, undue influence, misrepresentation or the like as would operate to invalidate a contract. [P 617 C 1, 2]

Brajendra Nath Chatterjee—for Appellants.

Bhupendra Kumar Ghosh—for Respondent.

Judgment.—This is an appeal by the defendant in a suit instituted by the respondent for recovery of possession of land upon declaration of title. The land in dispute constituted the occupancy holding of one Nadar Chand Ghose who died in 1890. Shortly before his death, he executed on 18th March 1890 a deed of gift in favour of his widowed daughter Suchandmukhi Dasi, whereby he professed to transfer the property to her. The document was duly attested and was registered as required by the provisions of the Transfer of Property Act. The donee continued in occupation till her death in 1898, when the present plaintiff, her daughter, came into possession under claim of title by inheritance. In 1910, the defendants forcibly took possession of the land on the allegation that after the death of Nader Chand Ghose the land had passed to his widow, and, upon her death, had vested in them as the reversionary heirs (nephews) of the last full owner. On 29th March 1913, the plaintiff instituted this suit for declaration of her title and for recovery of possession with mesne profits.

The defendants denied that the deed was executed by Nader Chand Ghose and contended that the claim was barred by limitation. The Court of first instance found that the claim was not barred by limitation and that the plaintiff had acquired a valid title to the property as the heiress of her mother, who had obtained the land from her father under the deed of gift already mentioned. An objection was taken before the trial Court that as the land constituted a non-transferable occupancy holding, the deed of gift was inoperative in law and that consequently the plaintiff had not acquired a valid title. The Court held that this question could be raised only by the landlord or his representative-in-interest, and accordingly decreed the suit. Upon appeal the District Judge has confirmed the decree of the Court of first instance. On the present appeal, the defendants have argued that no valid gift could be effected in respect of a non-transferable holding, that notwithstanding the execution and registration of the deed of gift, the property continued to form part of the estate of the donor, passing upon his death to his widow, and vesting upon her death in the defendants as the reversionary heirs to the last full owner. The decision of the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy* (1) has been distinguished by the appellants on the ground that the principles enunciated therein are expressly limited in their application to cases of transfer of occupancy holding for value. On the other hand, the respondents have referred to the decisions in *Rahimjan Bibi* v. *Imanjan Bibi* (2), which is an authority for the proposition that in circumstances closely analogous to those of the case before us, the question of transferability cannot be raised by the heirs of the donor to the prejudice of the donee or his representative-in-interest. In our opinion, the view taken by the Courts below is well founded on principle and must be upheld.

The decision of the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy* (1) is an authority for the proposition that in cases of transfers for value, the title passes from the transferor to the transferee, although the validity of the transfer is liable to be questioned by the landlord who is not a party to the transaction. Let us consider whether this principle is applicable to cases of gifts of non-transferable occupancy holdings. S. 122, T P. Act, defines a gift as the transfer of certain existing moveable or immovable property, made voluntarily and without consideration by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. S. 123 defines the mode in which the transfer is to be effected; in the case of immovable property, the

1. A I R 1915 Cal 242=42 Cal 172=27 I C 61.
2. (1912) 15 I C 698.

transfer must be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. S. 126 deals with the question of revocation of gifts. Para. 1 of the section provides that the donor and the donee may agree that on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift, which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be. Para. 2 lays down that a gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Then follows the important provision, in para. 3 that "save as aforesaid, a gift shall not be revoked." This provision is a legislative recognition of a doctrine enunciated more than two centuries ago by Lord Nottingham in the case of *Villers* v. *Beaumont* (3),

"If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must consequently establish this proposition, namely, that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd,"

The position, consequently, is clear, that except in the circumstances mentioned in S. 126, T. P. Act, a gift cannot be revoked. Para. 2 of the section shows that a gift may be revoked as if it were a contract but not on the ground of want or failure of consideration; in other words, a gift may be revoked, as a contract may be cancelled, on the ground of fraud, mistake, coercion and undue influence, misrepresentation or like reason. No such reason is assigned in the present case. But it is argued that the donor was competent to revoke the gift immediately after execution and registration of the document, on the ground that the property transferred by way of gift constituted a non-transferable occupancy-holding and that such right of revocation has vested in his heir. To test the validity of this argument, we have to consider whether the transaction could have been rescinded if it had been a contract. The section makes it plain that such rescission was not permissible. The substance of the matter is that although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration and in a gift there there is no such consideration, the right of rescission is circumscribed by the same set of circumstances. Now the decision of the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (1) shows that this transaction could not have been rescinded if it had been for valuable consideration. The inference follows that it cannot be rescinded merely by reason of want or failure of such consideration.

Reliance has been placed on behalf of the appellant upon the decision of *Milroy* v. *Lord* (4). That case, however, is clearly distinguishable. There the property transferred constituted fifty Bank shares which were transferable only by entry in the books of the company: no such transfer was ever made, but a deed poll was executed. In these circumstances, Turner, L. J., observed as follows:

"In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him."

These remarks were followed by Jessel, M. R., in *Richards* v. *Delbridge* (5), where he observed that a man may transfer his property, without valuable consideration, if he does such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership which vests in the person who by those acts acquires the property. Consequently, to make the principle of *Milroy* v. *Lord* (4) applicable here, the appellant would have to establish that the nature of the property transferred in this case was such that no valid transfer thereof could be effected till the consent of the landlord had been obtained and the name of the transferee registered in his books. But the decision of the Full Bench shows abundantly that in cases of transfer for value, title unquestionably passes from the transferor to the transferee, even though there is no recognition by the landlord, in other words, transfer of this description cannot be impeached by the transferor, though the landlord may possibly refuse to recognise the transfer.

3. (1682) 1 Vern 100=23 E R 342.

4. (1862) 4 Deg F & J 264=7 L T 178.

5, (1874) 18 Eq. 11.

In our opinion the principle of the decision in *Milroy* v. *Lord* (4) has no application to the circumstances of the present case. Reliance has finally been placed upon the decision in *Amulya Ratan Sarkar* v *Tarini Nath Dey* (6), which is an authority for the proposition that the holder of a non transferable occupancy holding is not competent to make a testamentary bequest of such holding. That case is clearly distinguishable founded as it is on the fact that the bequest was revocable up to the last moment of the life of the testator and that the very moment that the bequest would come into operation, if legal and valid, was the moment when the right of the heir would accrue by operation of law. In the case before us, the gift was not revocable, and was binding as between the donor and the donee. It cannot consequently be maintained that notwithstanding the execution and registration of the deed of gift, the property continued to form part of the estate of the donor. The property ceased to be part of the estate of the donor and there is thus no escape from the position that the heir did not succeed to it by right of of inheritance.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

V B./R K. *Appeal dismissed.*

6. A I R 1915 Cal 43=42 Cal 254=27 I C 235.

A. I. R. 1918 Calcutta 618 (1)

TEUNON AND CUMING, JJ.

Kanchani Bewa — Plaintiff — Petitioner.

v.

Jadub Paramanik and *others*— Defendants —Opposite Parties.

Civil Rule No. 214 of 1918, Decided on 26th July 1918, against Court of Dist. Judge, Faridpur, in Title Appeal No. 325 of 1917.

Civil P. C. (1908), O. 41, R. 10—Security for costs of suit or appeal is not required from plaintiff preferring appeal in forma pauperis.

A plaintiff preferring an appeal in forma pauperis cannot be required to give security for costs of the original suit or of the appeal.

[P 618 C 2]

Sarat Chunder Bysack and *Debendra Chunder Paul*—for Petitioner.

Suriya Kumar Guha — for Opposite Parties.

FACTS of the case will appear from the following extract from the petition to the High Court : " that the learned District Judge of Faridpur, by his order, dated 5th October 1917, permitted the petitioner to appeal as a pauper. That on 11th February 1918 the opposite party Nos. 1 to 4 filed a petition under O. 41, R. 10, Civil P. C., praying that proper security for costs in the lower Court and in the appellate Court be taken from the appellants. That on 27th February 1918, when the appeal came on for hearing, the pleaders on both sides agreed that the granting or refusing of the respondents' prayer for security for costs was in the discretion of the Court. That on 27th February 1918 the appeal remained part heard. That on 28th February 1918 when the hearing of the appeal was resumed, the appellant's pleader tried to contend that the Court had no jurisdiction to demand security for costs in the case of a pauper, but the learned District Judge of Faridpur did not hear him at all on the ground that the pleader for the appellant was too late in his contention, and on the same day passed an order under O. 41, R. 10, Civil P. C., requiring the petitioner to furnish to the appellate Court security for costs of the original suit and of the appeal. " Against the above order of the appellate Court the petitioner moved the High Court and obtained this Rule.

Judgment —On the authority of the decisions reported as *Mt. Hafizan* v. *Abdul Karim* (1) and *Khemraj Srikrishna Das* v. *Kisanlala Surajmal* (2) we make this Rule absolute and set aside the order against which it is directed. We make no order as to costs.

V.B./R.K. *Rule made absolute.*

1. (1908) 12 C W N 163.
2. A I R 1917 Bom 137=42 I C 67=42 Bom 5.

A. I. R. 1918 Calcutta 618 (2)

SANDERSON, C. J. AND MOOKERJEE, J.

Nundo Lal Mullick—Plaintiff—Appellant.

v.

Punchanon Mukherjee — Defendant—Respondent.

Appeal No. 79 of 1916, Decided on 9th February 1917, from original decision of Greaves, J., D/- 19th April 1916.

(a) Civil P. C. (1908), O. 43, R. 1 (w) and O. 47, Rr. 4 and 7—Review sought on allegation of discovery of new evidence — Strict proof is necessary — Appeal against order

granting review as well as against final decree after review—Appellate Court cannot enter into question of sufficiency of proof for granting review, but can reverse final decree if not justified by evidence.

The greatest care ought to be exercised in granting a review, when that review is asked for upon the allegation that fresh evidence has been discovered since the judgment was given. [P 621 C 1]

An application for review, which is based upon the allegation that new evidence has come to light since the judgment was given, should not be granted unless the new evidence is such as is presumably to be believed, and if believed would be conclusive, because when a litigant has obtained a judgment in a Court of justice, he is by law entitled not to be deprived of that judgment without very solid grounds.. [P 622 C 1]

Where the Judge of a primary Court in the exercise of his discretion has by his order granted a review of his judgment on the ground that new evidence has come to light since the judgment was given, it is not open to the appellate Court to revise that order, even though it thinks that that new evidence should not have been received and accepted as a ground for granting the application for review.

Per *Mookerjee, J.*—Order 43, R. 1, Cl. (w), must be read as controlled by R. 7, O. 47 and a right of appeal against an order granting a review is restricted in its scope by the operation of R. 7, O. 47. "Strict proof of" within the meaning of Cl. (b), R. 4, O. 47 means proof according to the formalities of the law and has no reference to the sufficiency of the quantum of evidence adduced. [P 625 C 1, 2]

After a decree was made, an application for review on the ground of discovery of new evidence, which was not known to the applicant and could not have been produced by him by the exercise of due diligence at the time when the decree was passed, was granted by the trial Judge reversing the decree. In an appeal against the order granting the review as well as against the final decree made in the suit after the review : [P 624 C 1]

Held : that although it was not open to the appellate Court in the appeal from the order granting the review to consider the question of the sufficiency of proof on which the review was granted, still it was open to that Court in the appeal against the final decree to reverse the final decree of the lower Court on the ground that the additional evidence adduced in the review proceeding was not sufficient to warrant the primary Court to reverse its original decision on review. [P 624 C 1]

(b) Practice—Evidence — Conclusion upon mere comparison of handwriting is unsafe.

It is by no means safe for a Court to base its conclusion upon a mere comparison of handwriting without proper materials on the subject. [P 626 C 2]

S. R. Das and *C. C. Ghose*—for Appellant.

H. D. Bose, A. N. Choudhury and *N. N. Bose*—for Respondent.

Sanderson, C. J.—This is an appeal from a judgment of Greaves, J., and it is a case, in my opinion, of considerable importance, having regard to one of the issues which has been raised. The suit was for a sum of Rs. 2,282-14-3. But in fact the only dispute was as to whether the defendant and paid the sum of Rs. 1,000, which was a part of the sum for which the suit was brought. The learned Judge when he tried the case gave his decision on 7th March 1916, and he came to the conclusion that an alleged receipt in respect of the Rs. 1,000 in question which was put forward by the defendant was a forgery and had not been signed by the plaintiff. He also expressed a strong opinion with regard to the way in which the witnesses gave their evidence. He said :

"If I have to choose between the evidence of the plaintiff and the defendant, I would unhesitatingly prefer the evidence of the plaintiff. So far as I could see, he seemed to me a truthful witness;"

and later on he said : "Having regard to this fact" (referring to the signatures which were put before him),

"and also the demeanour of the witnesses in the witness-box, I think my judgment in this case ought to be in favour of the plaintiff."

Then an application for a review of that judgment was made by the defendant on 13th March 1916, and it was based upon the allegation that fresh evidence had been discovered and the fresh evidence which was alleged to have been discovered was an entry in one of the plaintiff's books, which was under date 17th March 1915, purporting to state that this Rs. 1,000 had been paid on 13th March 1915. The actual entry translated by my learned brother Mookerjee, J.—a translation which was adopted by both the learned counsels in the case—was to this effect : The account was called "a deposit or suspense account," there was a word which might be translated as deposit or suspense and we might read it as a deposit account or a suspense account as you prefer to translate it :

"Received Rs. 1,000 from Punchanon Mukerjee, dated 29th Falgun, on account of Singhiram Poddar on account of rent Rs. 1,000."

I ought to have mentioned that this Rs. 1,000 which, it was alleged, had been paid was supposed to be in respect of one month's rent which was due from the defendant himself in respect of the premises in question and also in respect of Rs. 500 part of a sum which the defendant was bound to pay under a guarantee which he had given for one, Singhiram Poddar, one of the sub-lessees of the said

premises. Then the learned Judge upon this application for review directed on issue to be tried; and the issue was whether this entry was in the roker book at the time of the hearing of the case or had been inserted since. Upon that issue the learned Judge came to the conclusion that the entry was in the roker book when he tried the case, and had not been inserted subsequently. He therefore granted the review; but he did not follow the procedure which is directed by O. 47, R. 8, the rules under the Civil P. C., which provides that

"when an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as he thinks fit."

He proceeded to give judgment for the defendant, on all the facts of the case which had been proved before him both in the first trial and also at the hearing of the issue. It was however agreed by the learned Counsel in this Court that no objection should be taken upon the ground that the learned Judge had not strictly followed the procedure which is laid down by O. 47, R. 8, but that it should be taken that he had re-tried the case and had given judgment for the defendant on all the facts of the case. When the case comes to this Court, first of all, there is an appeal from the learned Judge's decision that there ought to be a review; and secondly, there is an appeal from his decision in favour of the defendant upon all the facts of the case. Now, in respect of the first matter I think that this case is of general importance, namely, the question whether there ought to have been a review. The other point is undoubtedly of importance to the parties themselves, because there is a sum of Rs. 1,000 involved and considerable costs which have been incurred but that point is not of general importance. Now, with regard to the question whether there ought to have been a review, the learned Judge has exercised his discretion and has granted it, and, in my judgment, it is not possible for us on this appeal to say that he ought not to have made an order for review, for this reason: It is admitted by the learned Counsel for the appellant that O. 47, R. 1 (1) of the rules under the Civil P. C. is applicable to this case, and that rule provides as follows:

"Any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred,. . , and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed, or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

Then there is R. 4 of that order, which provides:

"(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application. (2) Where the Court is of opinion that the application for review should be granted, it shall grant the same. Provided that . . . . no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

The matter does not rest there, because R. 7 provides:

"An order of the Court rejecting the application shall not be appealable; but an order granting an application,"

(which was the case here)

"may be objected to on the ground that the application was (a) in contravention of the provisions of R. 2"

(it does not apply to this case)

"(b) in contravention of the provisions of R. 4. . . . Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

Therefore in my judgment we are limited to seeing whether the application was granted by the learned Judge in contravention of the provisions of R. 4. To go back to the provisions of R. 4 (b), it says: "There must be strict proof of such allegation." What is the allegation? The allegation is that:

"the matter or evidence was not within the applicant's knowledge or could not be adduced by him when the decree or order was passed or made."

Now, having regard to the evidence which has been referred to by the learned Judge, I cannot say that there was not strict proof of those facts, namely, that the applicant had not knowledge of the new evidence or that he could not have adduced it at the time of the trial. I think it only necessary to mention the fact that the book in which the entry was made had not been produced until the trial of the action. In fact the plaintiff had claimed his right to limit the inspection to the entries which he swore were relevant to

the matter in issue, and it was not until the case was being heard before the learned Judge that the defendant's Attorney had the first opportunity of looking at the book generally; and I think it was quite possible, as was pointed out by the learned Judge, that the learned counsel for the defendant when he was in the act of cross-examining, although he looked through the book, might have missed this entry, especially as he was not looking for this particular entry, but he was looking for other entries to prove that the receipts of money were not always entered on the particular dates on which the money was received. Further, the evidence is not such that it is possible to say that during the course of the cross-examination the defendant's attorney ought to have seen or must have seen the entry in question if it was there, consequently, I do not think that this application for a review was granted in contravention of R. 4 of O. 47. But having regard to the argument which has been addressed to us on the one side as well as on the other, during the course of the appeal, as to the principle on which a review ought to be granted, when it is asked for upon the allegation that fresh evidence has been discovered, I think it is right to express my judgment with regard to the principle which ought to be acted upon in future with regard to such cases.

In my judgment it is most important that there should be some finality in the trial of cases, and the greatest care ought to be exercised in granting a review, when that review is asked for upon the allegation that fresh evidence has been discovered since the judgment was given. It must be obvious to every one that unless great care is exercised when such an application is made, the door may be thrown open to all kinds of abuses. It is so easy to the party who has lost his case, to see what the weak part of his case was and the temptation to try and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong. I do not think that I can do better than refer to two authorities upon that point which were referred to in the course of the argument. The cases to which I desire to refer are first, *Young* v. *Kershaw* (1), in which the judgments were delivered by Lord Justices A. L. Smith, Collins and Williams. A. L. Smith, L. J., said this:

"It seems to me that the cases which have been referred to show that a new trial may be granted."

I may say in passing that in this respect the question whether a review may be granted is the same as whether a "new trial may be granted"—"if new evidence, which could not have been obtained before, has been discovered which, if it had been adduced at the trial, would have been conclusive so that the verdict must have been found otherwise than it was. I think that is the rule, apart from all the authorities, which I will not discuss. That being so, what is the new evidence in this case which the defendant has discovered? Would that evidence have been conclusive of this case if it had been adduced at the trial? In my opinion it is evidence obtained under suspicious circumstances, and for that reason alone I think that it cannot be considered as conclusive."

I draw attention to that, because the learned Judge in his judgment has said that the circumstances under which this evidence came to light were "curious and suspicious, not to say improbable." As I have said, I think having regard to the provisions of O. 47, R. 7, this Court is debarred from going into this matter, and I am only dealing with it for the purpose of expressing the principle upon which the question now under discussion ought to be dealt with.—Collins L. J. said:

"It is obviously in the public interests tha parties, who have gone through the ordeal of litigation and have had their rights settled at the trial, should not afterwards be allowed to patch up the weak parts and fill up the omissions in their case by means of fresh evidence. That is a rule of great importance. It is true that in special and exceptional circumstances a new trial has been granted because new evidence has been discovered. But the rule which permits that to be done is fenced round with many limitations. The party asking for the new trial must show that there was no remissness on his part in adducing all possible evidence at the trial. Then again, as to the class of new evidence, the rule is that the new evidence must be such that, if adduced, it would be practically conclusive—that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different. In some of the cases which have been cited, the new evidence came in to corroborate evidence which was, although not contradicted, weak at the trial, and that corroboration made the previous weak, but uncontradicted evidence practically conclusive. The other cases were cases in which the new evidence con-

1. (1899) 81 L T 531=16 T L R 52.

sisted of documents which were not impeached and were conclusive."

Williams L. J. said:

"I do not believe that the Court can grant a new trial simply, because there is new evidence, which was not available at the trial, unless it can also be shown that the verdict was based on mistake, surprise, or fraud and that another Jury ought, therefore, to consider the matter."

Again, in the House of Lords, in the case of *Brown* v. *Dean* (2), the Lord Chancellor, Lord Loreburn, in discussing the same point said, at p. 374:

"When a litigant has obtained a judgment in Court of Justice, whether it be a County Court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed and, if believed, would be conclusive."

These are the principles which, in my judgment, ought to be applied to an application for a review which is based upon the allegation that new evidence has come to light since the judgment was given. The learned Judge in this case in the exercise of his discretion granted a review; and, as I have already said, by reason of the provisions of O. 47 it is not open to us to revise that order, because I do not think that it can be said that the provisions of R. 4 of that Order have been contravend. Having said that, I must come to the conclusion that the appeal with regard to the question as to whether the learned Judge was right in granting the review must be dismissed. Then I come to the question whether the learned Judge's judgment upon the facts of the case ought to be upheld: and, here I think this Court is placed in a position which is different from that in which the Court is often placed in a case where it is an appeal from the judgment of a learned Judge upon a pure question of fact, at a trial in the ordinary course of events. I have said so many times that I hardly need repeat it now that in an ordinary case, where the appeal is upon a question of fact, where the learned Judge of the Court of first instance has heard and seen the witnesses and has come to a conclusion upon the question of fact upon the evidence on the one side and on the other, there is a very great onus upon the shoulders of the appellant when he comes to this Court and asks it to overrule the decision of the learned Judge upon the question of fact.

2. (1910) A C 373=79 L J K B 690.

But this is not a case such as I have described. The circumstances of this case are peculiar, and I should think, probably they may never be repeated. In my experience I have never come across all case at all like it, because the position is this: The plaintiff brought his action for the recovery of Rs. 2,282 and it is alleged that he did so knowing that he had given a receipt for Rs. 1,000, a part of that sum, knowing that he had in his roker book an entry which would show that the money was paid in accordance with the defence that was set up by the defendant, knowing that though perhaps for a time he might by swearing falsely, conceal that entry, knowing—at all events his advisers must have known—that sooner or later that book would probably be inspected, and the entry would come to light and knowing all that, he brought his action for the sum. The learned Judge having heard the case, and having considered it, and having dealt with the evidence on the one side as well as on the other came to the distinct conclusion that the truth lay upon the side of the plaintiff, that the receipt in question, in respect of the Rs. 1,000 was a forgery and that the money had not been paid, and that the plaintiff was a witness of truth and defendant was not a witness of truth.

Then comes the other evidence and the learned Judge had to approach this further evidence, namely, the production of the entry from this point of view, that the circumstances under which the evidence came to light were "curious and suspicious, not to say improbable:" and, I am not surprised that the learned Judge came to that conclusion, having regard to the story told by defendant as to how he came to know that there was this entry in existence. I need not repeat the story in detail. But the suggestion is, that a few days after the trial, as defendant was going home from the High Court, he had to pass the plaintiff's house on the way to his own house; just when he was approaching the plaintiff's house he saw the plaintiff's brother-in-law and the servant Okhoy coming out of the house, and he heard them talking about the case which had just been decided, the plaintiff's brother-in-law expressing admiration to Okhoy as to how the difficulty of the receipt had been got over. I had better quote defendant's own evidence as to this. He says,

"the brother-in-law said, you have performed a feat, you have done an extraordinary thing. You have done away with the receipt granted with Nundo's own hand."

Okhoy then said,

"there is nothing extraordinary in this. There is a credit of Rs. 1,000 on 3rd Chaitra, but inspite of this application they could not see it."

He mentioned the date 3rd Chaitra. He did not mention the date of payment. Then the brother-in-law said, 'Charu Babu had cleverness.' I should have that that story in itself was highly improbable, but then there were other circumstances which lead me to believe that that story may be described not only as "curious and suspicious, not to say improbable, but one which could not be accepted." I need not go further than to say that I agree with the description which the learned Judge gave to it. Now, there are several other matters which are relevant to the consideration of the point at issue.

Looking at the entry itself, and here I speak, like the learned Judge in the Court below, with some hesitation, because I have not the advantage, which the learned Counsel on both sides and my learned brother have, of knowing the language in which the entry was made, and, therefore, I confine myself to saying this, it is obvious it is written in a different ink to the other entries which are on the same page. It is also obvious that it is the only credit entry on that page, and, therefore, it is difficult to understand why this came to be written in a different ink and with a different pen. And, if that was made in ordinary course of business one would have expected it to have been made by the same person who made the entries on the debit side with the same ink and same pen. There is something more important than this: It is not, I understand, disputed that everyone of the entries upon that page on the debit side have been carried forward to the ledger by the person who was employed to do that, the entries are ticked and they are carried forward to the ledger. If this entry was made in the ordinary course of business it must have been made, as the defendant's case is, on 17th March. But I do not see why this entry was not ticked and carried forward in the ledger except the one which is in dispute. This, to my mind, is evidence which points strongly to the fact that the entry did not come into existence in the ordinary course of business. But it is urged by the defendant that the receipt was obviously written, first of all as regards the body of it, by Okhoy, and secondly, as regards the signature by the plaintiff. I do not intend to express any opinion upon that because I do not like to base my judgment upon the observations which I made during the course of the case as regards the handwriting, although I have with the assistance of my learned brother observed some things. I am content to say that the learned Judge who saw the witnesses, and heard them give their evidence and who himself compared the signature in question with other admitted signatures of the plaintiff, and who was in a far better position to judge of it than I am, has come to the conclusion that that that was not the plaintiff's signature, and I am content to adopt his conclusion.

There is another matter which weighs with me, and that is this: If it be right to regard, as I think it is right, the circumstances under which this evidence came into existence as not only curious and suspicious but also improbable, so that the story is one which cannot be accepted, one has to ask oneself why such a story was brought forward. With what object was it brought forward? If that story is incredible why was it told: It could be told only for the purpose of explaining that which otherwise was inexplicable, viz., how it was that the defendant came to know of this entry. These are some of the reasons which make me think that the evidence with regard to the entry in the roker book is unsatisfactory, and if I had been the learned Judge who had to exercise his discretion as to whether he would grant a review or not, I would have refused, because the evidence came into existence under suspicious circumstances and was not in itself conclusive, inasmuch as there was a confiict of evidance as to whether it existed at the time of the trial or not. There is evidence on the one side as well as on the other side, and if there be a doubt as to whether the evidence as to the existence of the entry at the date of the trial ought to be accepted or not, it is difficult to see how it can be said to be conclusive.

I have, however, already said that we are bound by the rule to which I have referred, and we cannot go into the matter of the review. But the nature of the evidence and the circumstances under which it came into existence are material when I am considering the question whether the learned Judge upon all the facts of the case ought to have in effect overruled his previous decision. In my judgment, the evidence with regard to this entry is of such an unsatisfactory nature and it came into existence in such an unsatisfactory way and the learned Judge was apparently in such doubt as to whether it should be accepted, that it ought not to be taken as sufficient to overrule the distinct and clear opinion which he had formed, namely, that the money had not been paid, that the receipt had been a forgery, and that the plaintiff ought to be believed.

For these reasons, emphasising again, as I do that this is not an ordinary case of an appeal from a judgment upon a question of fact but that it is a case out of the ordinary, and with peculiar circumstances, in my opinion, the learned Judge's judgment on the previous occasion, when he came to the conclusion that the money had not been paid, ought to be upheld, and judgment ought to be given in favour of the plaintiff. The result is that the appeal against the review is dismissed. The appeal against the final decree of the Court of first instance is allowed and judgment for the plaintiff is to be entered with costs of both hearings in the Court of first instance. The plaintiff will have the costs of the appeal except one day's costs which are to be defendant's and set off against the plaintiff's costs.

Mookerjee, J.—This appeal raises two distinct questions: The first relates to the propriety of the order made by Greaves, J., on an application for review of judgment presented to him on 13th March 1916; the second relates to the correctness of the final decree made by him on review, in modification of the decree made at the original trial.

The plaintiff instituted this suit for recovery of a sum of money from the defendant. The defendant pleaded that the plaintiff had not allowed him credit for Rs. 1,000 which he had paid on 13th March 1915, and for which he held a receipt. Greaves, J., who tried the suit, came to the conclusion that the receipt was not genuine and that on the oral evidence the defendant had failed to prove the plea of payment. The result was that the claim was decreed in full on 7th March 1916. Six days later, the defendant made an application for review of judgment under O. 47, R. 1, sub-R. (1), Civil P. C. 1908, on the ground that he had discovered new and important evidence which was not within his knowledge and could not have been, by the exercise of due diligence, produced by him at the time when the decree was passed. The new evidence consisted of an entry in an account book filed by the plaintiff at the trial which recited the alleged payment of Rs. 1,000 by the defendant. The application for review was heard in due course and was granted, notwithstanding the assertion of the plaintiff that the entry was not in the account book when it was filed in Court on his behalf and must have been interpolated therein, after the close of the trial, at the instance and for the benefit of the defendant. Upon this disputed question of fact, Greaves, J., came to the conclusion that he could not hold, upon the evidence, as he would otherwise have done, but for the seeming impossibility of any subsequent insertion of the entry, that the entry was not in existence when he tried the case. The procedure prescribed by R. 8, O. 47 was however not strictly followed, and the case was not re-heard, but a decree was forthwith made in modification of the decree made at the original trial and credit was allowed to the defendant to the extent of Rs. 1,000.

The present appeal by the plaintiff was at first argued as an appeal direct against the order granting the review, but it was subsequently agreed between the parties that the appeal should be deemed as directed not merely against the order granting the review but also as against the final decree made in the suit. We have now to consider the questions raised in the appeal thus widened in scope by consent of parties. Now in so far as the appeal is directed against the order granting the review, it is clear that the scope of the appeal is restricted by R. 7, sub-R. (1), Cl. (b), O. 47 of the Code, the provisions of which are to this effect:

"An order granting an application may be objected to on the ground that the application was in contravention of the provisions of R. 4;"

and R. 4 prescribes in Cl. (b) of the proviso that:

"No application for review shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation."

Consequently, under R. 7, an order granting an application for review may be attacked by way of appeal on the ground that the application has been granted on the ground of discovery of new evidence without strict proof of the allegation of the applicant that such new evidence was not within his knowledge or could not be adduced by him when the decree was passed. In the case before us, Greaves, J., has held and, as the materials on the record show, correctly held, that there was such strict proof. In these circumstances, it is not open to this Court as the Court of appeal to consider the question of the sufficiency of proof, at the invitation of the appellant. This view is supported by a long series of decisions in this Court, to which reference will presently be made. But the appellant has invited our attention to O. 43, R. 1, Cl. (w) of the Code, which allows an appeal against an order granting a review, and has contended that the appeal thereby given is not restricted in its scope. In my opinion this contention is not well founded and is opposed to the decisions in *Jagar Nath Prasad Singh* v. *Ramavatar Singh* (3) and *Hari Charan Saha* v. *Baran Khan* (4). These cases recognize the principle that O. 43, R. 1, Cl. (w) must be read as controlled by R. 7, O. 47, of the Code. This is emphasized by the decision in *Abed Khondkar* v. *Mohendra Lal De* (5). In that case, an application for review had been granted by the Court of first instance on the ground of discovery of new evidence after the trial. An appeal was preferred against that decision, and the Court of appeal came to the conclusion that there had not been sufficient proof of the allegation that the new evidence was not within the knowledge of the applicant and could not have been adduced by him when the decree was passed. A second appeal was preferred to this Court and was heard by N. R. Chatterjea, J., who held that the Court of Appeal below was competent to determine the question of the sufficiency of the evidence adduced in support of the allegation made by the applicant, as otherwise the provision for appeal would be meaningless. An appeal was then preferred under Cl. 15 of the Letters Patent and was heard by Sir Lawrence Jenkins, C. J., and Woodroffe, J. who held that the expression "strict proof" means proof according to the formalities of the law and has no reference to the sufficiency of the quantum of evidence adduced. The result was that the judgment of N. R. Chatterjea, J., was reversed and the case was remanded for consideration of other points which arose in the appeal: see also *Indar Kuar* v. *Baldeo Bakhsh* (6). We are thus limited to the consideration of the question, whether there was strict proof, that is, proof according to the formalities of law, of the allegation that the new evidence was not within the knowledge of the applicant and could not have been adduced by him at the original trial.

That there was strict proof in this sense cannot be disputed. It is, consequently, not open to us to reverse the order whereby review was granted by Greaves, J., on the ground that the evidence was not sufficient to support his conclusion. But as the case is of considerable importance, I feel bound to record my concurrence in the opinion expressed by the learned Chief Justice that the procedure followed was contrary to well-established principles. The decisions in *Young* v. *Kershaw* (1) and *Brown* v. *Dean* (2) emphasize the care to be exercised in granting an application for review of judgment on an allegation of discovery of new matter or evidence; the new evidence must at least be such as is presumably to be believed and if believed would be conclusive: see also *Warham* v. *Selfridge & Co.* (7). I may add that the same view has been taken by the Judicial Committee in two recent cases, namely, *Turnbull & Co.* v. *Duval* (8) and *Kessowji Issur* v. *G. I. P. Ry. Co.* (9). In the first of these cases, Lord Lindley observed that a new trial ought never to be lightly granted: and he held with reference to the circum-

3. (1912) 14 I C 39.
4. A I R 1915 Cal 283=25 I C 903=41 Cal 746.
5. (1915) 42 Cal 830=29 I C 292.
6. (1910) 13 O C 245=7 I C 1015.
7. (1914) 30 T L R 344.
8. (1902) A C 429=71 L J P C 84.
9. (1907) 31 Bom 381=34 I A 115 (P C).

stances of that case, that no case of fraud or surprise had been made out. In the second case, Lord Robertson pointed out the dangers inseparable from the grant of an application for review of judgment on an allegation of discovery of new matter or evidence. In that case, an application was made to the Trial Court for review of judgment on the ground of discovery of new matter or evidence. That application was refused. On an appeal preferred against the decision of the Trial Court, an application was made to the Court of Appeal to receive such additional evidence.

The Appeal Court acceded to this prayer, and on the evidence so admitted, taken with the evidence previously on the record, reversed the decision of the Trial Court. The Judicial Committee condemned this procedure and held that the additional evidence, which, it was alleged, had been discovered after the decision of the Trial Court, should never have been received. I cannot consequently see any escape from the conclusion that, in the case before us, the additional evidence should not have been received and should not have been accepted as a ground for granting the application for review. But, as I have already said, it is not open to to this Court, under R. 7, O. 47, to reverse the order of Greaves, J., on this ground. We have next to consider the appeal in so far as it assails the correctness of the decree ultimately made by Greaves, J. in modification of the decree made by him at the first trial. The question in controversy relates to the alleged payment of Rs. 1,000 by the defendant to the plaintiff on 13th March 1915. The evidence may be divided into oral testimony and documentary proof. In so far as the oral testimony is concerned, we have oath against oath. Greaves, J., who had the opportunity of seeing the witnesses expressly stated in his first judgment that the evidence on the side of the defendant was untrustworthy and that if he had to choose between the plaintiff and the defendant, he would without hesitation accept the testimony of the plaintiff; he further described the demeanour of the witnesses on behalf of the defendant as unsatisfactory.

Under such circumstances, I am not prepared to take a different view of the value of the oral testimony from what has been adjudged by the Trial Judge. As regards the documentary evidence, we have two important items, namely, first, a receipt alleged to have been given by the plaintiff to the defendant, and, secondly, an entry alleged to have been made in the account book produced at the trial by the plaintiff. As regards the receits, Greaves, J., pronounced against its genuineness. We have been invited in this Court to compare the signature on the receipt with the various admitted signatures of the plaintiff on the record; but, as pointed out by the Judicial Committee in *Kurallee Persaud Misr* v. *Anuntoram Hajra* (10), it is by no means safe to base our conclusion upon a mere comparison of handwriting without proper materials on the subject: *Shankarrao Gangadhar* v. *Ramji Harjivan* (11). Consequently, I must hold that the view taken by Greaves, J., that the receipt was not genuine has not been successfully attacked in this Court. There remains finally the entry in the account book. That entry is of the most suspicious character, and I am by no means convinced that it was in fact in existence at the date of the first trial. On the strength of evidence of such doubtful value, I cannot hold that the defendant has discharged the burden which lay upon him to establish his plea of payment. On these grounds, I agree that this appeal must be allowed and the first decree of Greaves, J., restored.

V.B./R.K. *Appeal allowed.*

10. (1872) 8 B L R 490=16 W R 16 (P C).
11. (1904) 28 Bom 58.

A. I. R. 1918 Calcutta 626

FLETCHER AND NEWBOULD, JJ.

Nanda Lal Banerjee—Plaintiff—Appellant.

v.

Umes Chandra Das—Defendant—Respondent.

Appeal No. 134 of 1915, Decided on 20th April 1917, from appellate decree of Dist. Judge, 24-Parganas, D/- 12th September 1914.

Bengal Tenancy Act (8 of 1885), S. 167—"Date of sale" means date when sale is confirmed.

The words "date of sale" in S. 167, Ben. Ten. Act, mean the date when the sale is confirmed, and not the date when the property is actually sold to the purchaser. This is especially so where the sale took place when the Civil P. C. 1882, under which the purchaser could acquire no interest until the sale certificate was issued, was in force: 15 *I C* 430, *not Foll*; 7 *C W N* 552, *Foll.* [P 628 C 2]

Dwarka Nath Chuckerbarty and *Ramtaran Chatterjee*—for Appellant.

Mohesh Chunder Banerji for *Jyotish Chandra Hazra*—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned District Judge of the 24 Pargannahs affirming the decision of the Subordinate Judge at Alipore. The plaintiff sued for a declaration of his right to a putni which he had purchased at a sale for arrears of rent held under the provisions of the Ben. Ten. Act. The sale at which the plaintiff purchased took place on 16th December 1907. Litigation ensued after the sale and the sale was not confirmed until 5th September 1908. On 22nd September 1908, the plaintiff took possession and the present defendant then set up a dur-putni right. On 8th March 1909, an application was made under S.167, Ben. Ten. Act, to annul the defendant's encumbrance and the notice was served on 13th April 1909. The present suit was brought on 12th April 1912. The defence as raised by the defendant in his written statement was, first of all, that the plaintiff was the benamidar of the defaulting tenant. That was found against the defendant. So was also the defence raised that no notice had been served under the terms of S. 167, Ben. Ten. Act. But the suit was dismissed on the ground that the plaintiff had notice of the defendant's encumbrance before he purchased the property and, therefore, he was out of time under the terms of S. 167 in not having served the notice to annul the defendant's encumbrance in time. It has been argued in this appeal that that point was not raised in the defence and no issue had been settled with regard to it and that the defendant ought not to have been allowed to enter into that defence.

There is a good deal to say with regard to that. In the view that I take of the authorities of this Court, I am unable to agree with the view of the learned Judge of the lower appellate Court that the date of the sale was 16th December 1907, and not the date on which the sale was confirmed, namely, 5th September 1908. If the "date of sale" mentioned in S. 167, Ben. Ten. Act, is the date when the sale is confirmed, then it is quite clear that the notice that was served on 13th April 1909 was within one year from the date of the sale. The sale to the plaintiff was made under the poovisions of the Civil P. C. 1882, and, under S. 316 of that Code, the title to the property sold in execution vested in the purchaser from the date of the certificate of sale and not before. S. 65 of present Civil P.C. is in different terms. The question as to what is the meaning of the words "date of sale" as used in the sections of the Bengal Tenancy Act has formed the subject of judicial decision in certain cases before this Court. The first case that reference may be made to is the case of *Matangini Chaudhurani* v. *Sreenath Das* (1), where Maclean, C. J., and Stevens, J., held that the words "date of sale" used in S. 169, sub S. (1), Cl. (c), Ben.Ten. Act, meant the date of the confirmation of sale and not the actual date of sale. It is quite true that that decision was on S. 169, but there cannot be any difference, so far as I can see, between the meaning of the words "date of sale" as used in S. 169 and in S. 167. It is quite true that subsequent to that decision, the Legislature amended S. 169 by altering the words "date of sale" to "the date of the confirmation of sale;" but still the decisions of this Court remain unaffected that the words "date of sale" used in the Act as they existed before the amendment meant the date when the sale was confirmed. There is no reason why that decision should not govern the words "date of sale" as used in S. 167. The next decision that reference may be made to is the decision in the case of *Yusuf Gazi* v. *Asmatullah* (2), a decision of Brett, J., and Sharfuddin, J.

There the learned Judges held that the words "date of sale" in S. 167 meant the date on which the sale of the holding or tenure had actually taken place and the reason on which they based their judgment is this: that as S. 169 as amended referred to the date of the confirmation of the sale, therefore, in S. 167 where the words "the date of the confirmation of the sale" did not appear, the words "date of sale" must refer to a period other than the date of the confirmation of the sale. In my opinion, there is a manifest fallacy. S. 167 and S. 169 prior to the amendment both used the same words, namely, the words "date of sale." It was judicially declared in this Court that the words "date of sale" in S. 169 meant the date of the confirmation of the

1. (1903) 7 C W N 552.
2. (1912) 15 I C 430.

sale and the Legislature in amending S. 169 clearly did not consider the terms of S. 167, and S. 167 remained unaffected by that amendment. I think that the learned Judges who decided the case of *Yusuf Gazi* v. *Asmatullah* (2) were not justified in distinguishing the case, or, at any rate, in departing from the decision in the case of *Matangini Chaudhurani* v. *Sreenath Das* (1), on the ground that by a subsequent amendment of S. 169 different words had been used to those that appeared in S. 167. It may be doubted whether the same learned Judges in a subsequent case did not to some extent go back upon that decision, because in the case of *Taibatannessa Chowdhurani* v. *Pravabati Dasi* (3) those learned Judges came to the conclusion that in certain circumstances the words "date of sale" as mentioned in S. 167, Ben.Ten. Act, meant the date of the confirmation of the sale. With all due respect to the learned Judges, the conduct of a defendant cannot alter the meaning of the words used by the Legislature in a particular section of an Act. I think the learned Judges in the decision reported as *Taibatannessa Chowdhurani* v. *Pravabati Dasi* (3) have shown that in certain cases at any rate, the words "date of sale" as used in S. 167, Ben. Ten. Act, mean the date when the sale is confirmed. The next decision that has been referred to is the decision of a Judge sitting singly in this Court; that is, the decision of N. R. Chatterjea, J., in the case of *Banko Behary Das* v. *Krishna Chandra Bhowmick* (4). There the learned Judge held distinctly that the words "date of sale" used in S. 167, Ben. Ten. Act, meant the date when the sale was confirmed and he did so relying upon the decision of this Court in the case of *Matangini Chaudhurani* v. *Sreenath Das* (1). It is quite true that that decision is not binding on us; but the opinion of the learned Judge is, of course, entitled to the highest respect. In his view, the case was covered by the case of *Matangini Chaudhurani* v. *Sreenath Das* (1), and I think he rightly held so. The case of *Matangini Chaudhurani* v. *Sreenath Das* (1), which is the first of these authorities is not distinguishable from the present case.

It is quite true that against the decision of N. R. Chatterjea, J., a Letters Patent Appeal was preferred; but the judgment of the learned Judges who heard the Letters Patent Appeal rested on grounds other than that as to the meaning of the words "date of sale" as used in S. 167, but they cast no doubt upon the correctness of the decision of N. R. Chatterjea, J., in that respect. I think the words "date of sale", especially where the sale took place under the Code of 1882 and where the purchaser could acquire no interest until the sale certificate was issued, mean clearly the date of the confirmation of the sale. To hold otherwise would practically in some cases take away from the plaintiff the right to annul encumbrances at all because, as in the present case where the plaintiff has been found to have known of the encumbrance before the date of the actual sale and litigation ensued, and the sale was not confirmed for a considerable time after the date of the sale, if the date referred to in S. 167, Ben. Ten. Act, be the date of the actual sale, then the purchaser will have no period within which he can annul encumbrances unless he elects to annul the encumbrances before his title to the property has been finally determined. I think that the view that was expressed by N. R. Chatterjea, J., in the case of *Banko Behary Das* v. *Krishna Chandra Bhowmick* (4) is the correct view and that the words "date of sale" referred to in S. 167, Ben.Ten. Act, mean the date when the sale is confirmed, and not the date when the property is actually sold to the purchaser. That being so, even if this defence was open to the defendant in this case, I think it was not sufficient to bar the plaintiff's suit. The learned Judge of the lower appellate Court dismissed the plaintiff's suit on his finding that the plaintiff was out of time for the purpose of annulling the encumbrance. There were other issues arising on the merits and they have not been determined. The case must, therefore, go back to the lower appellate Court to have the appeal re-heard with reference to the other issues which have not been disposed of. Costs will abide the result of the re-hearing by the lower appellate Court.

Newbould, J.—I agree.

V.B./R.K. *Case sent back.*

3 (1909) 4 I C 750.

4. A I R 1914 Cal 48=9 I C 528.

* A. I. R. 1918 Calcutta 629

FLETCHER AND NEWBOULD, JJ.

Bhupendra Kumar Chakravarty—Plaintiff—Appellant.

v.

Pyari Mohan Roy and *others*—Defendants—Respondents.

Appeal Nos. 1905 and 2061 of 1913, Decided on 19th April 1917, from appellate decrees of Addl. Dist. Judge, 24-Parganahs, D/- 18th January 1913.

*** (a) Contract Act (1872), S. 70—Trespasser in good faith making improvements on land—Owner is liable for costs of improvements—Transfer of Property Act (1882), S. 51.**

The defendant encroached upon the land of the plaintiff, believing in good faith that it belonged to him as forming part of his adjoining land, cleared it of jungle and rendered it fit for cultivation at his expense:

Held: that the defendant was not entitled to a charge upon the land decreed to the plaintiff for the expenses, as it was not established that the plaintiff or his predecessor was aware of the encroachment but as what was done by the defendant for the improvement of the land was done by him lawfully and was not intended to be done gratuitously and as the plaintiff enjoyed the benefit of it, the defendant was entitled, under S. 70, to be compensated for the money spent by him and the plaintiff should get a decree to recover possession upon payment of the amount which was laid out by the defendant in improving the land of the plaintiff. [P 630 C 1,2]

*** (b) Contract Act (1872), S. 70—Scope of.**

Section 70, is not limited to cases where the person lawfully doing the thing for another person knows who the other person is. [P 630 C 1]

Basant Coomar Bose, *Siva Prasanna Bhattacharji* and *Lal Mohan Ghose*—for Appellant.

Mohendranath Roy and *Manmatha Nath Roy*—for Respondents.

In No. 1905 *of* 1913.

Fletcher, J.—This is an appeal by the plaintiff from a decision of the learned District Judge of the 24-Parganahs modifying a decision of the Subordinate Judge at Alipur. The present suit was instituted as long ago as 9th April 1906, and is therefore, slightly more than eleven years old to-day, and I think that the delay in the proceedings cast no credit either on the Courts or on the parties engaged in the litigation. The suit was a suit for a possession brought by the plaintiff as the assignee of a lease granted by defendant 3 in the month of June 1891, and the suit was principally brought against the contesting defendant who had obtained a lease from the same lessor in August 1899, his property adjoining the property let out to the plaintiff's predecessor-in-title. The case as decided by the learned Judge of the lower appellate Court in the judgment now under appeal is this: The learned Judge came to the conclusion that the defendant was acting in good faith when he encroached upon and cleared the lands of the plaintiff and that he had done so in the belief that the property was included in his share and that, so far as I gather from the reasons given by the learned Judge, was partly, if not, largely, due to the failure of the plaintiff or his predecessor to fulfil one of the terms of the lease which was granted to him, namely, that the boundaries should be demarcated between the plaintiff's predecessors and the defendant. But the learned Judge, made a finding that the evidence did not establish that the plaintiff or his predecessor-in-interest were aware of the encroachment that had been made by the defendant. The learned Judge, however, seems to have considered that that point was immaterial and he declared a charge on the property in favour of the defendant and declared the plaintiff's right thereto subject to the charge so created. The plaintiff appealed against that decision.

The first point is whether the learned Judge was right in the view that he took, namely, that having come to the conclusion that knowledge of the plaintiff or his predecessor had not been established to the satisfaction of the Court, whether the mere fact that the defendant had encroached and spent money in good faith was sufficient to entitle him to a charge on the plaintiff's property. The case is not governed by S. 51, T. P. Act, but it comes within the general rule as laid down in the well-known case of *Ramsden* v. *Dyson* (1). That rule has been adopted and followed in India in more than one case. The fact that the learned Judge found that the plaintiff or his predecessor had no knowledge or that, at any rate, the evidence did not establish such knowledge is sufficient to take the present case out of that rule, and, therefore, the judgment appealed from cannot be supported on the ground on which the learned Judge rested his decision. But the case does not rest there. There are other provisions in the law in this country governing the obligations of persons enjoying the benefit of a non-gratuitous act. S. 70, Contract Act, is a statutory enactment with refer-

1. (1866) 1 H L 129.

ence thereto. That section provides that where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered. It is argued on the part of the plaintiff that this section only applies when the person lawfully doing the thing for another person knows who the other person is. There is no warrant for such limitation being put on the section and the illustrations to the section negative the view that the person lawfully doing the thing for another person knew the name of the other person. It is quite clear that the two illustrations presuppose that the person doing the thing did not know the name. Illustration 1 of the tradesman having the goods at the wrong house is a clear case where the tradesman did not know the name of the person, or, at any rate, if he knew his name, he made a mistake as to the person bearing that name. There is no foundation for the argument put forward by the learned vakil for the appellant as regards the meaning of this section. The question is whether the present case comes within the terms of that section. The section is very wide and of course there must be some limitation. But it cannot be suggested in the present case that the clearing of the jungle was not done lawfully. It is quite clear from the findings made by the learned Judge that the defendant did not intend to do so gratuitously. The evidence also shows without doubt that the plaintiff has enjoyed the benefit of the money laid out by the defendant in clearing the jungle and making the land fit for cultivation. I think the case clearly comes within the terms of S. 70, Contract Act. The difference between S. 51, T. P. Act, and S. 70, Contract Act, is that in cases coming under S. 51, T. P. Act, and under the rule laid down in *Ramsden* v. *Dyson* (1), the defendant gets a charge on the property but in cases under S. 70, Contract Act, the plaintiff is bound to make compensation to the defendant for the amount spent; and therefore, the decree in this case instead of declaring a charge in favour of the defendant should declare that the plaintiff is entitled to recover possession upon payment of the amount that was found to be due to the defendant by the learned Judge of the lower appellate Court. I think on the findings made by the learned Judge the defendant is entitled to recover the money which he has laid out in improving and rendering fit for cultivation the land of the plaintiff. If the defendant be deprived of the amount spent by him on the land it will be a great hardship on him. The argument that has been put forward on behalf of the plaintiff-appellant, that this is in fact a case of the defendant having improved his own land, has no foundation. The land was dense jungle and had no value unless and until the property was cleared and made fit for cultivation. It is not suggested that the property could have been cleared and made fit for cultivation at any lesser sum. If the defendant loses the benefit of the money spent by him for clearing this considerable piece of land it would be a great hardship. Therefore, on the findings made by the learned Judge of the lower appellate Court, I think the case comes within the terms of S. 70, Contract Act, and the plaintiff is entitled to obtain the decree given in his favour by the lower appellate Court, subject to the variation I have mentioned.

Two other points were raised in this appeal which were touched upon somewhat lightly. It is hardly a matter of surprise when we find that the points were not referred to in the judgment of the lower appellate Court. The first point was that in ascertaining the amount of compensation allowed to the defendant, the defendant ought to have been charged by way of mesne profits. The point was not referred to in the judgment of the learned Judge of the lower appellate Court and presumably for the reason given in the Munsif's judgment, namely, that if the defendant be charged by way of mesne profits he ought to be allowed interest on the amount he laid out. It is sufficient to say that the point was not raised in the Court of appeal below, and it is much too late to raise it now in this Court in second appeal. The second point was that the defendant ought to have been also charged with the value of the timber that was cut and removed from the land in order to make it clear. There is nothing in the judgment of the lower appellate Court about this point at all. We do not know whether the timber was of any value or whether it

was merely under growth which was wholly valueless and would fetch nothing and would rather require money to be spent to remove it from the land. The point was however, not raised in the Court of appeal below and it cannot be taken here now in second appeal.

In the result, the judgment appealed from must be affirmed and the present appeal dismissed with costs subject to the variation that I have already mentioned.

Newbould, J.—I agree.

In No. 2061 *of* 1913.

This appeal is not pressed and is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 631 (1)

FLETCHER AND PANTON, JJ.

Amar Chandra and *others*—Plaintiffs—Appellants.

v.

Noor Khatun and *others*—Defendants—Respondents.

Appeal No. 1920 of 1916, Decided on 20th June 1918, from Appellate Decree of Addl. Sub Judge, Chittagong, dated 22nd May 1916.

Landlord and tenant—Raiyati right can be acquired by cultivator settled even by trespasser.

The actual cultivator of a land who honestly and bona-fide believes that the person who settled him on the land had a right to settle him may, after a period of years, acquire a right in the land as a raiyat even where it is proved that the settlor had no such right. [P 631 C 1]

Dwarka Nath Mitter and *Rishendra Nath Sarkar*—for Appellants.

Atindra Nath Mukherjee—for Respondents.

Judgment.—The only question raised in this appeal is this: whether the plaintiff is entitled to evict the actual cultivators who are the defendants 2, 3, 5, 6, 7, 8, 9, 14 and 15. It is found that the alleged talukdars and the durtalukdars have no interest in the property. The actual cultivators claim possession under an alleged settlement from the alleged durtalukdars. The decisions of this Court show that the actual cultivator who honestly and bona fide believed that the person who settled him on the land had a right to settle him may, after a period of years, acquire a right in the land as a raiyat. The learned Judge of the lower appellate Court in the present case has made no finding as to whether these cultivators defendants bona fide believed that the alleged dur-talukdars had the right to settle them on the land of which they took settlement. The decree of the lower appellate Court is accordingly set aside as regards the cultivating defendants, namely, the defendants 2, 3, 5, 6, 7, 8, 9, 14 and 15, and the case is sent back to that Court to have the question determined as to the belief of the said actual cultivators as stated above. Costs of this appeal will abide the result of the further hearing by the learned Subordinate Judge as directed.

V B./R.K. *Decree set aside.*

A. I. R. 1918 Calcutta 631 (2)

FLETCHER AND RICHARDSON, JJ.

Munsur Ali—Appellant.

v.

Abhoya Charan Das—Respondent.

Appeals Nos. 443 and 507 of 1915, Decided on 28th February 1917, from appellate orders of Dist. Judge, Noakhali D/- 29th June 1915.

(a) Limitation Act (1908), S. 15—Attachment before judgment is not stay of execution—Civil P. C. (1908), O. 38, R. 6.

An attachment before judgment is not an injunction or order staying execution within the meaning of S. 15, Lim. Act, no matter whether the subject-matter of the attachment is a decree or any other property [P 632 C 1]

(b) Civil P. C. (1908), O. 21, R 53, (1) (b) (ii)—Time barred decree—Set off of, is not allowable.

The form of execution by setting off cross-decrees is given in the Code of Civil Procedure and no equitable considerations can add to or detract from the provisions of the statute Therefore, a Statue-barred decree in favour of the judgment-debtor cannot be set off against a decree sought to be executed against him. [P 632 C 1]

(c) Civil P. C. (1908), Schedule — Schedule does not control provisions of Code.

The forms given in the Schedule to the Code of Civil Procedure cannot control the clear words of the Code itself. [P 632 C 1]

Chandra Sekhar Sen, *Basant Kumar Bose* and *Bepin Chunder Bose*—for Appellant.

Khitish Chandra Sen and *Dhirendra Lal Kastagir*—for Respondent.

In No. 443 *of* 1915.

Fletcher, J.—This is an appeal from an order of the District Judge of Nokhali, reversing the order of the Munsif of the 2nd Court at Sudharam. The admitted facts are as follows: The respondent to this appeal on 5th November 1908 obtained a decree absolute for Rs. 847 in a mortgage suit against the appellant. The appellant, having instituted a suit against

the respondent, attached this decree before judgment on 7th April 1909. On 30th September 1909, the appellant obtained a decree against the respondent for Rs. 851. On 7th September 1910, the appellant applied that both decrees should be set off one against the other but this application was on 26th January 1911 rejected as premature. The appellant applied on 20th November 1913 for execution of his decree. The learned District Judge held that the decree of the respondent was barred by limitation but it was equitable to allow the respondent to set off his statute-barred decree against the appellant's decree. Two points were urged on the appeal before us, first, was the execution of the respondent's decree stayed by an injunction or order within the meaning of S. 15, Limitation Act, and secondly, if not, is the respondent entitled to set off his statute-barred decree against the decree of the appellant. It is well established that an attachment before judgment is not an injunction or order within the meaning of S. 15, Limitation Act: *Beti Maharani* v. *Collector of Etawah* (1).

It is said, however, that different considerations arise when the subject-matter of the attachment is a decree. But this is clearly not so as O. 21, R. 53 (1) (*b*) (*ii*), clearly authorises the creditor who has attached the decree or his judgment-debtor to proceed to execute the attached decree. It is said that the forms in the Schedule to the Code of Civil Procedure support a different view. But even if that were so, the forms cannot control the clear words of the Statute itself. The respondent then argued that the fact of the attachment being before judgment made a difference but the terms of the rules of O. 38, do not support the argument. On the second point, reliance was placed on decision of this Court where on equitable grounds a defendant in a suit has been allowed to set off a statute-barred debt against the claim of a plaintiff. Those considerations cannot, I think, apply in execution of cross-decrees. This form of execution is given by the Code of Civil Procedure and no equitable considerations can add to or detract from the provisions of the Statute. In my opinion, the order of the learned District Judge should be set aside and the order of the Munsif restored with costs both here and in the Courts below. We assess the hearing fee at Rs. 25.

1. (1895) 17 All 198=22 I A 31 (P.C.).

Richardson, J.—I agree.

In No. 507 *of* 1915.

The same points are involved in this appeal as in Misc. appeal No. 443 of 1915 which has just now been disposed of by us, except that the learned District Judge did not allow the barred decree to be set off against the decree for which execution was applied for. The appeal fails and must be dismissed with costs. We assess the hearing fee at Rs. 25.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 632

WOODROFFE AND SMITHER, JJ.

Felani Mondalani — Decree-holder—Petitioner.

v.

Mukunda Lal Mondal and *another*—Judgment-debtors—Opposite parties.

Rule Nisi. No. 586 of 1917, Decided on 9th April 1918, against order of Dist. Judge, Murshidabad, in Misc. Appeal No. 20 of 1917.

Occupancy — Non-transferable — Sale of part in execution of money decree — One joint raiyat cannot object—His objection is limited to his share.

One of several raiyats who jointly hold a non-transferable occupancy holding cannot object to the sale of a part of the holding in execution of a money decree. His objection must be confined to the extent of his share.

[P 633 C 1]

Phanindra Lal Moitra for *Surendra Kumar Bose*—for Petitioner.

Karat Chandra Khan for *Hirendra Nath Ganguly*—for Opposite Parties.

FACTS of the case will appear from the following extract from judgment of the appellate Court: "In execution of a money-decree an occupancy holding belonging to the three appellants, who are brothers, was attached and was going to be put up to sale. Two of the appellants, namely, Mukunda and Chabban, objected to the sale on the ground that the holding was non-transferable but subsequently withdrew their objection. This was in Miscellaneous Case No. 204 of 1916. Subsequently the third brother, who is a minor, made a similar application which was allowed to the extent of releasing his 1/3rd share in the holding . . . . It is contended by the learned pleader for the minor appellant that on his objection alone no portion of the holding could be sold. This contention must prevail on the authority of the case of *Narayani* v.

Nabin Chandra Chowdhari (1) in which, in interpreting the rule laid down in the Full Bench case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2), it was held that an occupancy holding or any part of it could not be sold in execution of a money-decree when the raiyat objected, even if the landlords gave their consent to the sale. The minor appellant had thus a right to object to the sale of any part of the holding although his own share in the holding was confined to a third thereof . . . " Against the above decision of the appellate Court the petitioner moved the High Court and obtained the present Rule.

Judgment.—We think that the judgment of the learned District Judge cannot be sustained in law, and, therefore, the Rule must be made absolute with costs. We assess the hearing fee at one gold mohur.

V.B./R.K. *Rule made absolute.*

1. (1917) 44 Cal 720=36 I C 803.
2. A I R 1915 Cal 242=42 Cal 172=27 I C 61 (F B).

A. I. R. 1918 Calcutta 633

BEACHCROFT AND WALMSLEY, JJ.

Urmila Sundari Dasi—Appellant.

v.

Rati Kanta Saha and *another* — Respondents.

Appeal No. 15 of 1917, and Rule No. 51 of 1917, Decided on 13th February 1917, against orders of Dist. Judge, Nadia, D/- 16th December 1916.

(a) Guardians and Wards Act (1890), S. 32—Court can suspend guardian.

The words of S. 32 are wide enough to cover an order of suspension of the guardian by the Judge, as suspension is in effect a total restriction for a time of the powers of the guardian. [P 634 C 1]

(b) Guardians and Wards Act (1890), Ss. 32 and 43—Guardian suspended for time —Court can deal with him subsequently.

The suspension of a guardian for a time does not deprive the Court of power to deal with him subsequently. [P 634 C 1]

(c) Guardians and Wards Act (1890), Ss. 32 and 43 — Until actual removal, guardian remains guardian and Court can pass orders to protect minor's estate.

Until a guardian has actually been removed or discharged, he remains a guardian even though his powers may have been curtailed and the Court has authority under the Act to pass such orders on him as are necessary for the protection of the minor's property. [P 634 C 1]

D. N. Chakraburtty and *Baranasibasi Mukerjee*—for Appellant.

Ram Chandra Mazoomdar and *Upendra Narain Bagchi*—for Respondents.

Beachcroft, J.—One Haripada Shaha died in 1897. He left a will by which he gave his widow the power to adopt. In 1907, his widow, Urmila Sundari, adopted Hiranmoy Shaha, the son of her late husband's brother. In 1911, on her own application, she was appointed guardian of the person and property of the minor. In 1916, for reasons into which it is unnecessary to enter, the District Judge called upon her to show cause why she should not be removed from the guardianship, and on 24th July 1916, he passed an order suspending her guardianship in these words :

" The guardianship of Urmila Sundari Dasi is suspended and Rati Kanta Shaha is appointed guardian provisionally. "

It was alleged that in spite of this order Urmila continued to deal with the minor's property. The District Judge therefore on 16th December passed an order issuing a notice to her, warning her against realizing rents from the tenants of the minor as her guardianship has been suspended. He also had a notice put in the local paper warning the tenants not to pay rent to her gomastas. He added that the present proceeding would be confined to a consideration of the fitness of Urmila for guardianship. Apparently, a further complaint was made against her and on 10th January of this year, the Judge passed another order restraining her from the acts alleged against her and ordering her not to interfere with the realisation of rents from the minor's tenants. The present appeal is lodged against these two orders of 16th December and 10th January. There is also a Rule for setting aside the same orders in case it is held that there is no right of appeal.

The only argument which has been addressed to us is that, in view of the learned Judge's order suspending the widow from acting as guardian, the Court had no jurisdiction to pass the orders complained of, which orders, it is suggested, must have been passed under S. 43 of the Act, and could only be passed against the widow on the footing that she continued to be the guardian. In reply it was suggested that the Court has inherent jurisdiction to pass any orders which would be for the protection of the interests of the minor, irrespective of the actual terms of the statute. And though the appellant did

not attack the order of suspension, for which order the Act does not in specific terms provide, it was suggested that that order also could have been passed in the exercise of the Court's inherent powers. It was further argued that the Court's jurisdiction over the guardian did not cease until the discharge of the guardian. It seems to me that it is not necessary to invoke the inherent jurisdiction of the Court in this case, for I am of opinion that the words of S. 32 are wide enough to cover the Judge's order of suspension. That section provides that

" the Court may from time to time, by order define, restrict or extend his (i. e., the guardian's) powers with respect to the property of the wards in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject. "

The order of suspension of the guardian seems to me to be covered by these words, for suspension is in effect a total restriction for a time of the powers of the guardian. Then it seems to me impossible to hold that the effect of such a restriction of the guardian's powers is to deprive the Court of power to deal with the guardian. Until the guardian has actually been removed or discharged, he remains the guardian even though his power may have been curtailed and the Court has authority under the Act to pass such orders as are necessary for the protection of the minor's property. The orders of 16th December and 10th January may be looked upon as enforcing in detail the order of suspension. Whether they were passed under S. 32 or under S. 43 is immaterial : so far as they dealt with the minor's property they were clearly within the competence of the Judge to make. It is unnecessary to consider the question of the guardian's subsequent resignation in this proceeding. Indeed it would be out of place to do so. This appeal, in my opinion, ought to be dismissed with costs. We assess the hearing fee at three gold mohurs. The Rule is discharged. We allow no ex parte costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed; Rule discharged.*

A. I. R. 1918 Calcutta 634

FLETCHER AND SHAMSUL HUDA, JJ.

Indra Narain Ray—Plaintiff—Appellant.

v.

Nabin Chandra Banerjee and *others*—Defendants—Respondents.

Appeal No. 1257 of 1916, Decided on 6th June 1918, from the appellate decree of Dist. Judge, Birbhum, D/- 9th March 1916.

Bengal Tenancy Act (1885), Ss. 161 and 167—Part of holding purchased by mortgagee in execution of his decree—His interest therein is incumbrance within S. 161 and he cannot be ejected by purchaser in execution of rent decree until his incumbrance is annulled under S. 167.

The interest of a mortgagee of a part of a holding who has purchased the holding in execution of his mortgage decree is an incumbrance within the meaning of S. 161. Such a mortgage-purchaser cannot be ejected by the purchaser of the holding in execution of a rent decree until his incumbrance is annulled under the provisions of S. 167: 38 *Cal* 923, *Foll.* [P 634 C 2; P 635 C 1]

Bepin Behari Ghose II and *Bankim Chandra Mukherjee*—for Appellant.

Jyotish Chandra Sarkar—for Respondents.

Judgment.—This appeal will stand dismissed. Two grounds have been raised before us, and they are these: first of all, it is said that the present suit is a suit for possession of about 4 bighas of land, the plaintiff claiming through a purchase in execution of a rent decree. The plaintiff's claim was resisted by certain mortgagee purchasers, who had a mortgage of this property which is a part of a holding and who had purchased in execution of their mortgage-decree. This foundation of the plaintiff's claim is that he is the purchaser in execution of a rent decree. Otherwise, he would only get the right, title and interest of the judgment-debtor. It is said that the rent suit is a special suit, namely, a suit brought by a co-sharer landlord under S. 148 A, Ben. Ten. Act. But the learned Judge has found that the plaintiff had failed to show that he had brought the case within the provisions of S. 148-A.

The second point is also equally against the plaintiff. In a case like the present, the defendant has got an incumbrance on the property because for the purpose of the present suit he is entitled, having regard to the decision in *Bantihari Kapur* v. *Khetra Pal Singh* (1), to fall back

1. (1911) 38 Cal 923=13 I C 785.

on his mortgage as a shield against the purchase of the plaintiff. If that be so, he cannot be ejected until his encumbrance is annulled under the provisions of S. 167, Ben. Ten. Act. We agree with the conclusion arrived at by the learned Judge of the lower appellate Court. The present appeal, therefore, fails and must be dismissed. The appellant must pay to the respondent his costs in this appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 635

CHATTERJEA AND NEWBOULD, JJ.

Kedar Nath Dey Roy—Defendant—Appellant.

v.

Lakhi Kanta Day — Plaintiff—Respondent.

Appeal No. 507 of 1914, Decided on 11th May 1917, from Appellate order of Dist. Judge, Mymensingh, D/- 1st August 1914.

Limitation Act (1908), Art. 182 (5)—Application for summoning witnesses as to standard of measurement held step-in-aid of execution.

During the pendency of a substantial application for execution of a decree for possession of certain property, an application made by the decree-holder for summoning witnesses for the purpose of determining the standard of measurement without which he could not, in the opinion of the Court, obtain execution of the decree by delivery of possession, is a step-in-aid of execution within the meaning of Art. 182, Cl. (5), Lim. Act. [P 636 C 1]

Heramba Charan Guha—for Appellant.

Birendra Kumar De—for Respondent.

Judgment. The question involved in this appeal is whether the application for execution of the decree, out of which this appeal arises, is barred by limitation. It appears that the appellant obtained a decree for possession of certain property and possession was delivered to him on 28th January 1911. The judgment-debtor raised objections to the delivery of possession by the Commissioner, and the Court found it necessary to determine the standard of measurement and, for that purpose, to take evidence in the matter. The decree-holder applied for summons upon his witnesses who were examined. The Court, after taking evidence on both sides, directed fresh delivery of possession by another Commissioner and ordered the decree-holder to deposit costs, which not having been paid, the execution case was dismissed on 30th January 1914 for default. The question is whether the application made by the decree-holder on 11th February 1911 for summoning witnesses was a step-in-aid of execution under Art. 182, Cl. 5 Lim. Act. It is true, as contended by the appellant, that a step-in-aid of execution must be a positive step taken by the decree-holder on his own account in furtherance of his own application, and not merely in opposition to any objection taken by the judgment-debtor. But, in the present case, although possession had been delivered to the decree-holder, the judgment-debtor filed a petition of objection to the delivery of possession; and the application for execution was pending and had not been disposed of.

Upon the objection of the judgment-debtor, the Court found it necessary to ascertain the standard of measurement without the determination of which possession could not be delivered. Under these circumstances, it became necessary to adduce evidence on the point. The application to the Court for summoning witnesses therefore was an act in furtherance of the application for execution which was still pending and was therefore a step-in-aid of execution. The cases relied upon on behalf of the respondent were of a different nature. In the case of *Trolokya Nath Bose* v. *Jyoti Prokash Nandi* (1), it was held that the decree-holders' opposition to an application of the judgment-debtor to sell his properties in an order different from that in which they had already been directed to be sold, was not an application to take some step-in-aid of execution. It was only asking the Court to refrain from taking the course which had already been taken and not asking the Court to take some positive step. In *Umesh Chunder Dutta* v. *Soonder Narain Deo* (2) the appearance of the decree-holder by his pleader to oppose an application made by the judgment debtor to set aside a sale in execution of a decree was held not to be an application to take a step-in aid of execution. In *Shib Lal* v. *Radha Kishen* (3) the Court held that resisting or offering objections to an attempt on the part of the judgment-debtor to set off the amount of the decree against the amount due to himself is not taking some step-in-aid of execution. On the other hand, in the unreported case (Misc. Appeal

1 (1903) 30 Cal 761.
2. (1889) 16 Cal 747.
3. (1885) 7 All 898.

No. 373 of 1894, decided on 7th August 1895) it was held that where a decree-holder opposing an application to set aside a sale held at his instance puts in a list of witnesses and asks the Court to summon and examine the witnesses, he takes a step-in-aid of execution and is entitled to have a fresh period of three years for another application for the execution of his decree.

In the present case, as already stated, there was a substantive application by the decree holder which was pending and his application for summoning witnesses was in furtherance of the execution of the decree, namely, for determining the standard of measurement without which he could not, in the opinion of the Court, obtain execution of the decree by delivery of possession. We think therefore that the application was a step-in-aid of execution and the present application for execution, having been made within three years of the date on which such a step was taken, is not barred. The appeal fails and is dismissed with costs, one gold mohur.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 635

FLETCHER AND RICHARDSON, JJ.

Rajani Kanta Mondal—Plaintiff—Appellant.

v.

Lal Muhammad Sardar—Defendant—Respondent.

Appeal No. 292 of 1916, Decided on 27th February 1917, from original decree of Addl. Sub Judge, Rajshahi, D/- 22nd September 1916.

Contract Act (1872), Ss. 69 and 70—Sale of putni in execution of rent decree—Deposit of decretal amount by dar-putnidar who was ordered to be put in possession under S. 171, Ben. Ten. Act—Suit by putnidar for declaration that his right is not affected by order under S. 171—Payment by defendant held fell under Ss. 69 and 70—Decree conditional in putnidar's favour to pay proportionate share of rent held bad—Bengal Tenancy Act (1872), S. 171.

The landlord of a putni tenure brought a suit for arrears of rent against some only of the putnidars and obtained a decree. Defendant, a dar-putnidar of the judgment-debtors, deposited the decretal amount in Court to save the tenure from being sold, and was ordered to be put in possession as mortgagee under S. 171, Ben. Ten. Act. Plaintiff, a putnidar who was not a party to the landlord's suit for rent, brought a suit for a declaration and an injunction that his right in the tenure was not affected by the order under S. 171, Ben. Ten. Act and the Court gave him a decree conditional on his paying to the dar-putnidar his proportionate share of rent:

Held: (1) that the payment made by the defendant fell as against the plaintiff within Ss. 69 and 70, Contract Act; (2) that the condition attached to the decree in favour of the plaintiff was not improper. [P 637 C 2]

Sarat Chandra Roy Chowdhury and *Bireswar Bagchi*—for Appellant.

Mohini Mohan Chakrabarty and *Jotindra Mohan Chowdhury*—for Respondent.

Fletcher, J.—This is an appeal by the plaintiff against a judgment of the learned Additional Subordinate Judge of Rajshahi, dated 22nd September 1916. The plaintiff brought the suit for a declaration that his right in certain property had not been affected by the charge said to have existed in favour of defendant 1 under S. 171, Ben. Ten. Act. The facts are somewhat complicated as they appear from the judgment of the Court below, but from the very clear and lucid statement made by Mr. Roy Chowdhury, who opened the appeal, the following may be taken as the facts necessary to be considered for the purpose of this case. There was a putni in which one Nafar Mandal had a 9-annas share. The other 7-annas was vested in two persons named Ram Coomar and Mahabharat. Nafar Mandal died leaving three sons, Srinath, Lakshi Kant, and Baruni. Srinath died without issue leaving a widow Nayantara. Lakshi Kant also died without issue leaving a widow Bisseswari. Baruni died leaving six sons, the plaintiff being the eldest of those sons. As to the 7-annas share in the putni, Ram Coomar died leaving Akrurmani his widow and the widow of a predeceased adopted son, namely, Ramsasi. Mahabharat died also without issue leaving Bama Sundari his widow.

The landlord brought a suit to recover the rent in arrears due on the putni. In that suit, he made Nayantara defendant 1, Akrurmani, defendant 2 and Chandra Kamini, who was the widow of a nephew of Mahabharat, defendant 3. After the decree, the property was put up for sale in execution. Defendant 1 in the present case holds a dar-putni under the 7-annas cosharers and he deposited the whole amount of the decree and prevented the property from being brought to sale. After that, defendant 1 made an application under the provisions of S. 171, Ben. Ten. Act, to be put in possession as a mortgagee and the Court made that

order. Then the plaintiff brought the present suit on the footing that the decree in the suit brought by the landlord to which he was no party was not binding on him and that, it not having been a decree for arrears of rent within the meaning of the Bengal Tenancy Act, no order could be made under S 171, Ben. Ten. Act, as against him. The learned Judge of the Court below in the course of his judgment has found the title of the plaintiff and has held that the decree was not a decree for rent within the meaning of the Bengal Tenancy Act, as the landlord did, in fact, know of the interest of the plaintiff in the tenure and therefore he has made a declaration in the suit in favour of the plaintiff. He has also granted to the plaintiff an injunction as prayed for by him; but in his opinion, the plaintiff being liable under the law to pay to defendant 1 his portion of the rent which is represented by the 9-annas share in the putni, he has attached a condition to the issue of the injunction, namely, that the injunction would issue only on the plaintiff praying to defendant 1 his portion of the rent that has been paid by defendant 1. That is the only point involved in the present appeal, all the other matters being found and declared in favour of the plaintiff.

The first point that arises in this case is whether the payment made by defendant 1 falls within the terms of Ss. 69 and 70, Contract Act, or whether it was purely a voluntary payment made by defendant 1. The cases that have been cited to us on this point seem to me not to offer much assistance. The case of *Raja Baikunto Dey Bahadur* v. *Udoy Chand Maiti* (1) is a perfectly simple case. There the sale was being made of the interest of the zemindar under the Public Demands Recovery Act and the payment by the putnidar was not deemed to be a payment made by a person having an interest in the payment, as the putni by reason of the sale of the interest of the putnidar could not be affected in any way. So is the case of *Panchkori Ghosh* v. *Hari Das Jati* (2), because the finding made there was that the mortgage was a fictitious one and the person claiming under a fictitious deed could neither be called interested in the payment of the money within the meaning of S. 69, nor was the payment lawful within the meaning of S. 70, Contract Act. But when one comes to the case of a dar-putnidar of a share of a putni making a payment of the whole rent due on the putni, on the ground that the dar-putnidar's interest in the property is liable to be or may be destroyed if the property is brought to sale, it seems to me that that is a totally different case and I think that such a payment falls within the terms of both Ss. 69 and 70, Contract Act. The present dar putnidar was clearly interested in the payment of the money because, if the money was not paid, the putni was liable to be destroyed and with it would go the darputni. Obviously the putnidar was bound by law to pay the rent due to the zemindar. That seems to me clearly to bring the case within the terms of S. 69, Contract Act. I also think that the case comes within the terms of S 70 of that Act, because it is quite clear in a case of this nature that the darputnidar did not intend to act gratuitously when he paid the rent of the putni and the payment was a lawful one without doubt, because it was made by depositing the money in Court and the present plaintiff has in fact enjoyed the benefit of that because it is not his case that anybody else except defendant 1 paid the rent that he owed to the landlord. Therefore it seems to me clear that the payment comes within the terms of both Ss. 69 and 70, Contract Act.

Then it is said that defendant 1 ought to have been left to realise the money from the plaintiff by a separate suit. The view of the learned Judge was that he had a discretion before he awarded an injunction and it was an euqitable remedy and the Court could impose terms on the plaintiff before awarding it. The condition which the learned Judge imposed was that the plaintiff in this suit—the rights of all the parties having been ascertained—must undertake to pay to defendant 1 the amount that he was liable to pay in respect of the putni rent paid by the dar-putnidar and that otherwise the injunction would not be awarded. That view seems to me to be a view which the learned Judge was entitled to take before granting the injunction asked for. There can be no advantage gained in the present case by leaving the parties to a separate suit, the rights being ascertained of all the parties and the learned Judge, I think

1. (1905) 2 C L J 311.
2. (1916) 34 I C 341.

exercised a wise discretion in directing that before this injunction should issue, the plaintiff must undertake to pay to defendant 1 his portion of the amount of the rent paid by defendant 1 for the putni, the plaintiff having enjoyed the benefit of such payment. Without that condition the learned Judge declined to award the injunction. I am not prepared to say that in that he exercised his discretion wrongly or in a manner that we ought to review his order.

It is quite clear that without the award of an injunction the declarations that have been made by the learned Judge in favour of the plaintiff would not be of such value as when the injunction is awarded. I see no reason to dissent from the view taken by the learned Judge that the injunction in this case ought not to be granted, except on conditions that the plaintiff should undertake to pay to defendant 1 his portion of the putni rent which has been paid by defendant 1. In that view of the case the decree passed by the learned Judge of the Court below will be affirmed, subject however to the slight variation that, in lieu of the order of the learned Judge, that on failure to pay the money the whole suit would be dismissed, there should be a direction that on failure to pay the money the declarations that have been made in favour of the plaintiff would remain but that the injunction would not be issued as the injunction was made conditional upon payment of the said money. Subject to this slight modification the decree of the lower Court is affirmed and this appeal dismissed with costs—one hundred and fifty rupees. The cross-objection not being pressed is dismissed. We make no order as to costs in the cross-objection.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 638

FLETCHER AND SMITHER, JJ.

Badal Molla—Plaintiff—Appellant.

v.

Chemai Mondal and *others*—Defendants—Respondents.

Appeal No. 871 of 1915, Decided on 19th March 1917, from appellate decree of Addl. Dist. Judge, 24 Parganas, D/- 19th January 1915.

(a) Transfer of Property Act (4 of 1882), S. 60—Once a mortgage always a mortgage—Mortgagee is entitled to only principal amount, interest and costs due.

One of the elementary rules of equity is that once a mortgage always a mortgage, and that a mortgagee should not be allowed to obtain any undue advantage by his mortgage except the amount of the principal, interest and costs due on his mortgage. [P 638 C 2]

(b) Transfer of Property Act (4 of 1882), S. 60—S. 60 applies to all kinds of mortgages.

Section 60, T. P. Act, applies to all mortgages including anomalous mortgages within the meaning of S. 98. [P 639 C 1]

(c) Transfer of Property Act (4 of 1882), S. 98—Mortgage by conditional sale is not anomalous mortgage.

A mortgage by conditional sale is not an anomalous mortgage within the meaning of S 98, T. P. Act. [P 639 C 1]

(d) Transfer of Property Act (4 of 1882), S. 60—Usufructuary mortgage—Condition of forfeiture or transaction becoming absolute sale on failure to pay rent is clog.

Where under an usufructuary mortgage the mortgagee was put into possession to receive the usufruct of property in lieu of interest, and there was a condition in the mortgage that if the mortgagor should fail to pay the rent of the mortgaged holding to the landlord, the transaction will become an absolute sale in favour of the mortgagee:

Held: that the condition of forfeiture or the transaction becoming an absolute sale in the event of the mortgagor failing to pay the rent was void, being a clog on the equity of redemption. [P 639 C 1]

Mohini Mohan Chetterjee—for Appellant.

Gunada Charan Sen — for Respondents.

Fletcher, J.—This is an appeal by the plaintiff from a decision of the learned Additional District Judge of the 24 Pergunnahs, dated 19th January 1915, affirming the decision of the Munsif of the first Court at Alipur. The plaintiff brought the suit for redemption. It is admitted that the plaintiff's predecessor was the mortgagor and defendant 1 was the mortgagee. The equity of redemption has not been foreclosed or put an end to either by the acts of the parties subsequent to the mortgage or by an order of the Court. One would have expected, therefore, that a case for redemption had clearly arisen, because one of the elementary rules of equity is that once a mortgage always a mortgage. The Courts of Equity have always held that a mortgagee should not be allowed to obtain any undue advantage by his mortgage except the amount of the principal, interest and costs due on his mortgage. It is not necessary to go into the cases on this point. In the present case, however, the learned Judge of the lower appellate Court has held that the

mortgage is an anomalous mortgage within the meaning of S. 98, T. P. Act and that, therefore, no right of redemption subsists. I am not prepared, as at present advised, to agree with the view of the learned Judge that S. 60, T. P. Act, does not apply to an anomalous mortgage. I am inclined to think that S. 60 applies to all mortgages. But be that as it may, the question in this case is whether the learned Judge of the lower appellate Court was right in coming to the conclusion that the mortgage was an anomalous mortgage. The document before us is stated to be a kat kobala, which, I am told, means a mortgage by way of conditional sale. A mortgage by way of conditional sale is clearly not an anomalous mortgage within the meaning of S. 98, T. P. Act.

The document itself seems to be an usufructuary mortgage within the definition contained in S. 58 (d), T. P. Act. In this case, the mortgagee was put into possession to receive the usufruct of the property in lieu of interest and, therefore, in that view the mortgage clearly comes within the meaning of S. 58 (d). The contract that, if the mortgagor should fail to pay the rent to the landlord, the mortgagee should be entitled to enforce the kat kobala and that the kat kobala should be treated as a deed of absolute sale, obviously is a clog on the equity of redemption. It is not necessary to go into the authorities on this point. They have been cited in the case of *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (1). We do not really want an authority that a condition of that nature does not nullify the rest of the deed, namely, that it is a mortgage and further that the mortgage provided that, when the principal money would be paid off in one lump sum, the mortgagee would return the property. The condition of forfeiture or the transaction becoming an absolute sale in the event of the mortgagor failing to pay the rent is clearly void. In that view, the learned Judge of the lower appellate Court ought to have made an ordinary decree for redemption directing the usual account to be taken of what was due to the mortgagor on the footing of the mortgage security. The present appeal is, therefore, allowed and the case is remanded to the lower appellate Court for the learned Judge there to take an account of what is due to the mortgagee on the footing of the security bond and upon ascertaining the amount due, he should fix a date within which the money ought to be paid and the redemption made; and on the plaintiff's failure to do that, he should direct that the plaintiff's right to redeem shall be extinguished. In taking the account, the learned Judge will also consider the other matter raised by the plaintiff, namely, whether the rent was paid out of the additional land made over to the mortgagee. The appellants will get their costs in this Court. The mortgagee will be entitled, according to the ordinary rule in a redemption suit, to add to their security the costs incurred by them in the Courts below.

Smither, J.—I agree.

V.B./R.K. *Apepal allowed.*

1. A I R 1914 Mad 42=38 Mad 667=22 I C 54.

A. I. R. 1918 Calcutta 639

MOOKERJEE AND BEACHCROFT, JJ.

Sarada Kripalala—Defendant—Appellant—Petitioner.

v.

Akhil Chandra Biswas—Plaintiff and Respondent—Opposite Parties.

Letters Patent Appeal No. 104 of 1916, Decided on 16th March 1917, from decree of Newbould, J., D/- 6th April 1916, in Appeal from appellate decree No. 3872 of 1914.

(a) Lease—Construction—Interest created by taluka patta and called "taluka" constitute prima facie permanent tenure.

The interest created by a taluka patta and called a taluka constitutes prima facie a permanent tenure, where there is nothing, either in the surrounding circumstances or in the instrument which creates it, to show that it was intended to be otherwise. [P 640 C 2]

Where the instrument creating a tenancy called 'taluka' was silent upon the questions of heritability and transferability, but during the period of 60 years which had elapsed since its creation, the tenancy had passed in inheritance from father to son and had formed the subject of successive transfers and the succession and transfers were recognised by the landlord and the rent fixed at its inception was never varied and the grant was for residential purposes and structures were erected on the land:

Held: (1) that the lease was intended to be permanent, notwithstanding the fact that there was a covenant in the lease that if the grantor had personal necessity, the grantee would be bound to relinquish the land; [P 641 C 2]

(2) that the said covenant was a personal one and did not run with the land, so that it ceased to be operative after the death of the grantor. In such a case the covenant must be construed

most strongly against the grantor and most beneficially in favour of the grantee; [P 641 C 2]

(3) that the same conclusion was applicable not merely to the plot which was covered by the grant but also to another plot which had been annexed to it by the tenant by way of encroachment, as the landlord had not, within the statutory period from the date of encroachment, instituted a suit to eject the tenant from the second plot on the ground that he could not, without his consent, acquire the status of a tenant in that plot. [P 641 C 2]

Quaere.—Whether the landlord was entitled to claim additional rent in respect of the plot encroached upon.

(b) **Lease—Construction—Question whether covenant is personal or runs with land depends upon intention to be ascertained from instrument.**

The question whether a covenant in a lease is a personal one or runs with the land, depends upon the true intention of the grantor and grantee to be ascertained from the construction of the terms of the instrument. It is impossible to tell by general reasoning what rights will be held to belong to the class of personal covenants or where the line would be drawn between personal covenants and covenants running with the land [P 641 C 1]

(c) **Lease — Construction — Covenant reserving right of re-entry on certain contingency is to be construed strongly against grantor and in favour of grantee.**

A covenant in a lease, reserving a right of re-entry to the grantor on a certain contingency, must be construed most strongly against the grantor and most beneficially in favour of the grantee, unless the meaning of the covenant is perfectly clear and it is expressed in absolutely unambiguous language. [P 641 C 1]

Biraj Mohan Majumdar and *Probodh Kumar Das*—for Appellant.

Khitish Chandra Sen—for Respondent.

Judgment.—This is an appeal under Cl. 15, Letters Patent, from a judgment of Newbould, J., in an action in ejectment. The suit was decreed in part in the Court of first instance. On appeal the Subordinate Judge decreed the claim in full and that decree has been affirmed in second appeal to this Court. The rights of the parties are regulated by a contract of tenancy executed on 23rd April 1849 by Madan Mohan Ghose in favour of Abdul in respect of the first plot of land now in dispute. The lease, which is called taluka patta, recites that the tenant had executed a kabuliyat in favour of the grantor and that the taluka patta was granted on a rent of Re. 1 from year to year. Then follows an important covenant in these terms:

"You shall erect houses upon the land and live there. If I have a personal necessity you shall relinquish the land, and you will not be entitled to make any objection."

The plaintiff is the successor-in-interest of the original grantor; defendant 1, is the son of the original grantee; defendant 3, who really contested the suit, is a transferee of the tenure through defendant 2. The second plot in suit is not covered by the lease but was annexed to the first plot by the tenant by way of encroachment. The plaintiff has treated defendant 3, as a tenant in respect of both the plots, and, after service of notice to quit on him, has instituted this suit for recovery of possession. The defendant contends that he cannot be ejected as the tenancy is of a permanent character. In these circumstances, the plaintiff, in order to succeed, must establish first, that the tenancy was of a terminable nature, and, secondly, that it has been terminated in accordance with law. The fundamental question in the case relates to the nature of the tenancy created by the taluka patta of 23rd April 1849. The appellant contends that the expression 'taluka' prima facie implies permanence and relies upon the decision in *Krishano Chunder Goopto* v. *Meer Sufdur Ali* (1), which was recently followed in *Budyar Rahman* v. *Matiar Rahman* (2). It must now be treated as well settled that if there be nothing, either in the surrounding circumstances or in the instrument which creates the interest, to show that it was intended to be otherwise, the inference is that a tenancy called "taluka" constitutes a permanent tenure. We thus start with the presumption that the tenancy created by this lease was a permanent tenure. Are there, then, any indications in the instrument itself or in the surrounding circumstances which point to a contrary conclusion? On behalf of the respondent reliance is placed upon the fact that appropriate words of heritability or transferability do not occur in the instrument.

This may be conceded and the deed is silent upon the questions of heritability and transferability. But the significant fact remains that during the period of sixty years, which have elapsed since the lease was granted, the tenancy has passed by inheritance from father to son and has formed the subject of successive transfers; moreover, the succession and transfers have been recognized by the landlord.

Consequently, the inference legitimately follows that the parties intended the

1. (1874) 22 W R 326.
2. (1913) 21 I C 47.

leasehold interest to be heritable and transferable. We have the additional fact that the grant was for residential purposes; and as might have been expected, structures have been erected on the land, indeed, the decree entitles the plaintiff in accordance with the prayer in the plaint to remove the houses erected by the defendant on the disputed land. Finally it is noteworthy that the rent fixed in 1849, has never varied. Consequently, the indications furnished by the instrument all tend to confirm the conclusion that the lease described as taluka patta was intended to be permanent. Reliance however has been placed on the clause which entitles the grantor to re-enter and prevents the grantee from raising objection to such a course. On behalf of the appellant it is contended that this is a purely personal covenant in favour of the grantor himself. The respondent argues, on the other hand, that this is a covenant running with the land. Now as observed by Holmes in his Common law (p. 406), it is impossible to tell by general reasoning what rights will be held to belong to the class of personal covenants or where the line would be drawn between the two classes, that is, personal covenants and covenants running with the land. The proper course is to construe the terms of the instrument and thus ascertain the true intention of the grantor and grantee. Now, upon a plain reading of this lease, it is clear that the covenant was in favour of the grantor personally, for the words used are: "If I have personal necessity (* * * * *) you shall relinquish the land."

In a case of this description the well known rule applies that the covenant is to be construed most strongly against the grantor and most beneficially in favour of the grantee: (see the observations of Wilde, C. J., in *In re, Stroud* (3), of Romilly, M. R. in *Warde* v. *Warde* (4) and of Selborne, L. C. in *Neill* v. *Devonshire (Duke)* (5). We do not affirm the proposition that if the meaning of the covenant is perfectly clear, if it is expressed in absolutely unambiguous language, the language should be strained to obtain a conclusion in favour of the grantee and against the grantor. Such a course was condemned by Jessel, M. R. in *Taylor* v. *St. Helens Corporation* (6). It is equally clear that where the terms of the grant show plainly that the covenant was intended to be personally in favour of the grantor, the Court should not stretch the language and interpret the covenant to the detriment of the grantee. The covenant in this case is of a very stringent character and we should not accept the construction proposed by the grantor, which is not only more extensive than is justified by the actual words used but really destroys the permanency of the lease and places the grantee entirely at the mercy of the grantor. The position then is that the instrument, which is described as a taluka patta and consequently prima facie is a permanent grant, furnishes no indication that the intention of the parties was to create a terminable tenancy except that during the lifetime of the grantor, if he had personal necessity, the tenant would be bound to relinquish the land in his favour. That contingency has not happened. The tenancy has continued for 60 years and the successor-in-interest of the grantor now seeks to eject from the land a derivative holder from the grantee. In our opinion his claim cannot succeed. We have finally to consider whether this conclusion is applicable, not merely to plot 1 which is covered by the grant but also to plot 2 which has been annexed by the tenant to the land of his tenancy. No distinction can, in such circumstances, be made, we think, between the two parcels. The plaintiff has not treated the defendant as a trespasser in respect of plot 2.

If within the statutory period from the date of encroachment, he had instituted a suit to eject the defendant on the ground that he could not, without his consent, acquire the status of a tenant in plot 2, he might have succeeded in his claim: *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (7), *Whitmore* v. *Humphries* (8), *Hastings (Lord)* v. *Saddler* (9), *Attorney-General* v. *Tomline* (10). Instead of this, he has treated defendant 3 as a tenant in respect of the encroached land, while the latter has professed to

3. (1849) 8 C B 502=19 L J C P 117.
4. (1852) 16 Beav 103=51 E R 716.
5. (1883) 8 A C 135=31 W R 622.
6. (1877) 6 Ch D 264=46 L J Ch 857.
7. (1905) 2 C L J 125.
8. (1872) 7 C P 1=41 L J C P 43.
9. (1898) 79 L T 355.
10. (1877) 5 Ch D 750=46 L J Ch 654.

hold it as part and parcel of his tenancy. We need not decide whether the plaintiff may not claim additional rent from the defendant; it is sufficient to hold, for the purposes of the present claim in ejectment, that the two plots constitute one tenancy and stand on the same footing. The result is that this appeal is allowed, the decrees of the Courts below discharged and the suit dismissed with costs in all the Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 642

FLETCHER AND RICHARDSON, JJ.

Satis Chundra Mustafi and *another*—Plaintiffs—Appellants.

v.

Amanulla Bepari and *another*—Defendants—Respondents.

Appeal No. 453 of 1915, Decided on 12th February 1917, against appellate decree of Addl. Sub-Judge, Rangpur, D/- 4th December 1914.

(a) Bengal Tenancy Act (1885), S. 29—Rent reserved with temporary remissions is not recoverable in full.

Where the original rent of an occupancy holding was Rs. 18 a year, but for some unexplained reason, in a kabuliyat taken from the raiyat, the rent was stated to be Rs. 19-14-0, out of which for the term of the kabuliyat, a remission was allowed and the actual rent payable for the term was stated to be Rs. 12 only, and it was further provided that if the tenant failed to take a fresh settlement at an enhanced rent on the expiry of the term of the kabuliyat he would be liable to pay the full rent reserved in the kabuliyat:

Held: that the true rent of the holding, when the kabuliyat was executed, being Rs. 12, the provision as to the payment of rent at the rate of Rs 19-14-0 offended against or was a device to evade the provisions of S. 29, Ben. Ten. Act, and was therefore, inoperative. [P 643 C 1]

(b) Bengal Tenancy Act (1885), S. 29—Decree to evade provisions of S. 29 is inoperative.

Per *Fletcher, J.*—A provision as to the enhanced rent is a penal one, held in terrorem over the head of the tenant to make him come to the landlord and enter into a new settlement after the expiry of the kabuliyat, and is merely an attempt to evade the provisions of S 29, Ben. Ten. Act, and is therefore inoperative. [P 643 C 1]

Nagendra Nath Ghose—for Appellants.

Atul Chandra Gupta — for Respondents.

Fletcher, J.—This is an appeal by the plaintiffs against a judgment of the learned Additional Subordinate Judge of Rangpur, dated 4th December 1914, reversing the decision of the Munsif of Gaibandha The suit was brought to recover the rent due under a kabuliyat. The first Court decreed the suit. On appeal to the learned Additional Subordinate Judge, he reversed that decision. It has been found by the learned Subordinate Judge that the holding is an old holding and that the tenants have a right of occupancy in the land within the meaning of the Bengal Tenancy Act. The rent was originally Rs. 18, but for some reason which the learned Judge of the lower appellate Court was not satisfied with—and he was also not satisfied as to whether the truth had been told to him—the cash rent was reduced in the kabuliyat sued upon to Rs. 12, but it was stated that the balance of the rent, namely, Rs. Rs. 7-14-0 was kept in suspense and would not be payable during the term of the kabuliyat, but that if the tenants fail to come to a new agreement as to the rent to be paid to the landlords at the expiration of the term, then a rent of Rs 19-14-0 was to be payable. I do not know whether in this case it was stated that the suspense for three years was granted by the landlords owing to the charitable feeling that they bore to mankind in general and to these tenants in particular. But it is a matter for comment that no day practically passes before the Court, at any rate before this Bench, without leases of this sort being brought up in review. There can be little doubt that these leases are put forward by the landlords with intent to evade the stringent provisions contained in S. 29, Ben. Ten. Act. It cannot be that a particular Bench of the Court should every day have its attention called to cases where the landlord out of the good nature and kindness of heart has voluntarily reduced the rent for a few years owing to the poverty or other circumstances of the tenants and subsequently sues for rent at the original rate and the tenant litigates with his landlord on the terms of his lease up to the final Court of Appeal.

The present case seems to me to be a perfectly simple one. The cash rent, the talabi jama, i. e., the rent to be paid is stated to be Rs. 18. Why the original cash rent was reduced to Rs. 12, no satisfactory explanation has been given. The story why Rs. 7-14-0 was kept in suspense has been totally disbelieved by the learned Subordinate Judge and there cannot be any doubt that the learned Judge meant to find that the rent payable under the terms of this kabuliyat was Rs. 12. Then it was pointed out by Mr. Gupta,

who conducted the appeal on behalf of the tenants-respondents, that the condition for enhancement was purely in terrorem—a penalty held over the heads of the tenants — that unless the tenants should come to the landlords and enter into a new agreement satisfactory to the landlords, the rent would be enhanced from Rs. 12 to Rs. 19-14-0. That is a method of enhancement which is altogether opposed to the terms of the Bengal Tenancy Act and such an enhancement in my opinion, cannot be supported. I think in this case that the provision as to enhanced rent was merely one held in terrorem over the heads of the tenants to make them come to the landlords and enter into a new settlement and that it was only in the event of such settlement not being assented to by the tenants it was provided that the suspense rent should become payable. But that was merely an attempt to evade the provisions of the Rengal Tenancy Act and to enhance the rent in the manner prohibited by S. 29, Ben. Ten. Act. In my opinion, the result arrived at by the learned Subordinate Judge is correct. The present appeal, therefore, fails and must be dismissed with costs.

Richardson, J.—In my opinion, there is a sufficient finding in the judgment of the lower appellate Court that the true rent of the holding when the kabuliyat in question was executed was Rs. 12. If that be so, it is clear that the kabuliyat offends or is a device to evade the provisions of S. 29, Ben. Ten. Act and is inoperative. The landlord cannot, therefore, without taking proper proceedings for enhancement recover rent at a higher rate than Rs. 12. I agree that the appeal must be dismissed.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 643

FLETCHER AND SHAMSUL HUDA, JJ.

Baikuntha Nath Sarkar and *others* — Plaintiffs—Appellants.

v.

Satish Chandra Bhusan and *another* —Respondents.

Appeals Nos. 159 and 175 of 1917, Decided on 12th June 1918, from appellate decrees of Dist. Judge, Bankura, D/- 14th September 1916.

Hindu Law — Alienation — Widow — Permanent lease granted to pay off usufructuary mortgage by husband is binding on reversioners.

A permanent lease granted by a Hindu widow for a premium and an annual rent for purpose of paying off a usufructuary mortgage executed by her husband is binding upon the reversioners. [P 643 C 2]

Karunamoy Bose—for Appellants.

Baranashibashi Mukerjee for *Mohini Mohan Chatterjee* -for Respondents.

Judgment.—These are two appeals preferred by the plaintiffs against the decision of the learned District Judge of Bankura, dated 14th September 1916, reversing the decision of the Munsif of Bishnupur. The plaintiffs sued to recover possession of a piece of land held by the defendants under a permanent lease granted by the maternal grandmother of the plaintiffs in the year 1855. The lease was granted for a premium and an annual rent of Rs. 9. The money, according to the lease, was required for the purpose of paying off a creditor of the deceased husband of the grandmother of the plaintiffs; and that would, therefore, be a case of legal necessity. Of course, in a case like this, no direct evidence can be given at this length of time as to what actually took place; but the recitals in the deed, if true, show a case of legal necessity. Those recitals are no doubt consistent with the probabilities and the circumstances of the case because there was, in fact, an usufructuary mortgage and it was paid off by this money. These facts are quite clear. The defendants have been enjoying the land under the lease since the year 1855. The fact that the mother of the present plaintiffs did not take any steps with reference to the lease nor did the plaintiffs do anything until some years after their title accrued on the death of their mother, does not support their case. The facts found by the learned Judge of the lower appellate Court in this case are quite ample to warrant the finding that this lease was made for legal necessity. This case seems to come quite clearly within the observations made by the Judicial Committee in the case of *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya* (1). The present appeals, therefore, fail and are dismissed with costs.

V.B./R.K. *Appeals dismissed.*

1. A I R 1916 P C 110=14 Cal 186=36 I C 420=43 I A 249 (P C).

A. I. R. 1918 Calcutta 644

BEACHCROFT AND WALMSLEY JJ.

Haridas Datta — Defendant — Petitioner.

v.

Baidya Nath Ghose and *another*— Plaintiffs—Opposite Parties.

Rule Nisi No. 947 of 1916, Decided on 26th February 1917, against order of Munsif, 2nd Court, Krishnagar, D/- 17th August 1916.

(a) Civil P. C. (1908), Sch, 2, Paras, 4 and 15—Arbitrator giving evidence before colleagues—Award is not vitiated.

The mere fact that one of three arbitrators gave evidence before the others, does not constitute misconduct on the part of the arbitrators so as to vitiate their award. [P 644 C 2]

(b) Civil P. C. (1908), Sch. 2, Paras, 4 and 15—Reference not providing that opinion of majority should prevail— Majority award is valid.

A majority award by the arbitrators is not bad merely because the reference to arbitration did not provide that the opinion of the majority should prevail, where the application to Court for reference contained a provision to that effect. [P 645 C 1]

(c) Civil P. C. (1908), Sch. 2, Paras 4 and 15—One of parties deliberately absenting—Award is valid.

Where one of the parties to an arbitration deliberately absents himself from the hearing, the award concluded on the hearing of the arbitration in his absence is not bad. [P 645 C 1]

Surendra Kumar Bose—for Petitioner.

Gurudas Sinha—for Opposite Parties.

Beachcroft, J.—This is a rule calling upon the opposite party to show cause why the objection to the award of the arbitrators should not be upheld and the order of the Munsif confirming it set aside; or why such other order should not be passed as to this Court may seem fit and proper. The petitioner is the defendant in a suit which was pending before the Munsif of Krishnagar. An application was made to the Munsif to appoint three gentlemen as arbitrators. One of these gentlemen Jogendra Nath Bhattacharjee was a witness for the plaintiff. Another of them Lakhi Kanta Dey was a witness for the defendant. Both of them had appeared in Court. The third arbitrator nominated was Gokul Chandra Bandopadhya. During the course of the arbitration Jogendra Nath Bhattacharjee gave his evidence before the other arbitrators. The arbitration was not finished on that day and it was postponed till the next day, when the petitioner put in an application before the arbitrators objecting to their going on with the arbitration and saying that he would not put any evidence before them. Two of the arbitrators, namely, Jogendra Nath Bhattacharjee and Gokul Chandra Bandopadhya made an award in favour of the plaintiff. The third arbitrator Lakhi Kant Dey made an award in favour of the defendant. An application was made to the Munsif to set aside the award of the majority of the arbitrators but the application was rejected.

The first point taken before us is that there was misconduct on the part of the arbitrators in that Jogendra Nath Bhattacharjee gave evidence and the argument is put as high as this, that the mere fact of giving evidence constitutes misconduct. We are not told what the nature of that evidence was. For aught we know it may have been of a purely formal character. It is argued that the arbitrator is on the same footing as a Judge, who cannot give evidence in a case before himself. As regards the capacity of a Judge to give evidence in a case before himself there have been many decisions by the Courts, and the view has been taken that a Judge is a competent witness where his evidence has to be submitted to the independent judgment of other persons who are sitting with himself to try the case; such as a Jury or Assessors. But it seems to me that the considerations, which apply to the case of a Judge are beside the point in the present case. It is conceded that the arbitrator would have been guilty of still greater misconduct if he had concealed facts which were within his knowledge, and obviously it would be so, because in that case his award might be based on knowledge of his own in which his fellow arbitrators did not share. But in the present case, the parties knowingly appointed two gentlemen as arbitrators who were witnesses in the case; and if they with that knowledge appointed the arbitrators, it appears to me to be idle for defendant now to suggest that the arbitrator should not have acted as such because he had knowledge of the facts of the case, or should not have placed his knowledge at the disposal of his fellow-arbitrators. The petition shows that he was examined at the instance of the party.

The second ground taken is that the reference to arbitration did not provide that the opinion of the majority should

prevail and, therefore, the award is bad. The reference, it is true, does not in so many words provide for this, but the application for reference to arbitration contained a provision that the opinion of the majority should prevail. It is argued that in spite of that the award is bad in the absence of such provision in the reference itself. It seems to me that there is no substance in this ground. The authority of the Court to make a reference to arbitration depends upon the application of the parties. If the Court had made an order that there must be unanimity in the award, it is conceded that the reference would have been bad because it went beyond the intention of the parties. It is conceded that the only order which the Court could make in accordance with the intention of the parties on the point was that the award should follow the opinion of the majority. It seems to me that we ought not to give effect to the argument that because the Court did not in fact make the only order which it could have made, the award must be set aside although it is made in accordance with the agreement of the parties.

The third point taken is that the award is bad because it was concluded in the absence of the defendant. I have already stated that an application was made to the arbitrators on the second day of the hearing stating that the defendant withdrew from the arbitration and would not call any witness. No authority has been shown to us to support the suggestion that a party to an arbitration can at will retire from the arbitration. Reference was made to some observations of Mahmood J., in the case of *Ganga Sahai* v. *Lekhraj Singh* (1). Those observations have no application to the present case. Here the defendant deliberately absented himself from the hearing. To my mind on the attitude taken by the defendant the arbitrators were perfectly justified in continuing the hearing and giving their award. For these reasons I consider that this rule should be discharged with costs. We assess the hearing fee at two gold mohurs.

Walmsley, J.—I agree.

V.B./B.K. *Rule discharged.*

1. (1887) 9 All 253.

A. I. R. 1918 Calcutta 645

CHITTY J.

On difference between

TEUNON AND CHAUDHURI, JJ.

Amrita Lal Bose & others—Petitioners.

v.

Chariman of Corporation of Calcutta—Opposite Party.

Criminal Revn. No. 1215 of 1916, Decided on 5th and 19th February 1917.

(a) Calcutta Municipal Act. (1899), S. 561—Bye-laws framed under Act. Nos. 83, 85—Persons guilty of breach of bye-law are not separately punishable.

Per *Curiam*, (*Teunon, J.*, dissenting).—The breach of a bye-law of the Calcutta Corporation by several persons acting in concert is punishable under the Calcutta Municipal Act as a single offence, the individual offenders not being punishable separately. [P 649 C 2]

Per *Teunon, J.*—Under S. 561, Calcutta Municipal Act, a breach of a bye-law framed by the Calcutta Corporation makes the persons jointly guilty of the breach separately liable to be punished with a fine of Rs. 20 each [P 649 C 2]

(b) Calcutta Municipal Act. (1899), S. 561 Bye-law No. 85—Person—Joint proprietors of theatre are 'person' within meaning of bye-law 85.

The joint proprietors of a theatre are "person" for the purposes of Bye-law No. 85 of the Calcutta Corporation, framed under the Calcutta Municipal Act. Therefore for a breach of the bye-law the proprietors are not liable to be fined separately or more than Rs. 20 in all. [P 649 C 2]

When a theatrical performance is continued later than 1 a. m. in violation of bye-law No. 83 of the Calcutta Corporation, the Calcutta Municipal Act provides a punishment for the offence and not for the individual offenders. [P 647 C 2]

(c) Calcutta Municipal Act (1899), S. 561 Bye-law—Provisions of Penal Code do not apply to interpretation of bye-law—Penal Code (1860).

Per *Chitty, J.*—The provisions of the I. P. C. have no direct bearing on the question of the interpretation of a bye-law of the Calcutta Corporation.

It will be ultra vires of the Calcutta Corporation to frame a bye-law under the Municipal Act providing separate punishment for offenders jointly implicated in a breach of the bye-law. [P 649 C 2]

Norton and *Hemendra Nath Sen*—for Petitioners.

Langford James and *Manmathanath Mookerjee*—for Opposite Party.

FACTS of the case appear from the following judgments of Teunon and Chaudhuri, JJ :

Teunon, J.—In this case the three petitioners are the cosharer owners, and managers of a theatre known as the Star Theatre situate in Cornwallis Street in the town of Calcutta. On the night of 3rd September 1916 the performance at this theatre was continued beyond the

hour 1 A. M., the closing hour fixed by the bye-law framed by the Corporation under S. 559, sub-S. 52, Calcutta Municipal Act, 1899. The petitioners have, therefore, been convicted of a breach of one of the aforesaid bye-laws, namely, the 83rd and under the 85th bye-law they have been sentenced, the petitioner, to pay a fine of Rs. 20 and the petitioner 2 and 3 each to pay a fine of Rs. 10. It is not disputed, on the contrary it is admitted, that the petitioners acting in concert committed the breach complained of, but on their behalf it is urged that under S. 561 of the Act the breach of a bye-law is an offence single (or joint and indivisible) in its nature, and that there can, therefore, be but one penalty, a fine not exceeding Rs. 20. In other words, it is contended that in so far as Bye-law No. 85 says that every person guilty of a breach may be punished with fine which may extend to Rs. 20, it has gone beyond S. 561, which provides that it is the breach of a bye-law that is or may be punishable with a fine of that amount and to that extent, therefore, the bye-law is ultra vires. In support of this contention the case of *Rex* v. *Clark* (1), decided by Lord Mansfield in 1777, has been cited. In the course of the argument we have also been referred to the case of *Crepps* v. *Durden* (2), which seems to have no bearing on the question now at issue and also the case of *Reg* v. *Dean* (3), and *Reg* v. *Littlechild* (4).

Now in each of these cases it is to be observed that the joint offenders were severally punished, and the observations of the learned Judge touching offences in which, however many the persons concerned, only one penalty attaches, must be regarded as largely in the nature of obiter dicta. Two earlier cases, *King* v. *Bleasdale* (5), and *Hardyman* v. *Whitaker* (6), the latter cited in *Rex* v. *Clark* (1), appear to have been decided on the special wording of the Statute 12 Ann. c. 14, S. 4. Whether the distinction drawn or attempted to be drawn in *Rex* v. *Clark* (1), between offences single in their nature and offences several in their nature continues at the present time to be recognised in English law may be said, I think, to be doubtful. But, whatever the law in England, no Indian authority in support of the contention advanced on behalf of the petitioners has been cited before us, and to my mind it is fairly clear that neither the distinction referred to nor collective penalties have been recognized in Indian penal legislation. In support of this view I should refer to the definition of the word "offence" in S. 40, I. P. C. Clause 2 of that section makes the subsequent Ss. 109, 110, 112 and 114—117 regarding abetment applicable to things punishable under special or local law; S. 109 then provides that each conspirator shall be punished with the punishment provided for the offence committed in pursuance of the conspiracy.

I should next refer to the Bengal General Clauses Act, I of 1899, which, for instance, applies Ss. 64 and 67 Penal Code, to fines imposed under bye-laws made under the Calcutta Municipal Act 4 of 1899.

For these reasons and on general principles I hold that when in S. 561, Calcutta Municipal Act, it is said that a breach of a bye-law may be made punishable with fine which may extend to twenty rupees, what is provided is that the persons guilty of the breach, and in the case of breaches jointly committed, each offender, may be punished to that extent. A secondary argument was that by virtue of the definition of the word "persons" to be found in the Bengal General Clauses Act, S. 3, sub-S. (32), the three petitioners being joint proprietors of the theatre in question are to be regarded as one person for the purpose of the bye-law. But the definition applies only when there is no repugnancy in the subject or context. In the view I take three offenders cannot be punished as one, and fine and imprisonment are not to be apportioned.

Lastly, I observed that my learned colleague has suggested that the facts have not been sufficiently investigated, but this is to go outside the scope of the rule and beyond any suggestion made or argument advanced either at the time when the application was presented or when the rule came on for hearing. The petitioners having pleaded guilty, further investigation of facts became unnecessary, and there has been no suggestion that the theatre was kept open otherwise than as the result of combination and agreement between all three. In the foregoing reasons I am of opinion that the bye-law in ques-

1. (1777) 2 Cowp 610=98 E R 1267.
2. (1777) 2 Cowp 640.
3. (1843) 12 M & W 39.
4. (1871) 6 Q B 293.
5. (1792) 4 T R 809.
6. (1801) 2 East 573 *n*=102 E R 489.

tion is not ultra vires and the petitioners have been properly convicted and sentenced. In this view this rule should b- discharged.

Chaudhuri, J.—This rule was issued at the instance of three petitioners calling upon the Municipal Magistrate and the Chairman of the Calcutta Corporation, to show cause why the fine imposed upon them should not be reduced to a sum not exceeding Rs. 20 in all. They are the proprietors of a theatre known as the "Star Theatre" and have been convicted and sentenced by the Municipal Magistrate under Cls. 83 and 85 of the bye laws framed under S. 559 (52), Calcutta Municipal Act, Act 3 B. C. of 1899, for having on 3rd September 1916 continued the performance at the theatre later than 1 a. m. The petitioner Amritalal Bose has been fined Rs. 20 and Hari Charan Bose and Dasu Charan Neogy, the other two petitioners, Rs. 10 each. The question before us is whether separate fines exceeding Rs. 20 in all can be imposed. The Magistrate in his explanation says, tha it has not been shown that the Star Theatre is a limited liability company, that the petitioners may be partners, but do not consitute a "person" in the eye of the law. He does not think that the definition of "persons" in the General Clauses Act 10 of 1897 is strictly applicable to the Calcutta Municipal Act and the bye-laws thereunder. He has however overlooked that the Bengal General Clauses Act—Act 1 of 1899—applies, S. 3, sub-S. (32), of which defines "person" thus :

" 'Person' shall include any company or association or body of individuals, whether incorporated or not. "

If the petitioners constitute a partnership incorporated or not, it comes within the definition. Bye-law No. 85 runs as follows :

" Every person guilty of a breach of any of these bye-laws (referring to the bye-laws relating to theatre) shall be punishable with fine which may extend to Rs 20. "

I do not think that the three petitioners can be separately punished with fine exceeding Rs. 20 in all for a breach of bye-law No. 83, which prohibits performance later than 1 a. m. S. 559, Act 3 of 1899, sub-S. (52), empowers the General Committee of the Municipality to make bye-laws for the regulation of theatres. S. 561 provides that in making a bye-law under S. 559 the General Committee may provide that a breach of it shall be punishable with fine which may extend to Rs. 20. The penalty is therefore limited to Rs. 20 only. No doubt bye-law No. 85 says "every person guilty of a breach shall be punishable." The Statute makes the breach punishable. I do not think that the limit which has been imposed by the Statute can be exceeded by any bye-law. The Magistrate explains that bye law No. 85 says : " Every person shall be punishale and not every offence is to be punished. " He has referred to the case of *Reg.* v. *Dean* (3), and says that he has followed that ruling in awarding the above punishment. It is to be noticed that the case referred to was one under S. 44, Smuggling Prosecution Act, 3 & 4 Will.4, c. 53, which clearly makes different persons liable. Baron Alderson points out that it is necessary to look at the Statute to see whether it was intended that every person offending should be punished. Here clearly the Statute provides that the breach shall be punishable and the bye-law thereunder must be interpreted in that light. No bye-law can extend the meaning or effect of the present Statute. Here the penalty under the Statute refers to the offence. Crimes undoubtedly are several, but an offence of this character can rarely be said to be several. The person who is guilty of the offence are the proprietors of the theatre, not the partners individually. If each partner were held liable for the breach, the larger the number of proprietors the greater would be the penalty. I do not think it was ever intended that the fine was to be imposed in this way, a limit having been placed as to the amount by the Statute itself. In *Rex* v. *Clark* (1) Lord Mansfield enunciates the principle thus:

"Where ths offence is in its nature single, and cannot be severed there the penalty shall be only single, because though several persons may join in committing it, it still constitutes but one offence."

Rex v. *Clark* (1) was treated as good law in *Reg* v. *Littlechild* (4), in which Hannen, J., quoted with approval the following rule from Paley on Convictions, 5th Edn.5 p 262, (Edn. 6 p. 275):

"If either the penalty be impcsed by the Act upon each person convicted, even where the offence would in its own nature be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the others, in either of these cases the penalties are several."

Here the Act has not imposed several penalties, and it does not seem to me that keeping the theatre open is such an offence that the guilt of one proprietor can be considered distinct from the guilt of the others. They collectively are a person, *Crepps* v. *Durden* (2) was cited at the Bar to show that such an offence is not divisible in point of time. It relates to Sunday sales which are prohibited by 29 Car. 2, c. 7, and it was held that different sales by the same person on a Sunday are not punishable as separate offences but as one offence. A breach of bye-law No. 85 is under the Bengal General Clauses Act, 1 of 1899, S. 3 sub-S. (30), an "offence" which is defined as "any act or omission made punishable by any law for the time being in force".

The punishment for the offence is provided in the Municipal Act, and also in the bye-law thereunder. S. 26, Bengal General Clauses Act provides that Ss 63 to 70, I. P. C. and the provisions of the Criminal P. C., relating to the issue of processes for the levy of fines apply to all fines imposed under any Bengal Act or any rule or bye-law thereunder unless the latter contains an express provision to the contrary. Beyond that we need not go to the Penal Code. In this case we need not consider the question as to whether "abettors" as defined in the Penal Code can be held liable. The Magistrate says that the petitioners are

"also managers in three different capacities of the theatre in question."

There is nothing to show what part each took in the management of the theatre. It is not shown what each of them did in respect of the performance on the 3rd September. They have been separately fined, merely as proprietors. No individual default has been proved or attempted to be proved against them. They apparently admitted they were proprietors and pleaded guilty that the theatre was kept open after 1 A. M. Beyond that nothing has been proved against them. I am not prepared to give the bye-law an extended application and hold that individual members of the audience who were present on that occasion, the actors, the orchestra and the menial staff of the theatre, all who aided the performance, are liable to a fine of Rs. 20 each, under bye-law No 85. Take for instance bye-law No. 84, which says that the manager shall not allow any person in a state of intoxication to enter a theatre. Bye-law No. 85 equally applies to its breach, but by the introduction of the abetment section in the Penal Code, various other persons may be held liable. It seems to me fairly clear that it was not so intended but as I have said, it is unnecessary to deal with that question in this case. In the case of penalties we cannot adopt an oppressive interpretation. Several bye-laws have been framed under Municipal Act for the regulation of theatres and S. 85 collectively deals with penalties for their breach. The language used in it does not seem to me to be happy.

The Magistrate has referred to some earlier cases in which separate fines were imposed upon the petitioners, to which apparently they did not object. I notice that in all these cases the aggregate amount of fine imposed did not in any instance exceed Rs. 20. Those cases have no value at all in considering the question before us. In view of what I have said, I would make the Rule absolute and direct that the fine in excess of Rs. 20, if paid be refunded. (On difference between their Lordships, Chitty, J., delivered the following).

Chitty, J.—In this case a Rule was issued at the instance of the three petitioners Amritalal Bose, Hari Prasad Bose and Dasu Charan Neogi, calling on the Municipal Magistrate and the Chairman of the Corporation to show cause why the sentences imposed on the three petitioners should not be modified and reduced to a sum not exceeding Rs. 20 in all. The grounds were (1) that bye-law No. 85 does not empower the Magistrate to impose a fine of more than Rs. 20 for a breach thereof, and (2) that the petitioners being joint partners and owners of the Star Theatre were a "person" within the meaning of bye-law No. 85 and thus not liable to be fined separately or more than Rs. 20 in all. The learned Judges who heard the Rule having differed in opinion, the case has been laid before me for my opinion under S. 429, Criminal P. C. The three petitioners are the joint proprietors of the Star Theatre in Cornwallis Street. On the night of 3rd September 1916, the performance at that theatre was continued beyond 1 A. M. The three petitioners were summoned for having committed a breach of bye-law No. 83 and the second petitioner appeared

and admitted the offence. The Municipal Magistrate thereupon fined the three petitioners Rs 20, Rs. 10 and Rs. 10 respectively. The only question is whether the imposition of such penalties was authorized by-law. S. 559, Calcutta Municipal Act 1899, provides that the General Committee may make bye-laws, (inter alia), (52) for the regulation of theatres and other places of public resort, recreation or amusement.

By S. 561, in making a bye-law under S. 559, the General Committee may provide that breach of it shall be punishable (a) with fine which may extend to Rs. 20, and in case of a continuing breach with fine which may extend to Rs. 10 for every day during which the breach continues after conviction for the first breach. By bye-laws made under S. 559, for the regulation of theatres, etc., it was provided. (inter alia), (83), no performance shall be continued later than 1 A. M. unless with the special permission of the Chairman for any particular occasion, and (85) every person guilty of a breach of any of these bye-laws shall be punishable (a) with a fine which may extend to Rs. 20, etc., (following the words of S. 561 above quoted). In Paley on Summary Conviction, Edn. 6, at p. 275, the law is thus stated:

"Though several offenders may be (as it seems) included in one conviction for offences jointly committed, it depends upon the wording of the particular statutes applicable to each case and the quality of the offence, whether each person be liable to a distinct penalty or all collectively to but one."

The determination of the question therefore depends upon the interpretation to be put upon the particular statute, in this case the Calcutta Municipal Act 1899. In *Rex* v. *Clark* (1) Lord Mansfield thus enunciated the proposition:

"Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single, because though several persons may join in committing it, it still constitutes but one offence; but where the offence is in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty; because the crime of each is distinct from the offence of the others and each is punishable for his own crime."

I am unable to agree that because in that case the offence was found to be in its nature several, this is a mere obiter dictum. It lays down in clear and unmistakable terms the test to be applied. So, too, the remarks of Alderson, B., in *Reg* v. *Dean* (3):

"We must look at the statute to see whether it was intended that every person offending should be punished, or merely that every offence should be punished. The question is whether an offence which is committed by several persons is to be visited by one penalty or each person is to be visited by a penalty."

In the case before me I am clearly of opinion that the offence is single in its nature and that the Calcutta Municipal Act provides a punishment for the offence and not for the individual offenders. The words "a breach (of a bye-law) shall be punishable" can only mean that. Nor can it have been intended that the penalty to be imposed, i. e., Rs. 20 or Rs. 10 per diem, for a continuing breach, should be indefinitely multiplied in proportion to the number of persons jointly committing such breach.

If it be argued that such an intention is indicated by the use of the words: "Every person" in bye-law No. 85 and if that was the only possible interpretation to be put upon them, I should be inclined to hold that the bye law was to that extent ultra vires. But I do not so read it. The word "person" by the definition in the Bengal General Clauses Act, 1899, includes "any company, or association or body of individuals, whether incorporated or not." It would therefore include the three petitioners as joint proprietors of this theatre and they may properly be regarded as a "person" for the purposes of bye-law No. 85. In my opinion the provisions of the Indian Penal Code have on direct bearing on the present question, which is one of the interpretations of the particular statute. No doubt some of that provisions of that Code are made applicable by the Bengal General Clauses Act, 1899, and in other ways to offences under special and local laws, such as the present. But we are not now concerned with, say the question of abetment of the breach of a bye-law, and I am not prepared to that say a person might not be charged with such an abetment. The question of intention would then crop up which finds no place in cases of the breach of many of the bye-laws. So far as S. 64, I. P. C., is concerned, it has been pointed out that it could not be enforced in case of such a breach of a bye-law as that which we are now considering: see *Basanta Kumari Devi* v. *Corporation of Calcutta* (7).

7. (1911) 15 C W N 906.

So far as I am aware, the principles laid down in the various English cases for the interpretation of the statutes, to ascertain whether the offence be single or several in its nature, have not been changed in recent years. In the case of *Reg* v. *Showdar Ghenar* (8), the question came before a Full Bench of the Bombay High Court. Westropp, C. J., in an exhaustive judgment reviewed all the English cases, and the Court applying the same test to the statute then before them (Regn. 21 of 1827, S. 4) held that the several accused could only be liable for the one penalty. This case, which does not appear to have been cited to the Bench who heard the Rules, shows that in Bombay at least the old English decisions were accepted as sound law in 1870.

I agree, therefore, with Chadhuri, J. in holding that the rule must be made absolute. The conviction of the three petitioners will be upheld but the penalty imposed upon them will be one of rupees 20 only, to be apportioned equally between them. Any excess over Rs. 20, if paid, to be refunded.

V.B/R..K. *Rule made absolute.*

8. (1870) 7 B H C R Cr 39.

A. I. R. 1918 Calcutta 650 (1)

NEWBOULD AND SHAMSUL HUDA, JJ.

Hafizuddin Khan—Complainant.

v.

Mahammed Elim and *others*—Accused

Criminal Ref. No. 63 of 1918, Decided on 18th June 1918.

Criminal Trial—Cross cases of rioting—Conviction in one case on plea of guilty does not bar conviction in cross cases—Penal Code (1860), S. 147.

The fact that there has been a conviction in one rioting case, on a plea of guilty, is no bar to a conviction in a cross-case of rioting in connexion with the same occurrence which arose out of a dispute regarding the exclusive possession of a piece of land. [P 650, C 1,]

Manmatha Nath Mukerjee, *Jotindra Mohan Chowdhury* and *Ananda Ch. Kurkun*—for Complainant.

Atulya Charan Bose and *M. A. S. M. Akram*—for Accused.

Judgment.—We are unable to accept this reference. We cannot agree with the learned Additional Sessions Judge that the fact that there has been a conviction in one rioting case on a plea of guilty, is legally any bar to a conviction in a cross-case of rioting in connection with the same occurrence. The conviction on a plea of guilty did not amount to a finding by the Court that the accused who so pleaded, were not in exclusive possession of the land in dispute, nor was there any reason why the Magistrate who tried the subsequent case, should not convict the accused in the second case if he was satisfied on the evidence that they did commit the offence of rioting. The plea of guilty in the previous case was really no more than an admission and not a conclusive proof that that party was without possession. It was open to them to explain the circumstances under which they made that plea and if the Magistrate was satisfied with that explanation he was justified in ignoring that admission. Let the papers be sent back. The accused who have been convicted, will be sent back to jail for the unexpired portion of their sentence.

V.B /R.K. *Reference rejected;*

*A. I. R. 1918 Calcutta 650 (2)

SANDERSON, C. J. AND MOOKERJEE, J.

Beatrice Alice De Ste Croix—Appellant.

v.

Phillips De Ste Croix—Respondent.

Civil Appeal No. 45 of 1916, Decided on 23rd January 1917, from judgment of Greaves, J., D/- 11th April 1916.

*** (a) Divorce Act (1869), S. 12—Condonation—Mere forgiveness of conjugal offence does not amount to condonation—Condonation must restore previous position of adulteror and must be followed by cohabitation—After wife's confession of adultery mere allowing her to use her separate bed in same room cannot be regarded as condonation.**

Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is a question of fact, not of law. It is a blotting out of the offence imputed, so as to restore the offending party to the position which he or she occupied before the offence was committed; consequently mere forgiveness is not condonation, in order to amount to condonation it must completely restore the offending party, and must be followed by cohabitation. [P 651 C 1]

Where after the wife's confession of adultery, the husband allows her to occupy her bed (which is a separate bed) in the same room and to live in the house as usual for some days, the conduct of the husband cannot be regarded as condonation of the adultery. [P 651 C 2]

(b) Divorce Act (1869), S. 13—'Collusion' explained.

A collusion within the meaning of S. 13 is held to exist where the initiation of the proceedings for dissolution of marriage is procured, or its conduct provided for, by agreement or bargain between the spouses or their agents. [P 656 C 1]

(c) Divorce Act (1869), S. 14—Mere refusal by husband of matrimonial bed is not ground for dissolution of marriage.

A mere refusal by the husband, without reasonable cause, of the matrimonial bed does not constitute desertion on his part or such wilful neglect or misconduct as conduces to adultery, and is not an adequate ground for dissolution of marriage. [P 652 C 2]

A. Awetoom and *A. K. Ghosh*—for Appellant.

P. L. Buckland and *Surita*—for Respondent.

Sanderson, C. J.—This is an appeal against the judgment of Greaves, J., given on 11th April 1916, by Beatrice Alice De Ste Croix, who was the respondent in divorce proceedings brought against her by her husband on the ground of her adultery with the co-respondent. The learned Judge granted a decree nisi for the dissolution of the marriage. The adultery was admitted by the respondent, and the appeal was based on allegations: (1) that the petitioner had condoned the adultery complained of, (2) that the petition was presented or prosecuted in collusion with the respondent, (3) that the petitioner had been guilty of such wilful neglect or misconduct as had conduced to the adultery and (4) that the petitioner had deserted the respondent without reasonable cause. As regards the first point the learned Judge held that the petitioner had not condoned the offence.

Condonation is a conclusion of fact, not of law, and means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven: see *Bernstein* v. *Bernstein* (1), per Lopes, L. J., at p. 303, or as stated by the Judge ordinary in his direction to the Jury in *Keats* v. *Keats* (2), condonation means a blotting out of the offence imputed so as to restore the offending party to the same position he or she occupied before the offence was committed. The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation and this must be shown by a reinstatement of the wife in her former position, which renders proof of conjugal cohabitation or the restitution of conjugal rights necessary. S. 14, Divorce Act, 1869, provides that no adultery shall be deemed to have been condoned within the meaning of the Act unless where conjugal cohabitation has been resumed or continued.

1. (1893) P 292=63 L J P 3.
2. (1859) 1 Sw & Tr 334=28 L J Mat 57.

The facts relied upon in this case to show condonation are that when the confession of adultery was made on the night of Friday, 12th November 1915, the wife was allowed to occupy her bed (which was a separate bed) in the same room as her husband and to live in the house as usual until 17th November (Wednesday). That inasmuch as the husband and wife had not had any marital intercourse for 9 years previously, the husband, by allowing the wife to occupy the bedroom and to live in the house, had reinstated the wife in her former position and had completely forgiven her. I do not think this is the right conclusion. The husband at once as soon as he was informed of the adultery on the night of Friday, 12th November, asserted his intention to take proceedings to protect the interests of his children and himself. He had been told thet his wife was going to have a child (she was in fact confined on 23rd November), he was obviously very sorry for her, and he had his two girls living in the house.

This happened on Friday. Monday was a holiday on which solicitors' offices were closed, he went to see his solicitors on Tuesday, and in consequence of their advice he decided she must leave the house though he was anxious to give her shelter in some part of his house, and she consequently left his house on Wednesday, 17th. I see no reason for interfering with the learned Judge's finding of fact on this part of the case.

As to what happened afterwards, the facts relied upon by the learned counsel for the appellant were that at the wife's request she was allowed to visit the husband at his house on his birthday, that she dined with him and the family on that day and on Christmas day, that he kissed her, that on several occasions she breakfasted with him and had other meetings, and the letters which the respondent wrote to the petitioner are also relied on. In considering the events of this period it must be remembered that on 25th November 1911 the wife wrote, "you say you have forgiven me and yet, Phil, you are taking the matter up," evidently referring to the husband's determination to proceed for divorce: Pro-

ceedings were in fact begun on 16th December 1915 and the letters written by the respondent are full of appeals to the husband to discontinue the proceeding and take her back, and may be summarised in her own words used in evidence:

"He said he had forgiven me. I did not accept that because he was going on with the suit. What I wanted was, that he should forgive me and take me back. Although he had forgiven me to some extent, he had not forgiven me to the extent that he was willing to take me back."

I need not refer to the rest of the facts which are fully dealt with in the learned Judge's judgment: It is sufficient for me to say I see no reason for interfering with his decision of fact that the petitioner had not condoned the respondent's adultery. As regards the second point, viz., collusion—it is based on two allegations:

First, that the petitioner had agreed that if the respondent would not defend the case, he would marry her again after the expiration of six months from the decree. The learned Judge came to the conclusion that the respondent was labouring under a delusion in this matter and found as a fact that there was no understanding or agreement that if the respondent did not defend the suit, the petitioner would remarry her. The learned Judge has seen the witnesses and accepted the petitioner's evidence on this part of the case, and on the materials before the Court I am not prepared to interfere with his finding of fact.

Second, it was alleged that it was agreed between the parties that if the wife would not defend the suit, the husband would be a friend to her and would not allow her to be on the streets and would, if there was no condition against it, give her welcome in his house. This matter is not dealt with by the learned Judge, nor is it referred to in the pleadings and judging from the very careful manner in which he has dealt with the various points, I am constrained to think that much reliance, if any, was not placed on it at the trial. The husband denied that his promise to be a friend to her was conditional upon her not defending the case. I refer to the concluding sentences of the learned Judge's judgment, and I think it is clear that the petitioner was anxious that she should not defend the suit to avoid publicity and scandal, and at the same time intended to help as far as he could the woman who had been his wife for so many years. The proceedings were in fact defended from the outset, and I find no sufficient ground for holding that the proceedings were either instituted or prosecuted in collusion. As regards the third point viz., wilful neglect or misconduct conducing to the adultery. The allegations relating to this point were:

(1) that the petitioner had wilfully abstained from marital intercourse with the respondent for a period of about nine years although there was no physical cause for this and he had no aversion to her; (2) that he had gone his own way and the wife had done the same.

As regards the first allegation, the mere fact that the husband refrained from marital intercourse, in my judgment, cannot by itself be held to be such wilful neglect or misconduct as conduced to the adultery.

In *Forster* v. *Forster* (3) Lord Stowell, speaking of a case in which a husband was alleged to have withdrawn himself from his wife's bed, said:

"This species of malicious desertion is a ground of divorce in some countries—certainly not so here—and still less with it justify a wife, in a resort to unlawful pleasures that lawful ones are withdrawn It is not, however, to be considered as a matter perfectly light in the behaviour of complaining husband that he has withdrawn himself without cause and without consent from the discharge of duties that belong to the very institution of marriage, and, if he has done so, he ought to feel less surprise if consequences of human infirmity should ensue."

And in *Synge* v. *Synge* (4), the President of the Probate Division and Admiralty Division, in dealing with a case where the wife had refused marital intercourse to the husband, said:

"I do not say that the wife has been guilty of conduct conducing to his misconduct within the meaning of S. 31 of the Act, because it appears to me that though no doubt a wife, who behaved as the petitioner in this case behaved, is to a certain extent, as Lord Stowell said in the case to which I have referred, morally responsible and cannot hold herself altogether free from responsibility—still I think it is a very long step—and one I cannot take to say that a wife who refuses matrimonial intercourse has conduced to the adultery of her husband: a husband has no right to commit adultery because she refuses him. I think that would be a low and mean view to take of it. She may perhaps be morally responsible but I do not say that she has been guilty of conduct conducing to his adultery."

3. (1790) I Hag Con 144=161 E R 504.
4. (1900) P 180=69 L J P 106.

I adopt the principle of these decisions and hold that the mere fact that the husband refused marital intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery. But it is argued that in this case the refusal of marital intercourse did not stand by itself: for the petitioner had wilfully neglected his wife and allowed her to go her own way while he went his. The evidence on this point is as follows:

The wife said she had reason to complain of her husband's friendliness for her sister and on one occasion followed him to her house, and after describing what she saw, viz., her husband holding her sister's hand, she said that the next day her husband said, "I do not want you to follow me. You go your own way and I go mine." This was five or six years before the proceedings for divorce. The Judge's note of the petitioner's evidence is as follows:

"For 6 years prior to November 1915 I went my way and she went hers, you might say for 12 or 15 years it has always been so. We each did as we liked without consultation for 12 or 15 years."

The husband's remark to which the wife speaks may have been in temporary anger at finding himself followed by his wife, but it remains to consider the state of affairs as described in the petitioner's evidence: The wife lived with her husband in the same house, slept in the same room, and was one of the family with her daughters, she had all the comforts of the home, and, under such circumstances, I agree with the learned Judge that the fact that the parties went their own way in the sense that they had their own friends and interests. cannot be said to be conduct conducing to adultery, even when ocupled with the abstinence by the husband from marital intercourse. Lastly, as to the alleged desertion without reasonable cause: This was based on the same ground as the allegation of wilful neglect conducing to adultery, viz., the fact that the husband had abstained from marital intercourse and that he had allowed the wife to go her own way. The inference which the learned Judge drew from the evidence was that both parties assented to that course, and, if that be a correct inference, it is an answer to the allegation of desertion. The wife's evidence is as follows:

"I had no marital intercourse with my husband eight or nine years. I resented this conduct, and he saw my manner towards him."

There is no suggestion that the wife ever asked that marital intercourse should be resumed and that he refused, and we are left in the dark as to what her manner was. I am inclined to think that if the wife had had any real resentment against her husband's abstention for all these years, she would have taken some step, more unequivocable than a mere manner, to let him know what her real feelings were, and I think the learned Judge was justified by the evidence in coming to the conclusion which is above mentioned. But whether this conclusion is correct or not, I do not think the facts in this case would justify a finding of desertion on the part of the petitioner.

In *Synge* v. *Synge* (4) the facts were that the husband and wife had been separated for some considerable time: the husband wished to live with his wife as her husband if marital rights were allowed to him: the wife was willing to live with him, but not as his wife, and only if such marital rights were not insisted on. The learned President held on these facts that the husband did not desert his wife but rather that she deserted him: or, if he did desert her, he did so with reasonable excuse within the meaning of the Act. I gather the learned President came to the conclusion that the separation, which undoubtedly took place between the parties, was due to the wife's conduct, for which she had no reasonable excuse, and that therefore she was guilty of desertion, The facts in this case are materially different; the abstaining from marital rights by the husband did not result in the separation of the parties: on the contrary they continued to live together as before, they slept in the same room, though in separate beds, and there is no evidence that during all the nine years the wife ever requested the renewal of marital intercourse, or that the husband refused. The evidence amounts to nothing more than that the husband abstained from marital intercourse, and that thougn living together, the parties went their own ways, and followed their own interests, and I am not prepared to hold that under such circumstances the petitioner was guilty of desertion without reasonable cause within the meaning of the Act. For these reasons, in my judg-

ment, the appeal should be dismissed. On a former application made before the hearing of the appeal, this Court decided that it ought not, under the circumstances of this case, to make an order that the husband should make provision for the costs of the wife's appeal, and I see no reason for acceding to the application which has now been made on behalf of the appellant that the Court should order the respondent to pay her costs of the appeal. The respondent's counsel not asking for costs, the appeal is dismissed; no order as to costs.

Mookerjee, J.—This is an appeal by the wife against a decree nisi for dissolution of marriage, made on the petition of the husband on the allegation of adultery. The facts material for the determination of the questions in controversy are fairly clear on the evidence. The parties were married on 8th May 1894. They have had three children, two of whom survive, the eldest born on 16th July 1895 and the youngest born on 27th October 1905. The parties have lived as husband and wife ever since their marriage, but there has been no marital intercourse during the last nine years; though they used to sleep in the same room, they had different beds. How this was brought about, cannot be determined with absolute certainty; the husband admits that it was due neither to physical causes nor to an aversion to her. An incident is however mentioned in the evidence, which may possibly furnish an explanation. The wife was jealous of the visits paid by her husband to her younger sister; on one occasion, she followed him, and when she entered her sister's house, found her husband sitting alongside her sister holding her hand. The next day after this incident, the husband said to the wife, "I don't want you to follow me, you go your own way and I go mine." They continued however to live together. The husband was absent from home for a month from 12th October to 11th November 1915. The day after his return, which was a Friday, his mother-in-law informed him that his wife was about to be confined and give the name of the co-respondent. On this discovery that his wife had committed adultery, he said that he would take proceedings to protect himself and his children. After return home of his wife the same evening, he obtained from her a written confession of her misconduct. She slept in the house that night and the four following nights, either in his bedroom or with her mother, but it is admitted that he had no intercourse with her. As Monday was a holiday, he consulted his solicitors on Tuesday, 16th November; as the result of advice which he received from them, the wife was made to leave his house on 17th November. She was confined six days later. On 16th December he instituted the present proceedings against his wife and co-respondent for dissolution of marriage. Greaves, J., has made a decree nisi, and the propriety of that decree is now called in question not on the ground that adultery has not been proved, but for four special reasons mentioned in Ss. 12, 13 and 14 Divorce Act, 1869.

Sections 12, 13 and 14, Divorce Act, when analysed, show that to an application for dissolution of marriage on the ground of adultery presented by a husband under S. 10, there are four absolute defences and five discretionary defences. The four absolute defences are: (1) denial of facts alleged in the petition; (2) connivance; (3) condonation; (4) collusion. The five discretionary defences are: (1) adultery of petitioner; (2) unreasonable delay in presenting or prosecuting the petition; (3) cruelty to the other party to the marriage; (4) desertion or wilful separation from the other party, before the alleged adultery, without excuse; (5) wilful neglect or misconduct, such as to have conduced to the adultery complained of. The appellant relies upon the third and fourth of the absolute defences and the fourth and fifth of the discretionary defences. It will be convenient to examine the validity of these objections in the order stated.

As regards condonation, reliance is placed upon the conduct of the husband both before and after the date on which the wife left the house. It has been argued that as the husband suffered his wife to remain in the house after he had been apprised of her misconduct, he must be deemed to have condoned the adultery. It has further been contended that as he is proved to have allowed his wife to return to the house on several days, to have breakfasted with her, to have dined with her on his brithday, on the Christmas day and on New Year's day, and also to have kissed her, the same inference is considerably strengthened. I am unable to give effect to this conten-

tion as well founded. As Sir C. Creswell explained in *Peacock* v. *Peacock* (5), condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is a question of fact, not of law. This was emphasized in *Keats* v. *Keats* (2), where Lord Chelmsford held that condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed; consequently, mere forgiveness is not condonation; to be condonation it must completely restore the offending party and must be followed by cohabitation. This view is reproduced in S. 14, Divorce Act, which requires that no adultery shall be deemed to have been condoned unless where conjugal cohabitation has been resumed or continued. The expression "conjugal cohabitation" need not be given a restricted meaning, for as Lord Chelmsford puts it in *Keats* v. *Keats* (2), to say that condonation requires conjugal cohabitation or connubial intercourse leaves the nature of the cohabitation or intercourse to be adopted to the varying conditions and circumstances of different parties: *Campbell* v. *Campbell* (6), *Anichini* v. *Anichini* (7), *Seller* v. *Seller* (8), *Bernstein* v. *Bernstein* (1). Much stress has been laid on two decisions of the House of Lords, *Lord Cloncurry's* case (9) and *Miller's* case (10). The first of the cases shows that the fact that the husband allowed the wife to live in his house after discovery of her misconduct did not disentitle him to a decree for dissolution, when reasonable grounds were assigned for not turning her out immediately on discovery of her infidelity. The second case does not assist the contention of the appellant in any way because the proceedings were discontinued and the bill was abandoned: the facts proved were that the husband, though apprised of his wife's misconduct, nevertheless suffered her to remain in his house for three weeks thereafter, and they dined together for three days after the disclosure. No special circumstances were made out to explain this conduct on the part of the husband. On the other hand, the decision in *Hall* v. *Hall* (11) shows that the husband need not be "unnecessarily harsh" towards his wife on discovery of her infidelity to entitle him to escape the bar of condonation; this view was affirmed on appeal: *Hall* v. *Hall* (12). As Sir Francis Jeune observed in the case just mentioned, the true position is that if with full knowledge of his wife's misconduct, a man says, I wish to treat my wife just as if it had never happened, he cannot afterwards sue for relief on the ground of the adultery which he has condoned; he cannot blow hot and cold. Now, can it be really suggested that the husband has done so in this case? The answer must obviously be in the negative. From the very moment of the discovery of the misconduct, the husband announced his intention to have recourse to legal proceedings, and he has throughout persisted in that determination. He may have treated her kindly and considerately, but he certainly did not intend to restore her to her marital rights. The argument of the appellant ignores the distinction between condonation and forgiveness. Condonation imports forgiveness, but the reverse is not necesssarily true; forgiveness is not sufficient, for the reason that the injured party may conclude to forgive the offender and at the same time withhold a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation or intercourse. In my opinion, the defence of condonation cannot be sustained.

As regards collusion, the argument is based on two allegations, first, that the husband had promised to re-marry the appellant after the expiry of the statutory period of six months (S. 57), if she did not defend the case; secondly, that the husband agreed, if she did not oppose the application, to be friendly to her and to provide for her in his house if there was no legal bar. As regards the first allegation, Greaves, J., has not accepted the testimony of the appellant and I see no reason to doubt the correctness of his conclusion. As regards the second allegetion, it is substantially borne out by the evidence. It is thus necessary to consider whether the petition has been presented or prosecuted in collusion within the meaning of S. 13, Divorce Act.

5. (1858) 1 Sw & Tr 183=27 L J Mat 71.
6. Deane 285 at p 288.
7. (1839) 2 Curt 210.
8. (1860) 1 Sw & Tr 482=28 L J Mat 99.
9. (1811) Macqueen H L Prac 606.
10. (1821) Macqueen H L Prac 627.
11. (1891) 64 L T 837.
12. (1891) P 302=65 L T 206.

As observed in *Gethin* v. *Gethin* (13) collusion implies an agreement or understanding between the parties; in other words, collusion is held to exist where the initiation of the proceeding for dissolution of marriage is procured or its conduct provided for by agreement or bargain between the spouses or their agent: [*Lloyd* v. *Lloyd* (14), *Jessop* v. *Jessop* (15)]. In the prsent case, there was no understanding or agreement between the parties.

No doubt, the husband suggested to the wife that she should not oppose the application, but he did so to avoid publicity, and also on the ground that in view of her confession it would be absurd for her to defend the suit. There was no intention to withhold any relevant evidence from the Court. In these circumstances, it is impossible to sustain the defence of collusion. As Lopes, L. J., explained in *Butler* v. *Butler* (16), the object of the special provision with regard to collusion is to compel the parties to come into the Court of Divorce with clean hands; it is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect, to oblige them so to act as to enable the Court to be in a position to do justice between the parties [*Bacon* v. *Bacon* (17), *Hunt* v. *Hunt* (18)]. On this principle it has been held that the bar of collusion applies, even though the parties concur in getting up a true case [*Midgley* v. *Wood* (19)] or even if the facts suppressed, though pertinent and material, would not have been sufficient to establish the counter-charge [*Hunt* v. *Hunt* (18)]. Similarly, it was ruled in *Churchward* v. *Churchward* (20) that if the initiation of a divorce suit be procured and its conduct provided for by agreement (specially if abstention from defence be a term), this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld.

It is impossible to bring the present case within the principle thus enunciated, because there was no compact not to defend, and there was no intention to conceal material facts from the Court. As regards desertion without excuse, the contention is based ou the circumstance that the petitioner had deliberately abstained from marital intercourse with the respondent for nine years without any reason to justify such conduct on his part. Reference has been made to the decision in *Synge* v. *Synge* (4) in support of the proposition that refusal of marital intercourse without excuse constitutes desertion in law. In my opinion, this contention is too broadly formulated and is not supported by the decision mentioned. In that case, the wife refused to submit to marital intercourse with her husband; he left her in consequence and subsequently committed adultery. The wife then petitioned for divorce on the ground of adultery and desertion. The Court refused the petition for dissolution of marriage. Sir Francis Jeune held in substance that a wife who, without causs, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him, if in consequence he refused to live with her. It is important to remember that under S. 27, Mrtrimonial Causes Act, 1857, it is necessary for the wife when she petitions for dissolution of marriage to prove adultery coupled with desertion without reasonable excuse on the part of the husband.

No doubt, there are observations in the judgment which may tend to support the view that the wife is herself in such circumstances guilty of desertion without reasonable excuse; but I do not think the judgment can be taken as an autho- for the broad principle that refusal of marital intercourse without excuse constitutes by itself desertion in law sufficient to justify a decree for dissolution of marriage. The question now in controversy has been the subject of elaborate investigation by the Courts of the United States and has led to considerable divergence of judicial opinion upon the construction of statutes of sub stantially the same scope as the Matrimonial Causes Act, 1857, and the Divorce Act, 1869. The prevailing view is that the term desertion as used in the Divorce Statutes does not include the mere unreasonable refusal of one spouse to have with the other matrimonial intercourse

13. (1861) 31 L J Mat 43.
14. (1859) 1 Sw & Tr 567=30 L J P 97.
15. (1861) 2 Sw & Tr 301=30 L J P 193.
16. (1890) 15 P D 66=59 L J P 25.
17. (1877) 25 W R 560.
18. (1877) 47 L J P 22=39 L T 45.
19. (1860) 30 L J P 57.
20. (1895) P 7=64 L J P 18.

which, in the words of Bigelow, C. J., in *Southwick* v. *Southwick* (21),

"would be merely a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract."

[*Fritts* v. *Fritts* (22), *Pfannebecker* v. *Pfannebecker* (23) and *Reynolds* v. *Reynolds* (24)]. Typical statements by the conflicting views may be found in the judgment of Peters, C. J., in *Stewart* v. *Stewart* (25) and of MacGill, Ch., in *Watson* v. *Watson* (26). The view of Peter, C. J., amplified is that marriages were encouraged (by Ecclesiastical law) for reasons of public policy and morality. If one party was impotent, that is, incapable of sexual intercourse, the marriage was held voidable, for the other party was not to be held in an unnatural relation, repugnant to sex, injurious to health and promotive of adultery. In our age and country, marriage is encouraged for the propagation of the race and the nurture and education of children in a home as well as the prevention of licentiousness; and the State has no active interest in preserving a marriage where these ends and purposes are defeated. If the impotence of a party defeats the purpose of marriage, it must be conceded that a wilful, coutinued, and unjustifiable refusal of sexual intercourse will do so, for what is the difference to the complaining party whether the other will not or cannot consent to marital intercourse? Chancellor Mc Gil, on the other hand, argues as follows:

"It would degrade the marriage relation to hold that it is abandoned when sexual intercourse only ceases. The lawfulness of that intercourse is, perhaps, a prominent and distinguishing feature of married life, but it is not the sum and all of it. The higher sentiment and duty of life, interest, sympathy and companionship have an important place in it, and the thousand ministrations to the physical comforts of the twain, by each in his or her sphere, in consideration of the marriage obligation and without ceaseless thought of pecuniary recompense fills it up. These latter factors may possibly to some extent exist in other relations of life but not in completeness. They are necessary to the perfect marriage relation. My opinion is that our Statute means that divorce may be had when substantially all of the duties and amenities shall have been abandoned by the guilty party, wilfully, continuedly and obstinately, for two years and not until then. In other words, the desertion must be complete, not partial; and when the party accused remains in discharge of any duties which rise in value above mere pretence and form, the desertion which the statute contemplates does not exist; that is, the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her."

Upon a careful consideration of these conflicting views, I am unable to accept the conclusion that a mere refusal of the matrimonial bed constitutes desertion and furnishes adequate ground for dissolution of marriage, though text writers of repute have strenuously maintained that position (Bishop's New Commentaries on Marriage, Divorce and Separation, Vol. 1, Ss. 1676-1686; Nelson on Divorce, Vol. 1, S. 71). I hold accordingly that the plea of desertion as a bar cannot be supported.

As regards the plea of wilful neglect or misconduct such as has conduced to the alleged adultery, the contention is based on the ground that when a husband has refused marital intercourse to his wife without reason, his conduct may be deemed to conduce to her adultery. Reference has been made in this connexion to the decision in *Dixon* v. *Dixon* (27). But there is weighty authority, based on obvious good sense, against this view. I need refer only to the decision of Sir Francis Jeune in *Synge* v. *Synge* (4), where he quoted with approval the well-known observation of Lord Stowell in *Forster* v. *Forster* (3):

"that this species of malicious desertion is a ground of divorce in some countries, certainly not so here and still less will it justify a wife in a resort to unlawful pleasures that lawful ones are withdrawn."

This is consistent with the observation of Sir C. Creswell in *Rowe* v. *Rowe* (28):

"there is no doubt, after the case of *Orme* v *Orme* (29), that although this Court enforces conjugal cohabitation it does not pretend to enforce marital intercourse; the reasons why it does not embark in such an attempt are sufficiently obvious."

I hold accordingly ,that the conduct of the husband in this case cannot be held to have been such as conduced to the misconduct of the wife. This plea like the others must be overruled as unsustainable. On these grounds I agree that the decree nisi must be confirmed and this appeal dismissed.

V.B./R.K. *Appeal dismissed.*

21. (1867) 97 Mass 327=93 Am Dec 95.
22. 138 Ill 486=28 N E 1054.
23. 133 Lo va 425=110 N W 618.
24. (1910) 68 W Va 15=69 S E 381.
25. 78 Maine 548=57 Am Rep 822.
26. 52 N J Eq 349.
27. (1892) 67 L T 394.
28. (1865) 4 Sw & Tr 162=34 L J P 111.
29. (1824) 2 Addam 334.

A. I. R. 1918 Calcutta 658

CHITTY, J.

Gregory Carapiet Balthazar and *another*—Plaintiffs.

v.

Samuel Balthazar and *others*—Defendants.

Originating Summons No. 38 of 1917, Decided on 12th March 1917.

Will— Construction — Decision held not res judicata as regards construction of will— Civil P. C. (1908), S. 11.

Where a freehold property was devised to trustees upon trust to pay the rents, income and profits thereof to the testator's two sons *G.* and *B.* during their respective lives in equal shares as tenants-in-common and to hold half of the corpus in trust for such persons as each of the sons shall by his will appoint and in default of such appointment, for his heirs, executors and administrators:

Held: that each of the sons took under the devise an absolute estate in a moiety of the property. [P 659 C 1]

In a previous suit filed in the chief Court of Lower Burma at Rangoon by the official assignee of the estate of *G.*, one of the two sons for the construction of the will in which the two sons and others were defendants, a consent decree was made by which it was declared that the official assignee was only entitled to a moiety or half share of the rents and profits of the said property during the life of the said G. without prejudice to the rights of any person in remainder claiming as appointee under his will or as his heirs, executors and administrators:

Held: that the consent decree did not operate as res judicata upon the question of the sons' rights under the will of their father. [P 659 C 1]

Offg. Advocate-General and *S. M. Bose* —for Plaintiffs.

S. R. Das - for Defendants.

Judgment.—This is an Originating summons for the construction of a clause in the will of Carapiet Balthazar, father of the plaintiffs. The defendants are the surviving executors and trustees of that Will. By that will, dated 9th December 1900, the testator directed (inter alia) as follows:

"I devise all my freehold property known as Balthazar's Buildings situate in Merchant Street and Shafraz Road in Rangoon aforesaid unto and to the use of my trustees upon trust to pay the rents, income and profits thereof to my said two sons (meaning thereby the plaintiffs) during their respective lives in equal shares as tenants-in-common, and, subject thereto, shall stand possessed of the said property known as Balthazar's Buildings as to one equal undivided half part or share thereof upon trust for such person or persons for such purposes and in such manner as my son the said Gregory Carapiet Balthazar shall by will or codicil appoint, and in default of and subject to any such appointment upon trust for the heirs, executors and administrators of my said son Gregory Carapiet Balthazar and as to the other equal undivided half part or share thereof upon trust for such person or persons for such purposes and in such a manner as my son, Balthazar Carapiet Balthazar, shall by will or codicil appoint and in default of and subject to any such appointment upon trust for the heirs, executors and adminisrrators of my said son Balthazar Carapiet Balthazar."

The facts are as stated in the plaint and I need not repeat them. At the hearing it transpired that there was a suit in the Chief Court of Lower Burma at Rangoon for the construction of this will, in which the official assignee was plaintiff and the present plaintiffs and others were defendants. I postponed my decision in this case until I had seen the proceedings in that suit. The prayer of that plaint was as follows:

1 "That this Honourable Court will be pleased to construe the said Will and settlement in respect more particularly to the following matters: (a) In the events which have happened, have all or any and, if so, which of the beneficiaries under the said will and settlement elected to abide by the will or the settlement and what is the effect of any such election. (b) What are the respective rights of the said beneficiaries under the said will and settlement in the events which have happened. (c) What is the effect of the insolvency of the said Gregory Carapiet Balthazar on the devise to him by the said will and on the power of appointment therein contained. (d) What estate or interest, present or future, has the plaintiff obtained by virtue of the insolvency of the said Gregory Carapiet Balthazar in all or any of the property subject to the will or settlement. (e) What are the rights, if any, of the plaintiff in respect of the execution of the power of appointment contained in the said will. (2) For a declaration of the share in the property subject to the said will and settlement to which the plaintiff, as assignee of the estate and effects of the said Gregory Carapiet Balthazar, is entitled."

A number of the defendants filed written statements and on 13th August 1909 by consent of the parties a decree was passed. The portions material for the present purpose are Cls. (2) and (3):

(2) "That the said G. C. Balthazar and defendant 7, i. e., B. C. Balthazar, have elected to take the benefits conferred upon them by the said will and are precluded from claiming any interest in the

said property (Balthazar's Buildings) otherwise than under the said will. (3) That the plaintiff, as assignee of the estate of the said G. C. Balthazar, is only entitled to a moiety or half share of the rents and the profits of the said property (Balthazar's Buildings) during the life of the said G. C. Balthazar without prejudice to the rights of any persons in remainder claiming as appointees under the will of the said G. C. Balthazar or as the heirs, executors and administrators of the said G. C. Balthazar."

Subsequently on 31st August 1909 the plaintiff G. C. Balthazar bought from the official assignee his brother's life-interest in the rents and profits. The contention of the plaintiffs is that under the gift they each took an absolute estate in a moiety of the property. I think that this is correct: see *London Chartered Bank of Australia* v. *Lempriere* (1), *In re Onslow, Plowden* v. *Gayford* (2). The case of B. C. Balthazar is plain. The only question is in the case of G. C. Balthazar whether it is affected by the insolvency proceedings or by the subsequent purchase by his brother B. C. Balthazar from the official assignee. On considering the matter, I hold that it is not. Both brothers are now before the Court as plaintiffs and it matters not that part of the estate of G. C. Balthazar has passed to B. C. Balthazar. Together they are entitled to the whole estate of G. C. Balthazar and that is by the form of the bequest an absolute estate. It was necessary to see what had taken place in Rangoon in order to ascertain whether any question of res judicata arose. I hold that in the circumstances it did not. I accordingly answer both the questions in the summons in the affirmative. Costs of all parties as between Attorney and client out of the estate. Counsel certified.

V.B./R.K. *Questions answered in the affirmative.*

1. (1873) 4 P C 572=17 E R 574.
2. (1888) 39 Ch. D 622.

A. I. R. 1918 Calcutta 659

CHATTERJEA AND RICHARDSON, JJ.

Abdul Majid Mian and *another*—Defendants—Appellants.

v.

Baksha Ali and *others*—Plaintiffs and Defendants—Respondents.

Appeal No. 1853 of 1914, Decided on 19th June 1917.

Limitation Act (1908), Art. 138—Third person in possession for more than 12 years—Suit for possession by execution purchaser within 12 years of sale does not save limitation.

The purchaser of a land at a sale in execution of a decree cannot, by bringing a suit for its possession within 12 years from the date of sale, save his claim from the bar of limitation, where the land purchased has been in the possession, not of the judgment-debtor, but of the defendants, from before the date of the sale and for a period of more than 12 years under an independent title.

[P 659 C 2]

A. K. Fazlul Huq for *Mahomed Mastapha Khan* and *Atendra Nath Mookherjee*—for Appellants.

Ramesh Chandra Sen—for Respondents.

Judgment—The question involved in this appeal is whether the lower appellate Court was right in holding that the suit was not barred by limitation. The plaintiff purchased the land in suit in the year 1901 and obtained symbolical possession in 1907. The present suit was instituted on 18th May 1912. Defendants 14 and 15, who are the appellants in this Court, pleaded that they had obtained a settlement of the land from the landlord in the year 1898 and had been in possession of the land ever since in their own right. The Court of first instance found that the plaintiff was never in possession and dismissed the suit. On appeal the learned District Judge was of opinion that the suit was not barred by limitation because it was instituted within 12 years of the date of the confirmation of sale. But if, as the defendants allege they were in possession of the land from before the date of the sale and for a period of 12 years under an independent title, the plaintiff's claim cannot be saved from limitation merely because he brought the suit within 12 years of the date of the sale. Art. 138, Lim. Act, prescribes a period of 12 years from the date of the sale for a suit by a purchaser of land at a sale in execution of a decree for possession of the purchased land when the judgment-debtor was in possession at the date of the sale. It is necessary, therefore, to find whether the judgment-debtors whose interest the plaintiff purchased at the execution sale was in possession, or whether defendants 14 and 15 were in possession from before the date of the sale under an independent title. The decree of the lower appellate Court must be set aside and the case sent back to that Court

in order that the question may be decided in the light of the observations made above and the appeal disposed of accordingly. Costs will abide the result.

V.B./R.K. *Decree set aside.*

A. I. R. 1918 Calcutta 660

SANDERSON, C. J. AND TEUNON, J.

Abdul Wahed Khan— Plaintiff —Appellant.

v.

Natabar Ghose and *others*—Defendants —Respondents.

Letters Patent Appeal No. 117 of 1916, Decided on 29th August 1917, against decree of Newbould, J., D/- 27th April 1916.

Landlord and Tenant— Tenancy — Origin in obscurity—Conduct and surrounding circumstances may be considered to determine its nature.

Where the question is whether a tenancy is a tenure or raiyati holding and the origin of the tenancy is hidden in obscurity the subsequent conduct of the parties and the surrounding circumstances may be considered for the purpose of drawing an inference as to the nature of the tenancy in its inception. [P 660 C 2]

Satcowripati Roy—for Appellant.

Mohini Mohan Chatterji—ior Respondents.

Sanderson, C. J.—This is an appeal by the plaintiff from the decision of Newbould, J., whereby he affirmed the judgment of the District Judge. The suit was for the khas possession of certain land by ejecting the defendants on whom, the plaintiff said, he had served notice under S. 49, Ben. Ten. Act. The plaintiff alleged that he was a raiyat and that the defendants were under-raiyats. The dedefendant's case was that they were not under-raiyats, that they themselves were raiyats and the plaintiff was a tenure-holder. Their further defence was that even if they were under-raiyats, notice had not been served upon them. The learned District Judge came to the conclusion that the notice had not been served and secondly, that the defendants were raiyats and consequently could not be evicted. Now in this Court it is admitted that the appeal must be dismissed because proper notice was not served upon the defendants. even if they were under-raiyats. But it was urged by the learned vakil for the appellant that if the finding of the learned Judge that the defendants were raiyats and the plaintiff was a tenure holder was allowed to stand it would prejudice the plaintiff in any future proceedings which might have to be taken. Consequently, the point has been argued.

As I have said there is no doubt about the result of this appeal, because it must be dismissed on the ground of the non-service of notice. But with regard to the other point, namely, whether the plaintiff was a raiyat or a tenure-holder and the defendants were raiyats or under-raiyats, in my judgment this matter ought to be left open for decision in the future if it becomes necessary; and the reason for my conclusion is that I do not think that the conclusion of the District Judge has been arrived at upon a proper principle. It is common ground that the origin of the plaintiff's tenancy is hidden in obscurity and that being so, the subsequent conduct of the parties may be considered for the purpose of drawing an inference as to the nature of the tenancy in its inception. This was laid down in *Mohesh Jha* v. *Manbharan Mia* (1) (the case was dealing with a document):

"The jote extends over 300 bighas and although permission is given to her to cultivate herself or to get the lands cultivated, it is at the best an ambiguous document; and what the Courts have to see is how, since the grant was made, the parties have chosen to deal with the lands.

I pause there for one moment and say, for what purpose? What is the purpose of seeing how the parties have chosen to deal with the land? We are to look at she surrounding circumstances and see how the parties have chosen to deal with the lands, for the purpose of drawing an inference as to what was the tenancy in its inception. Again that point was made clear by the decision to which my learned brother, Teunon, J., was a party in the case of *Pramotha Nath Kumar* v. *Nilmoni Kumar* (2). In dealing with the case of *Midnapur Zemindary Company* v. *Bamapada Roy* (3), the learned Judges said:

"The learned Judges who decided that case merely laid down that if the terms of the original grant are ambiguous, the subsequent conduct of the parties may be looked into to ascertain the nature of the tenancy in its inception,'',

So in this case I think the origin of the tenancy being lost in obscurity, it was open to the learned Judge to inquire into the conduct of the parties for the

1. (1907) 5 C L J 522.
2 (1911) 10 I C 431.
3. (1911) 10 I C 430.

purpose of ascertrining the nature of the tenancy in its inception. But it does not seem that he has done that because he says:

"For the above reasons I would agree with the lower Court that so far as the Dutts and the defendants are concerned the former converted themselves into rent receivers by their conduct over a lengthy period and they (so far as defendants are concerned), and consequently their successor (the plaintiff), must be regarded as tenure-holders."

That judgment I think is consistent with the learned Judge's thinking that the Dutts were originally raiyats but that they had by their conduct shown that they had converted themselves from the status of raiyats into that of tenure-holders. In my judgment inasmuch as his judgment is consistent with this view the safest thing to say is that this point which has arisen between the plaintiff and the defendants ought to be left open so that it may be decided in future if it becomes necessary, and the plaintiff ought not to be debarred by the finding of the lower appellate Court on the point. Subject to this observation, the appeal must be dismissed with costs on the ground that no notice was served upon the defendants.

Teunon, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 661

FLETCHER AND NEWBOULD, JJ.

Bhudhar Chandra Roy Chowdhury—Plaintiff—Appellant.

v.

Nanda Lal Roy and *others*—Defendants—Respondents.

Appeal No. 3184 of 1917, Decided on 15th June 1917, from appellate decree of Dist. Judge, 24 Parganas, D/- 5th August 1915.

Bengal Tenancy Act (1885), S. 30 (b)—Suit for enhancement of rent on ground of rise in prices in food crops—Landlord is not bound to prove price of crops at inception of tenancy.

In a suit for enhancement of rent on the ground that there has been a rise in the average local prices of staple food crops during the currency of the present rent, it is not incumbent upon the landlord, in order to enable him to get a decree for increased rent under the provisions of S. 30, sub-S. (b), to prove by positive evidence what was the value of the staple food crops at the date of the inception of the tenancy in order to enable the Court to compare that value with the current list of prices kept by the Government under the provisions of the Bengal Tenancy Act.

[P 661 C 2]

Amarendra Nath Bose—for Appellant.

Fletcher, J.—This is an appeal by the plaintiff against a judgment of the learned District Judge of the 24 Parganas, dated 5th August 1915, modifying the decision of the Assistant Settlement Officer of the same District. The suit was brought by the plaintiff for enhancement of rent on the ground that there had been a rise in the average local prices of staple food crops during the currency of the present rent. The tenancy, as found by the learned Judge, was created in the year 1848, and the view that the learned Judge has taken is this, that in order to enable a landlord to claim an increased rent under the provisions of S. 30, sub-S. (b), Ben. Ten. Act, the landlord must prove by positive evidence what was the value of staple food crops at the date of the inception of the tenancy, so that the Court could compare those prices when so proved with the current list that is kept by the Government under the provisions of the Bengal Tenancy Act and decide whether the landlord should or should not have an increase of rent. That seems to me to be an impossible view to take. First of all, it is not workable. Secondly, all these tenancies came into existence earlier than 1848 and it is quite impossible for a landlord to undertake to prove what were the local prices of staple food crops at the inception of the tenancy.

The learned Judge ought not to have confined himself to this one section. If he had referred to the Act he would have seen what the Courts do in a case that came under S. 30 (b), Ben Ten. Act. S. 32 coupled with S. 37 shows quite clearly what the Judge has to do and the limit of the time within which rent can be enhanced. There is no difficulty in a case like this. It was never intended that the landlord should be bound to prove what the local prices in the year 1848 were and the Court should compare those prices with the local prices in the year 1915. Evidence as to the local prices in the year 1848 may not be available now.

It is highly possible that such records do not exist. That is a matter not provided for in S. 32, Ben. Ten. Act. The case must therefore go back to the lower appellate Court for the learned Judge there to re-hear the appeal having regard to the observations that have already been made. The learned Judge

will deal with the costs of the parties when he re-hears the appeal.

Newbould, J.—I agree.

V.B. R.K. *Case remanded.*

A. I. R. 1918 Calcutta 662 (1)

WALSMLEY AND PANTON, JJ.

Indra Narain Das and *another*—Plaintiffs—Appellants.

v.

Badan Chandra Das and *others*—Defendants—Respondents.

Appeal No. 304 of 1917, Decided on 27th June 1918, from Appellate decree of Sub-Judge, 5th Court, Midnapore, D/- 8th November 1916.

Vendor and Purchaser — Conveyance stipulating that on purchaser being dispossessed, vendor would not be liable—Failure of purchaser to get possession—Purchaser was not entitled to refund of purchase-money.

Plaintiff made a speculative purchase of a piece of land from the defendant. The latter protected himself by inserting a clause in the conveyance to the effect that if the plaintiff was dispossessed by anybody other than the vendor defendant the latter would not be liable to the purchaser:

Held: that on his failure to get possession of the land the plaintiff was not entitled to a refund of the purchase-money. [P 662 C 1, 2]

Jyotish Chandra Hazra and *Mohini Mohan Bose*—for Appellants.

Saroda Charan Maity and *Bhupendra Kumar Ghose*—for Respondents.

Facts.—One Kailashi Dasi, defendant 3 in the present case, sold the disputed land to Haradhan Das, defendant 4, for legal necessity while her son, Issar defendant 2, was a minor, and possession was delivered to him (defendant 4). Issar on attaining majority, sold the same land to Badan Das, defendant 1, who again sold it to the plaintiffs, Indra Das and another. There was a clause in the kobala executed by Badan, defendant 1, in favour of the plaintiffs to the effect that defendant 1, would be liable to refund the consideration money or to pay compensation only in the event of the plaintiffs' failure to get possession by reason of any act done by defendant 1 and not by any act of a third party. The plaintiffs brought this suit for possession of the disputed land and, in the alternative, or refund of the purchase-money. The suit was dismissed by both the Courts below. Hence this appeal.

Walmsley, J.—The plaintiff-appellant made a speculative purchase of the land from defendant 1. The latter protected himself by inserting a clause in the kobala to the effect that if the plaintiff-purchaser was dispossessed by anybody other than the vendor the vendor would not be liable to the purchaser. The learned Subordinate Judge held that effect should be given to the saving clause, and I think he was correct. The appeal is dismissed with costs—one set to defendant 1, and one set to defendant 4, who appear by different vakils.

Panton, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 662 (2)

TEUNON AND SHAMSUL HUDA, JJ.

Hazari Khan and *others*—Petitioners.

v.

Nafer Chandra Pal Chowdhury and *others*—Opposite Parties.

Criminal Revn. No. 555 of 1917, Decided on 8th June 1917, against order of Dist. Magistrate, Nadia.

Criminal P. C. (1898), S. 145—Symbolical possession of holding delivered to party before institution of proceedings in respect of that holding—Evidence of actual possession on date of proceedings cannot be discarded.

Where symbolical possession of a holding was delivered to a party on 2nd June 1915 and proceedings under S. 145, in respect of the same holding were instituted in November 1916:

Held: that it was incumbent on the Magistrate to go into the question of actual possession between those two dates and consider the evidence tendered by the parties on that question before he could properly pass a final order under S. 145, Criminal P. C., and that it was not competent to him to wholly discard and leave out of consideration the evidence of actual possession on the date on which the proceedings were instituted. [P 663 C 1]

Gurudas Sinha—for Petitioners.

Manmatha Nath Mukerjee for *Amarendra Nath Bose* and *Monmotho Nath Pal*—for Opposite Parties.

Judgment.—This is a Rule calling upon the District Magistrate of Nadia and the second party to proceedings under S. 145 Criminal P. C. to show cause why the final order that was made under that section should not be set aside on certain grounds. It appears that the members of the second party obtained a money decree against one Nabai Khan and three others, his sons, and that in execution of that decree certain holdings alleged to be the property of Nabai Khan were put up for sale and purchased by the second party. One of the holdings so put up for sale is described as the kunjimari khal and four connected jalkars with a rental of Rs. 3 and it appears that in pursuance of the

sale, delivery of possession was taken through the civil Court on 22nd June 1915. The case for the first party was that this khal and its connected jalkars did not in fact belong to Nabai Khan personally but were the property of practically the whole body of villagers, Nabai Khan and Sabdul Khan being entered in the zamindar's sherista as representative tenants. Their case then was that the possession given in 15th July to the zamindar of the second party in no way affected their rights and did not in fact affect their possession, which continued as before from June 1915 upto November 1916 when these proceedings were instituted.

From the judgment delivered by the trying Magistrate it is quite clear that he did not appreciate the case set up by the 1st party, and in making his order he has proceeded solely upon the symbolical possession given to Nafer Chandra Pal, the leading member of the second party, on 22nd June 1915. But the possession thus given is obviously of little value as against parties who set up an independent title, and even as against Nabai Khan and his descendants, the value of the decree and of the delivery of possession as a piece of evidence must vary inversely with the time that has elapsed since the date of the decree and the delivery of possession thereunder. As we have said, that delivery of possession was in June 1915, and the present proceedings were instituted in November 1916. It was obviously incumbent on the Magistrate to go into the question of actual possession between those miscellaneous dates and consider the evidence tendered by the parties on that question before he could properly pass a final order under S. 145, Criminal P. C. There can be no question that the petitioners have been seriously prejudiced by the way in which the trial has been held and by the way in which the trying Magistrate has wholly discarded and left out of consideration the evidence of actual possession on the date on which the proceedings were instituted. That being so, we set aside the order complained of and we direct that the proceedings be re-heard from the point at which the taking of evidence was completed in the Court of the trying Magistrate. But having regard to the period of time that has elapsed, it will be open to either party to adduce further evidence as to possession and also, if they are so advised, evidence going to show under sub-S. (5) S. 145, Criminal P. C., that no dispute likely to lead to a branch of the peace now exists.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 663

TEUNON AND CHAUDHURI, JJ.

Alec Aran Cohen—Complainant—Petitioner.

v.

Sasi Bhusan Das Gupta and *another*—Accused—Opposite Parties.

Criminal Revn. No. 61 of 1917, Decided on 9th February 1917, against order of 4th Presy. Magistrate, Calcutta.

(a) Penal Code (1860), S. 406—Car disposed of in contravention of hire purchase agreement—Merger of agreement in decree of Court—No lien declared by Court on car—Offence under S. 406 is not committed.

The accused obtained a motor car from the complainant on a hire-purchase agreement, stipulating that so long as the whole amount of the price was not paid, the car would remain the absolute property of the complainant and that the accused would not in any way dispose of it. The complainant brought a suit for the recovery of the price still remaining due under the agreement and got a decree for a certain sum with costs, but no lien on the car was declared by the Court. Soon after this decree the accused sold away the car:

Held: that the accused in disposing of the car in contravention of the original hire-purchase agreement did not commit an offence under S. 403, I. P. C., as the original contract was merged in the decree of the Civil Court.

[P 664 C 2]

(b) Penal Code (1860), S. 206—Offence under S. 206 held probable.

Semble.—The act of the accused in disposing of the car in contravention of the hire purchase agreement after decree of Court on suit for amount due when the Court did not declare any lien on the car might amount to an offence under S. 206, I. P. C., for which proceedings might be taken by the complainant against the accused on getting sanction from the Court which made the decree. [P 664 C 2]

Manmotha Nath Mookerjee—for Petitioner.

S. K. Sen and *Probodh Chandra Chatterjee* and *Surendra Kumar Bose*—for Opposite Parties.

FACTS material to the report will appear from the following portion of the verified petition of the complainant:

(1) That in December 1915 the accused above named took a motor car from your petitioner on the hire-purchase system, the price settled being Rs. 3,250, of which he paid Rs. 400 on 14th November 1915, and Rs. 300 on 1st December 1915,

and he took possession of the car agreeing to pay the balance by weekly instalments of Rs. 60 and executing a bond therefor; (2) That in the said bond the said accused made the following stipulation: "Failing payment of any four consecutive instalments, the bill to become due at once and for such consideration I do further agree that the motor car shall remain their absolute property till such time and period as the balance is liquidated in full. That I further undertake not to part with the possession of the said motor car, do or suffer anything to be done whereby the same may be distrained or taken in execution, or deal with the motor car otherwise than in the usual course of my business": (3) That the said accused having stopped payment of the instalments stipulated by him, your petitioner instituted a suit in the Original Side of the Hon'ble High Court for the money due and obtained a decree in May 1916: (4) That thereafter when your petitioner went to attach the said motor car, he came to know that the accused had sold the car to Sheik Samir above named on or about 24th June 1916 accepting Rs. 1,300 only as the price therefor: (5) That your petitioner thereafter instituted a complaint in the Court of the Chief Presidency Magistrate, Calcutta, charging the accused Sasi Bhusan Das Gupta aforesaid with an offence under S. 406, I. P. C., and your petitioner obtained a search warrant from the said Court in execution of which the car was brought before the Court where it is now lying; (6) That the case was tried by Mr. K. B. Das Gupta, Presidency Magistrate, who on 4th January 1916 examined your petitioner and the aforesaid Sheik Samir as a witness called by the Court, and discharged the accused under S. 253, Criminal P. C., and made an order directing the car to be made over to the aforesaid Sheik Samir."

* * * The order of the Presidency Magistrate was in these terms: "I find from the judgment of the Hon'ble Judge of the High Court of 19th May 1916 that it was held by the Hon'ble Judge that it was an executed contract of sale under which the accused took the car from the complainant. After the case was disposed of in the High Court, the accused sold the car to Sheik Samir. He sold it knowing that it was his property. So I cannot find that he dishonestly disposed of it. The case for the prosecution thus fails. The accused is discharged." The decree of the Hon'ble High Court referred to in para 3 of the petition was in these terms: "* * * It is ordered and decreed that the defendant do pay to the plaintiff the sum of Rs. 2,310 with interest thereon at the rate of 6 per cent. per annum from the date hereof until realisation. * * *"

Judgment.— This Rule is directed against an order of the Fourth Presidency Magistrate by which he discharged the accused person under the provisions of S. 253, Criminal P. C. The complainant in the case was one A. A. Cohen, and it appears that on what may be described as a hire-purchase agreement the accused opposite party has obtained from him a motor car. A sum of Rs. 2,310 remained due upon the car, and in that state of things the complainant brought a suit on the Original Side of this Court, praying inter alia for the appointment of a Receiver and the issue of an injunction. He obtained a decree directing payment by the defendant in that suit of the sum of Rs. 2,310 and also costs. No lien on the car was declared; and it would seem that the prayer for the issue of an injunction and the appointment of Receiver was refused. Before the Presidency Magistrate the complainant brought his suit on the footing that the car was still his property, and that in disposing of the car in contravention of the terms of the original contract the accused person had acted dishonestly. But it appears to us that the original contract has been merged in the decree, and it is, therefore, rather difficult to say at the present stage that the car still remains the property of the complainant.

We are, therefore, unable to make this Rule absolute. But we leave it open to the complainant to apply for sanction to the Court which made the decree to the taking of proceedings in view of the provisions of S. 206, I. P. C., or to take such other steps as he may be advised. In these terms this Rule is discharged.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 665 (1)

FLETCHER AND SHAMSUL HUDA, JJ.

Monindra Nath Chowdhuri and *another*—Defendants—Appellants.

v.

Radha Prosanna Gon and *another*—Plaintiffs—Respondents.

Appeal No. 2011 of 1916, Decided on 5th June 1918, from appellate decree of Sub-Judge, Second Court, Burdwan, D/- 14th July 1916.

(a) Transfer of Property Act (4 of 1882), S. 106—S. 106 applies in absence of contract.

The provisions for serving a notice to quit on a lessee were inserted in the Transfer of Property Act to provide for cases where the parties to the lease are not regulated by their contract.

[P 665 C 2]

(b) Transfer of Property Act (4 of 1882), S. 106—Lease providing for re-entry at any moment on payment of compensation—Notice to quit is not necessary.

Where a lease itself provides that the landlord may at any moment resume possession of the land on payment of the full compensation to the lessee for the buildings he may have erected thereon, there is no necessity for giving a notice to quit under S. 106, T. P. Act, in order to entitle the landlord to get back khas possession of the land.

[P 665 C 2]

Hira Lal Sanyal—for Appellants.

Jadunath Kanjilal—for Respondents.

Fletcher, J.—This is an appeal by defendants 2 and 3 against the judgment of the learned Subordinate Judge of Burdwan, dated 14th July 1916, affirming the decision of the Munsif of the same place. The suit was brought for ejectment. The defendants are the original tenant and the two transferees. No notice to quit was served on defendants 2 and 3 under the provisions of S. 106, T. P. Act. The learned Judge considered that the covenant restricting alienation in the lease was binding and, therefore, defendants 2 and 3 were trespassers and had no interest. It is not necessary for us to go into that question. The case is a perfectly simple one on the terms of the lease. It was a lease to defendant 1 for the purpose of building a pucca house on the land. The lease provided that, if the landlord desired to resume possession of the land, he could do so provided he paid for the value of the building; that means the buildings that were to be erected in accordance with the proper provision in the lease. There are no buildings on the land within the meaning of the prior provision of the lease, because they were all swept away by flood. The present buildings are huts and walls not coming within the meaning of the purpose for which the lease was granted. The landlord can, therefore take possession of the land at any time upon paying compensation, if any.

It is said that he cannot take possession without giving notice. That is absurd. The parties must stick to the bargain made and if defendant 1 thought it worth his while to take lease of a piece of land within the limits of the Municipality of Burdwan at a rent of 12 annas a year subject to the provision that the landlord might at any moment retake possession on payment of full compensation for the buildings, then he must stand strictly to that bargain however inconvenient that may be. There are no provisions in the Transfer of Property Act requiring notice to be given in such a case. Those provisions for notice were inserted there to provide for cases where the parties are not regulated by their contracts. It is quite clear that the landlord in this case is entitled to resume possession. The suggested hardship on the defendants in having to deliver possession at any moment is considerably discounted when the fact is taken into consideration that for four years by resisting the plaintiffs' just claim the defendants have managed to maintain possession of this land in the town of Burdwan at a rent of 12 annas per annum contrary to the terms of the lease. I am not disposed, as at present advised, to disagree with the reasons given by the learned Subordinate Judge in his judgment, and I agree with the conclusion arrived at by him. The present appeal, therefore, fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 665 (2)

FLETCHER AND NEWBOULD, JJ.

Rashed Kazi—Defendant—Appellant.

v

Pachoo Sardar—Plaintiff — Respondent.

Appeal No. 1779 of 1916, Decided on 18th July 1917, from appellate decree of Dist. Judge, Khulna, D/- 25th July 1916.

(a) Bengal Tenancy Act (8 of 1885), Ss. 49 and 85—Permanent sub-lease by raiyat is invalid and not admissible in evidence—Sub-lessee can be ejected by notice under S. 49 (b).

A permanent sub-lease granted by a raiyat is inadmissible in evidence, even though some

money or some rent has been paid by way of part performance under the terms of the document. [P 666 C 1,2]

Therefore, the rights of the parties cannot be adjudicated on with reference to it, and consequently a raiyat who has granted a permanent sub-lease can eject the sub-lessee by a notice to quit under S. 49 (b), Ben. Ten. Act: 15 *I C* 476; 18 *I C* 791 and 29 *I C* 879, *Foll.* [P 666 C 2]

(b) Lease — Raiyat — **Raiyat can grant permanent sub-lease if allowed by custom —Burden of proof of custom is on sub-lessee—Raiyat at fixed rent can grant such lease.**

A raiyat may by custom have a right to create a permanent sub-lease and a permanent sub-lease so created is not inadmissible in evidence, but the party who wants to prove it must establish the custom before it is admitted in evidence. [P 667 C 1]

Semble.—A raiyat holding at a fixed rate of rent is competent to create a permanent under-lease. [P 667 C 1]

Jadunath Kanjilal—for Appellant.

Narendra Kumar Bose—for Respondent.

Fletcher, J.—This is an appeal by the defendant against a judgment of the learned District Judge of Khulna, dated 25th July 1916, affirming the decision of the Munsif at Bagarhat. The suit was a suit brought by a raiyat to eject an under-raiyat. The defence was that the defendant held under a permanent sub-lease. The question as to the validity of a document like this between a raiyat and an under-raiyat has been the subject of judicial decision on many occasions in this Court. The later course of decisions, however, turns on a point that did not find a place nor was considered in the earlier judgments. The earlier judgments were not all one way, but there was no doubt a considerable body of authority for saying that the under-lease was good between the raiyat and the under-raiyat. The later cases, as I have said, were decided on different grounds, and they were decided on this ground that the under-lease was inadmissible in evidence and could not be looked at to enable the Court to adjudicate on the rights of the parties.

The first case in which that view was taken was the case of *Jarip Khan* v. *Durfa Bewa* (1). That was followed in the case of *Telam Pramanik* v. *Abu Sheik* (2). The latter case is interesting, because the Senior Judge on the Bench who decided the case of *Telam Pramanik* v. *Abu Sheik* (2) was Carnduff, J., who had been a party to one of the decisions that are principally relied on by the appellant's vakil in this case. The case was further followed in *Mohim Chandra Dey* v. *Baidya Nath Kapali* (3) As far as I know, after the date of the decision of the case of *Jarip Khan* v. *Durfa Bewa* (1), there is no case in which it has been held that a permanent sub-lease granted by a raiyat is admissible in evidence. If it is not admissible in evidence the rights of the parties cannot be adjudicated on with reference to that document. We have been asked to refer the case to a Full Bench. But the decision in *Jarip Khan* v. *Durfa Bewa* (1) has been followed on more than one occasion and the learned Judges who decided the subsequent cases did not consider that the point required the decision of a Full Bench. The learned Judges, I suppose, who decided these cases came to the conclusion that this point was a new point that had not been before the Court in the earlier cases and that, if it had been, the Court would have arrived at a different conclusion. However, as the other Benches consisting of other learned Judges saw no difficulty in following the case of *Jarip Khan* v. *Durfa Bewa* (1) in other cases, I do not think we ought to refer that matter to a Full Bench.

The next point that has been raised would seem to be a much better point if disentangled from the agrument made by the learned vakil for the appellant with regard to it. The present plaintiff stated that within the jurisdiction of a particular Police station there was a kaimi jama belonging to the plaintiff. The suggestion was put forward before us that kaimi jama meant fixed rent. A fixed rent could not be within the limits of the jurisdiction of a Police station. It obviously meant that there was a permanent holding. The point that has been made is this: That the lower appellate Court has only found the plaintiff in the present case to be a raiyat. It may be said that he was raiyat holding at a fixed rate of rent and, if he was a raiyat holding at a fixed rate of rent, he would be able to create a permanent under lease having regard to the terms of S. 18 and S. 85, Ben. Ten. Act. In support of that Dr. Kanjilal relied on the case of *Hari*

1. (1912) 15 I C 476.
2. (1913) 18 I C 791.
3. (1915) 29 I C 879.

Mohan Pal v. *Atul Krishna Bose* (4). That, I think, would have been the best point in the case if it had been raised in the grounds of appeal either here or in the lower appellate Court. The learned gentlemen who drew up the grounds of appeal in the lower appellate Court and this Court did not challenge the judgment appealed against on the ground that it was erroneous in finding that the plaintiff was a raiyat and therefore not able to grant a permanent lease but their ground of appeal was that the plaintiff ought to have been found to be a tenure-holder and the defendant a raiyat. We cannot go into this point which has never been gone into during the course of these proceedings.

There is another point that Dr. Kanjilal seems to have placed much stress on, and that is the question as regards the admissibility of the permanent under lease in evidence. Dr. Kanjilal's view is this; that although the three decisions that I have already referred to state that the document is not admissible in evidence, that decision is subject to this qualification that a raiyat may by custom have a right to create a permanent under lease. It is clear that he may have. Dr. Kanjilal's view is therefore that first the lease ought to be given in evidence and then it ought to be seen whether the custom to grant a permanent sub-lease has or has not been established. With all due respect, that seems to me to be placing the cart before the horse, that is not the regular way in which judicial proceedings are conducted that the Court should, first of all, let in all documents that are prima facie inadmissible in evidence and then see whether a party can establish certain particular exceptions which would entitle him to give in evidence documents which under the general rule are not admissible. It is clear and well established in the course of proceedings in Courts of law that a party should, first of all, give prima facie proof entitling him to give a document in evidence. You cannot hand over a document and read it and then say that the document is admissible in evidence. The last point is as regards Ex. A, a lease which cannot be looked at. It is said that the defect, if any, is cured by part performance and therefore the Court ought to admit the document in evidence. That document, according to the view that has been taken in the case, is not admissible in evidence. Because some money or some rent has been paid under the terms of that document does not assist the appellant at all. An under-raiyati tenancy is liable to be determined by notice to quit and it has been found in this case that such notice has been given. The present appeal fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

4. (1916) 32 I C 503.

A. I. R. 1918 Calcutta 667

FLETCHER AND NEWBOULD, JJ.

Hasiswari Debi—Plaintiff—Appellant.

v.

Hari Nath Chakervarty—Defendant—Respondent.

Appeal No. 2732 of 1915, Decided on on 23rd April 1917, from appellate decree of Addl. Sub-Judge, Jessore, D/- 15th July 1915.

Landlord and Tenant—Permanent tenure—Registered lease is necessary.

A permanent tenure cannot be created under the Bengal Tenancy Act or any other Act except by a registered instrument, even where the land is agricultural land situate outside a town and let out for the purpose of growing thatching grass.

[P 667 C 2]

Therefore a person who enters upon land as a tenant, cannot set up a permanent tenure unless his lease is registered in accordance with law.

[P 667 C 2]

Hamenara Chandra Sen—for Appellant.

Hiralall Chakerbutty—for Respondent.

Fletcher, J.—This appeal must be dismissed. The first point that has been made is that, though this document which created the permanent tenure required registration under the provisions of the Registration Act, yet because the land was a land situated outside the town and let out for the purpose of growing thatching grass therefore the interest of the plaintiff that was a permanent interest could have been created without a registered document. I do not agree with that view. This is not a raiyati holding, nor is it one in which the plaintiff could have acquired a right of occupancy. It is merely a permanent tenure of this small piece of land, and one cannot get a permanent tenure under the Bengal Tenancy Act or under any other Act except by a registered document. The learned vakil, who has argued the appeal on behalf of the plaintiff-appellant, thinks that when-

ever the land is an agricultural land one can get a permanent tenure without a registered document. It is quite true that one can get an interest as a raiyat by way of occupancy.

The other point as to the case of adverse possession has got no foundation at all. The plaintiff's case is that she entered upon the property as a tenant. She has not been able to prove that she was a permanent tenant, because the law requires that in such a case the lease should be registered. She says that her case is that at the time she entered into possession as tenant her possession became adverse Obviously, that is not so. The appeal fails and is dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 668

TEUNON AND RICHARDSON, JJ.

Udai Narain Gain—Petitioner.

v.

Ramanath Midda—Opposite Party.

Criminal Revn. No. 442 of 1917, Decided on 24th May 1917.

(a) **Execution — Land delivered — Crops growing on land also pass with it**

Where in execution of a decree in title suit, possession of land is given to the decree-holder, the growing crops pass with the land. [P 668 C 2]

(b) **Penal Code (1860), S. 379—Mistake of law as to accused's right to property—He cannot be convicted of theft.**

The accused, having cut and removed paddy from a land of which possession had been delivered to the complainant in execution of a decree in a title suit, was prosecuted for theft, but was acquitted by the Magistrate on the ground that he had grown the paddy prior to the delivery of possession:

Held: (1) that the case had not been properly tried and, therefore, the order of acquittal could not stand;

(2) that the case should be re-tried but that the accused should not be convicted of theft if it was proved that though he may have made a mistake as to his rights under the law, he was acting in the exercise of a bona fide claim of right. [P 668 C 2; P 669 C 1]

Bejoy Kumar Chatterjee—for Petitioner.

Satis Chandra Ghose, Manmotha Nath Mukherjee, Aruna Chandra Ghose—for Opposite Party.

FACTS of the case material to this report are as follows:

The petitioner, after having obtained a settlement from his landlord on payment of the proper selami, had been in possession of the disputed plot of land as tenant till 1912. After the death of the landlord, his son illegally settled the land with the accused who dispossessed the petitioner. Thereupon the petitioner brought a title suit against the accused in the Civil Court, and the Civil Court found that the petitioner was a tenant in possession of the land after having obtained settlement from the landlord on payment of a selami of Rs. 600 and that the defendant wrongfully dispossessed the petitioner. The petitioner obtained peaceful possession of the land through the civil Court peon. Thereafter the accused entered upon the land armed with lathis and other weapons, and forcibly cut away paddy growing on the land. The petitioner prosecuted the accused for criminal trespass, rioting and forcibly removing the paddy and causing hurt. The accused admitted having taken away the paddy but stated further that the paddy was grown by him before the delivery of possession to the petitioner. The Magistrate apparently believed the prosecution story that the accused carried away the paddy by force, but came to the conclusion that he did not commit any offence thereby inasmuch as the paddy was grown by the accused and acquitted the accused under S. 258, Crimidal P. C. Against that order of acquittal the petitioner moved the High Court.

Judgment.—This case arises out of a dispute regarding apparently 9 bighas of land. The Magistrate appears to have found that as a matter of fact in a suit brought by the complainant against the accused for declaration of his title to and recovery of possession of the said land, the complainant was successful. In execution of that decree the complainant obtained possession from the Court. Thereafter the accused, opposite party, removed from the land, the possession of which had been given to the complainant, the crop that the accused had grown thereon. The charges brought against the accused were charges of rioting and charges of theft. The charge of rioting has not been considered by the Magistrate, and in so far as the charge of theft is concerned, the learned Magistrate has acquitted the accused on the ground that he had grown the crop prior to the delivery of possession. In this clearly he has fallen into a mistake of law. Where in execution of a decree in a title suit possession of land is given, the growing crop passes with the land. In that view of the matter it is quite clear that this case has not been properly

tried, and we, therefore, set aside the order complained of and direct that the complainant's complaint be further enquired into and the case against the accused opposite party re-tried. On the re-trial, of course, care will have to be taken not to convict the accused of theft, should it be found that though he may have made a mistake as to his rights under the law, he was yet acting in the exercise of a bona fide claim of right.

V.B./R.K. *Order set aside.*

A. I. R. 1918 Calcutta 669

CHATTERJEE AND NEWBOULD, JJ.

Zamir Munshi — Defendant—Appellant.

v.

Bisseswari Debya Chowdhurain and *others*—Plaintiffs—Respondents.

Appeal No. 18 of 1914, Decided on 30th January 1917, from appellate decree of Offg. Sub. Judge, Third Court, Mymensingh, D/- 8th September 1913.

(a) Occupancy holding — Non-transferable —Surrender of portion after transfer of same is invalid—Transferee cannot be ejected.

Per *Chatterjee, J.*—A tenant has no right to surrender a portion of a non-transferable occupancy holding after he has transferred the same to a purchaser, and the landlord has no right to eject such purchaser on accepting such surrender. [P 670 C 1]

(b) Bengal Tenancy Act (1885), S. 86 (6) —Transfer of portion is not incumbrance on tenancy.

Per *Newbould, J.*—A sale of a portion of a non-transferable holding does not create an incumbrance on the tenancy within the meaning of S. 86 (6). [P 670 C 2; P 671 C 1]

(c) Occupancy — Transferable — Position of tenant is similar to English tenant with covenant against transfer.

The position of a tenant of a holding not transferable without the landlord's consent is similar to that of an English tenant, who has made a covenant not to transfer. [P 670 C 2]

(d) Landlord and tenant—Relinquishment —Implied—Surrender of portion transferred and then acceptance of new settlement of remainder implies relinquishment of whole.

Where a tenant, after having transferred a portion of an occupancy holding not transferable by custom, surrenders that portion to the landlord, and takes a new settlement of the remainder of the holding, his act operates in law as an implied relinquishment of the holding, so as to entitle the landlord to eject the purchaser of the portion. [P 672 C 1]

Bimal Chunder Das Gupta—for Appellant.

Dwarka Nath Chakerbutty and *Ramani Mohan Chatterjee*—for Respondents.

FACTS material to this report are as follows: The plaintiff's case was that the lands in suit forming part of three occupancy holdings were verbally surrendered by the respective tenants in favour of the plaintiff landlord in 1314 and the tenants took fresh leases in respect of the remaining portions. The plaintiff when she went to take possession of the surrendered lands in 1315, was resisted by the defendant. Hence this suit for recovery of possession on declaration of plaintiff's title. The defence was that the disputed lands were sold by the tenants to the defendant prior to their alleged surrender; that the story of surrender and fresh settlement with defendant's vendor was false, and even if true, the transactions were spurious, fraudulent and collusive; that there was an agreement by the plaintiff landlord to settle with the defendant and the defendant paid nazarana but the kabuliyat was not actually executed on account of a fraudulent attempt on the part of the landlord to include lands of the defendant's original holding in the kabuliyat which contained a stipulation for the payment of enhanced rent, that the defendant was not liable to ejectment as he was a transferee of a portion of a occupancy holding. The Munsif dismissed plaintiff's prayer for khas possession but declared her zamindari title. On appeal, the lower appellate Court reversed the decision of the Munsif and decreed the suit fully. Hence this second appeal by the defendant.

Chatterjee, J.—In this case certain tenants sold portions of their occupancy holdings to the principal defendant and surrendered those portions only to the landlord and took from him leases at an enhanced rent in respect of the residue of their holdings. The landlord by virtue of the surrender wants to eject the principal defendant. The first Court disallowed the prayer for khas possession and the lower appellate Court has allowed it. The question before us is whether the decree for khas possession is right. The judgment of the lower appellate Court finds support in the cases of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (1) and *Ramani Mohan Koy* v. *Kalimuddi* (2). It is contended, however, that these cases were wrongly decided and in any, case, are no longer binding authorities as they are inconsistent with the later Full Bench ruling in

1. (1910) 5 I C 116.
2. (1912) 17 I C 682.

Dayamoyi v. *Ananda Mohan Roy* (3) and have been questioned in the case of *Asgar Ali* v. *Gouri Mahan Roy* (4). I think these contentions are right and that the judgment of the lower appellate Court is wrong. It was held in *Dayamoyi's* case (3) that the sale of a portion of an occupancy holding is valid and the landlord has no right to khas possession of the land. Now what more has taken place in this case? The tenants sold portions of their occupancy holdings and had no right or interest left in the same. Then they made a show of a surrender of the self-same lands to the landlord. They had nothing to surrender and the landlord had no right to eject the purchaser. Then there is an amalgamation of these two nothings and at once the landlord is competent to eject the purchaser. It is true the landlord was not bound by the sale and could, under S. 86 (7), Ben. Ten. Act, accept a partial surrender, but this means a surrender of something which the tenant had to surrender. Apart from the meaning of the word "surrender" in English Law, the word has a meaning as a word in the English language, to give up or resign or yield to the possession of another; but the tenant has no right to give up or resign or yield what he has already sold. In this view of the case surrender is a misnomer for the act of the tenant and S. 86 (5), even if it could apply to part-surrender (for the clause speaks of surrender of his holding), would not entitle the landlord to take khas possession. Nor in this view of the case it is necessary to consider whether the word incumbrance in S. 86, (6) includes the sale of a portion of a holding.

Having regard to the fact that I differ from the decision of the Court in the cases of *Tamizuddin Khan* v. *Khoda Nawaz Khan* (1) and *Ramoni Mohan Roy* v. *Kalimuddi* (2), the better course would perhaps have been to refer the matter to the Full Bench, but as I cannot do so alone and as the second branch of the argument, namely, the effect of *Dayamoyi.s* case (3) may be sufficient to dispose of the case I would allow the appeal. As we differ on a point of law, the case must go to the Chief Justice for reference to a third Judge. The point of law in respect of which we differ is — whether a raiyat, having sold a part of his occupancy holding, can surrender the self-same part to his landlord so as to entitle the latter to take khas possession of the said part by ejecting the purchaser?

Newbould, J.— The facts as found in this appeal are as follows: The tenants of these holdings with occupancy rights under the plaintiff sold the plots of land in suit, which form portions of the lands of these holdings, to the principal defendant who is the appellant in this appeal. Subsequently, these tenants orally relinquished the lands in suit in favour of the plaintiff and took fresh settlements at enhanced rates by executing kabuliyats in respect of the remaining lands of their holdings. The appellant alleged that he had obtained a settlement of the disputed land from the plaintiff but this was found against him by the lower appellate Court, who granted the plaintiff a decree for khas possession. On behalf of the appellant it is contended that the tenants after their sale to the appellant-defendant were divested of all their interests in the land in suit and had nothing left to surrender to their landlord and consequently there was no valid surrender. It is also contended that the appellant-defendant, as a transferee of a portion of an occupancy holding, is not liable to ejectment and further that he is protected by the provisions of S. 86 (6), Ben. Ten. Act, which provides that, when a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer. In support of the first contention a passage from Foa's Landlord and Tenant (5th Edn. p. 624) was read to us. But the general principles of English Law that are relied on have no application to the present case. No English case could be cited to support the contention that the landlord would be bound by a transfer made by a tenant who had covenanted not to transfer. The position of a tenant of a holding not transferable without the landlord.s consent is similar to that of an English tenant who has made such a covenant.

In my opinion the facts of the present case cannot be distinguished from the facts of the cases of *Thmizuddin Khan* v. *Khoda Nawaz Khan* (1) and *Ramoni Mohan Roy* v. *Kalimuddi* (2). In both these cases it was held that the sale of a portion of a

3. A I R 1915 Cal 242=27 I C 61=42 Cal 172.
914 Cal 376=21 I C 58.

non-transferable holding did not create an "incumbrance" on the tenancy within the meaning of S. 86 (6), Ben. Ten. Act, In the former of those cases the tenant sold a portion of his holding without the landlord's consent and then surrendered that portion. The landlord then settled this surrendered portion with the plaintiff and it was held that the plaintiff could eject the transferee. In the latter case the facts still more closely resemble the facts of the present case. The tenant after selling a portion of his holding surrendered that portion and executed a kabuliyat in respect of the remaining portion of the holding. It was held that upon such surrender the landlord was entitled to eject the transferee as a trespasser.

The learned vakil for the appellant did not deny that these cases were in point but contended, firstly, that the decisions were erroneous and secondly, that they were opposed to the later decision of the Full Bench of this Court in *Dayamoyi's* case (3). In support of the first of these contentions he relies on the decision of a Bench of this Court in *Asgar Ali* v. *Gouri Mohan Roy* (4). There the accuracy of the decision in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (1) was doubted and Mookerjee, J., in his judgment pointed out that at least four points required consideration before that case could be held to furnish a correct exposition of the law. I will, therefore, consider these points seriatim. The first point is that

"the learned Judges adopted for the purposes of the interpretation of S. 86, which finds a place in Ch. 9, Ben. Ten. Act, the definition of the term "incumbrance" given for the purpose of Ch. 14 alone."

This statement appears to be incorrect. The learned Judges remarked that the Subordinate Judge had accepted the definition of incumbrance in S. 161 of the Rent Law. But though they quoted this definition and stated that the word was nowhere else defined in Indian Acts, they appear to have accepted the meaning attached to this word in the English Conveyancing Act of 1881 [44 & 45 Vict. c. 41, S. 2 (vii)]. The second point noticed is that

"the decision of this Court in the case of *Chundra Sakai* v. *Kalli Prosanno Chuckerbutty* (5) shows that 'an exchange is an incumbrance within the meaning of S. 161, Ben. Ten. Act,' and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale."

5. (1896) 23 Cal 254.

The answer to this objection is that in the case cited the meaning of incumbrance as defined in S. 161, Ben. Ten. Act, was being considered and as pointed out above the definition in that section is not applicable to the word as used in S. 86 (6). The third point is that

"the effect of the decision is to place the purchaser in a worse position than a mortgagee or lessee under sub-S (6) of S. 86."

The result may seem anomalous, but that does not make the decision bad law. It is similar to the effect of the Full Bench decision in *Dayamoyi's* case (3), which puts the purchaser of the whole of a non-transferable holding in a worse position than the purchaser of a part. The last point is that,

"it may be a question whether there can be a surrender effective for the purposes of S. 86 when the conditions mentioned in Sub-S. (5), cannot be fulfilled

Sub-section (5) of S. 86 is as follows:

"When a raiyat has surrendered his holding, the landlord may enter on the holding and either let it to another tenant or take it into cultivation himself."

I cannot see that this clause is any bar to the landlord making a fresh settlement with the original tenant after his surrender. Even if the agreement to make a resettlement was entered into before the surrender, this, in the absence of collusion, would not make the surrender invalid. There is nothing in the law to prevent a surrender being made subject to conditions. In the case of *Asgar Ali* v. *Gouri Mohan Roy* (4) the question of the correctness of the decision in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (1) was expressly reserved. After considering the objections throwing doubt on its correctness, I see no sufficient reason for refusing to follow it, on the point that a sale of a portion of a holding is not an incumbrance within the meaning of S. 86 (6) Ben. Ten. Act. If it is not an incumbrance, Cl. (7) of that section clearly provides for the valid surrender of a part of holding. The learned vakil for the appellant relied on the unreported case of *Hasuni Bibi* v. *Sadir Mamud Sarkar* (6), which was followed in *Ram Udar Singh* v. *William Cox* (7). Both these cases are distinguishable on the ground that the transfers made by the raiyat were by way of mortgage and were, therefore, obviously

6. (1915) 30 I C 252.
7. (1915) 27 I C 564.

incumbrances within the meaning of S. 86 (8). The recent case of *Naba Kishore Saha* v. *Dhananjoy Saha* (8) is not in point, as there the pretended surrender of the whole holding was held to be a collusive surrender and not a real surrender. Here there is no finding that the surrender was collusive and I see no reason for thinking that the landlord had any fraudulent intention in acting as he did. Finally, the effect of the decision of the Full Bench in *Dayamoyi's* case (3) has to be considered. It was there decided that where the transfer is of a part only of the holding the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within the meaning of S. 87, Ben. Ten. Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy.

This does not help the appellant, as in the present case there has been a relinquishment of the holding. It may be conceded that relinquishment of the holding means a relinquishment of the whole holding but the whole holding has been surrendered. The part sold to the defendant-appellant was expressly surrendered and the taking of a new settlement of the remainder of the holding operated in law as an implied surrender of the remaining portion. Cl. (3) (a) of S 86, Ben. Ten. Act, shows that there canbe implied surrender under that Act as well as under S. 111, T. P. Act, which is not applicable to leases for agricultural purposes. It is contended that it was not the plaintiff's case as set forth in the plaint that there was a surrender of the whole holding. The facts that the tenants made estifa of some of the land of their holdings and executed separate registered kabuliyats in favour of the plaintiff in respect of the remaining lands are set out in the plaints. It was open to the plaintiff at the trial to agree that these facts amounted to a surrender in law of the whole holding I consider, therefore, the lower appellate Court was right in granting the plaintiff's decree of khas possession and would dismiss this appeal with costs.

As their Lordships differed the case was referred to a third Judge, Chitty, J., who, however, did not decide the case as he thought that the judgment of the two Judges proceeded upon different views of facts. The case was then sent back to the learned Judges, who dismissed the appeal with costs under sub-S. 2 of S. 98, Civil P. C. We understand an appeal under S. 15, Letters Patent, has been preferred by the appellant and is pending.

V.B./R.K. *Appeal dismissed.*

8. (1916) 33 I C 611.

A. I. R. 1918 Calcutta 672

CHITTY AND BEACHCROFT, JJ.

Denibeswar Sarma Bara Thakur—Defendant—Appellant.

v.

Bethoram Saikia and *others*—Plaintiffs—Respondents.

Appeal No. 2731 of 1915, Decided on 24th April 1917, from appellate decree of Dist. Judge, Assam, D/- 31st May 1915.

Evidence Act (1872), S. 116—Mortgagee in possession is not estopped from denying right of purchaser of mortgaged property.

Property belonging to a lunatic was usufructuarily mortgaged by his brother, who was his guardian, to the defendant. On the death of the lunatic the property was sold by the brother to the plaintiff, who thereupon brought a suit for redemption of the mortgage against the defendant :

Held : that S. 116 did not estop the defendant who was placed in possession of the land as a mortgagee from requiring the plaintiff to make out his title to redeem the mortgaged property by virtue of his purchase. [P 673 C 1]

Hirala Sanyal and *Narendra Kumar Basu*—for Appellant.

Satindra Nath Mukerjee and *Manmatha Nath Mukerji*—for Respondents.

FACTS of the case are briefly as follows : One Brojonath as guardian of Kaliprosad, who it is alleged was a lunatic executed an usufructuary mortgage of Kaliprosad's property against the defendant appellant. Kaliprosad died leaving sons and daughters, and after his death, Brojonath sold the mortgage property together with the equity of redemption to the present plaintiff, and the plaintiff as purchaser of the equity of redemption instituted the suit out of which this appeal has arisen to redeem the mortgage. The case for the defence was that there was no valid legal mortgage, that Brojonath was no heir to Kaliprosad, and hence he could not confer any title on his vendor (the plaintiff), that the plaintiff was not entitled to redeem the mortgage, that the mortgage being a void transaction the defendant-appellant had acquired by virtue of his possession for more than 12 years a title by adverse possession. The Munsif gave a decree for redemption

and on appeal, the lower appellate Court affirmed the decision of the first Court by a judgment which was very short and abrupt and which did not decide all the points necessary for the decision of the appeal. Hence this second appeal by the defendant. The judgment of the lower appellate Court was as follows :

" This appeal arises out of a suit brought by the plaintiff-respondent for redemption. The plaintiff's case was that the land in suit belonged to one Kaliprosad who was a lunatic ; that the latter's guardian Brojonath mortgaged the land to defendant 1 for a sum of Rs. 400 by a registered deed of mortgagee (Ex. 4) ; that defendant 1 is still in possession as mortgage and that after Kaliprasad's death the land passed to his brother the aforesaid Brojonath who sold the equity of redemption to the plaintiff. The defendant filed an evasive written statement in which he took up a number of technical objections. The lower Court held that these were without any substance and gave a decree. The point for determination is whether the suit has been rightly decreed. In my opinion the answer to this is in the affirmative. The main point involved is whether the appellant having accepted the mortgage is entitled to raise the plea that Brojonath had no right to mortgage the land. In my opinion he cannot do so. S. 116, Evidence Act, lays down that no preson, who comes upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given. Here the mortgagee came upon the land by licence of the mortgagor and he cannot now be heard to deny the title of the mortgagor. The same principle is enacted in S. 117, Evidence Act. I hold therefore that the suit has been rightly decreed. The appeal is accordingly dismissed with costs. "

Judgment.—In this case we are of opinion that the judgment of the lower appellate Court is not in accordance with law. In stating the point for determination the learned District Judge remarked that it was whether the suit had been rightly decreed and gave his opinion that the answer to this was in the affirmative. He then deals with the question of estoppel under S. 116, Evidence Act, which does not arise in the way in which he has dealt with it. The issues raised in the first Court were quite explicit and showed what the real points at issue between the parties were. S. 116, Evidence Act, would have no application to the point whether the plaintiff has made out his title to redeem this land by virtue of his purchase from Brojonath. The other points have not been touched by the learned District Judge, first whether the mortgage was valid and, if not, what would be the rights of the parties ; secondly, whether Kaliprosad was a lunatic and Brojonath could act as his guardian, and thirdly, whether Brojonath was the brother and the heir of Kaliprosad or not. There admittedly were other points raised by the appellant into which the Court of first instance also did not go.

We think that the judgment and decree of the lower appellate Court must be set aside, and the appeal reheard, the whole matter being open to the Judge who hears the appeal. Costs of this appeal will abide the result.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 673

CHATTERJEA AND NEWBOULD, JJ

Amrita Lall Roy and *another*— Plaintiffs—Appellants

v.

Secretary of State and *others*— Defendants—Respondents.

Appeal No. 1055 of 1912, Decided on 3rd April 1917, from appellate decree of Dist. Judge, Faridpur, D/- 27th January 1912.

(a) Bengal Land Revenue Sales Act (1859), S. 2 — Instalment of revenue payable on account of January kist does not become " arrear " until 1st February next following—Question whether instalment constitutes " arrears " of revenue is question of law — Civil P. C. (1908), S. 100.

Per *Curiam*.—An instalment of revenue payable on account of the January kist, if unpaid, does not became an arrear of revenue until 1st of February next following. [P 674 C 2]

There are three dates to be considered in connexion with sales under Act 11 of 1859. The first is the kist or instalment date fixed by the kistibandi of each estate. The second is the date fixed by the Board of Revenue for each district as the latest day in each quarter for payment of all arrears, and lastly, the date fixed for the sale. The question whether an instalment of payment remaining unpaid constitutes an arrear of revenue within the meaning of S. 2 of the Act is a question of law and cannot therefore be decided by the statement of a witness that it was an arrear of revenue within the meaning of the Act. [P 674 C 2; P 675 C 1]

(b) Bengel Land Revenue Sales Act (1859), S. 58 — Collector having made bid of Re. 1 cannot afterwards purchase at highest amount of bid made by another — Bid of Re. 1 made by peon in Collector's presence must be regarded as Collector's bid.

Per *Chatterjee, J.* (*Newbould, J.*, dissenting). —Under S. 58 of the Act 11 of 1859, the Collector having made a bid of Re. 1 cannot afterwards purchase the estate on behalf of the Government at the highest amount of the bid made by another bidder. [P 677 C 1]

The purchase of an estate so made by the Collector is in contravention of the provisions

S. 58 of the Act and cannot confer a legal right on the Government under the purchase. Therefore the proprietor can recover the estate by a suit in the Civil Court brought for the purpose, even though in his grounds of appeal to the Commissioner such an objection to the sale was not specified. [P 677 C 2]

Per *Newbould, J.*—Where an estate is put upto auction under Act 11 of 1859, the commencement of the bidding according to the usual practice with a bid of Re. 1 for Government does not not prevent the Collector from taking advantage of the provisions of S. 58 to purchase the estate on behalf of the Government at the highest bid made by another bidder. [P 680 C 2]

Where an estate being put up to auction under Act 11 of 1859, the peon of the Collector made a formal bid of Re. 1 on behalf of the Government in the presence of the Collector, who did not forbid it :

Held : that as the Collector allowed his peon to make the bid of Re. 1 it must be taken to be his bid, and whether it was a matter of form or not, the legal consequence must ensue, so that the Collector could not purchase that estate on behalf of the Government under S. 58 of the Act at the highest bid made by another bidder..

[P 676 C 2 ; P 677 C 1]

(c) Bengal Land Revenue Sales Act (1859), S. 33—Words " unless such ground has been declared and specified " do not include reason for such ground.

The words " unless such ground has been declared and specified " in S. 33 of the Act 11 of 1859 do not include the reasons for the ground. Therefore where an objection to a revenue sale was taken in an appeal to the Commissioner, on the ground that the purchase by the Collector under S. 58 of the Act was illegal, the same objection may be taken in the civil Court though the reason given for it in the appeal may not be the same as that which is urged in the suit.

[P 677 C 2]

(d) Bengal Land Revenue Sales Act (1859), Ss. 6 and 7 — Where notices are signed by Sub-Deputy Collector " for Collector ", legal presumption arises that issue of notice was directed by Collector.

Per *Newbould, J.*—There is a sufficient compliance with the provisions of the Act if the Collector or other authorised officer settles or directs that notices of sale under Ss. 6 and 7 of the Act should be issued and the notices are signed on his behalf by the subordinate officer to whom the duty of signing them has been delegated. Where such notices were signed by a Sub-Deputy Collector " for the Collector, " a legal presumption arises that the issue of the notices was directed by the Collector.

[P 679 C 2]

Per *Chatterjea, J.*—Whether notice of sale under Act issued and signed by Sub-Deputy Collector " for the Collector " invalidates sale.

[P 681 C 1]

(e) Bengal Land Revenue Sales Act (1859), S. 7 — Non-service of notice under S. 7, whether invalidates sale—Quaere.

Quaere.—Whether non service of notice under S. 7 of the Act is not a material irregularity in the conduct of the sale so as to invalidate the sale ? [P 681C 1]

Chakerbutty, Surendra Chandra Sen, Khetra Mohan Ghose for *Satis Chandra Bhattacharji*—for Appellants.

Ram Chandra Mitra and *Biraj Mohan Majumdar*—for Respondents.

Chatterjea, J.—This appeal arises out of a suit to set aside the sale of a revenue paying estate under Act 11 of 1859. The estate was sold for arrears of revenue for the " January kist " of 1859 on 25th June 1908, and was purchased by the Government for Rs. 50. Plaintiff 1, who was the owner of the largest share in the estate, and plaintiff 2 who was the patnidar, preferred appeals to the Commissioners, but the appeals were dismissed for default. Thereupon the present suit was instituted for reversal of the sale. The plaintiffs alleged that the estate was worth Rs. 6,000, and it has been found that it is worth Rs. 3,000. The Courts below dismissed the suits and the plaintiffs have appealed to this Court. The first contention raised on behalf of the appellants is that the sale was without jurisdiction, as there was no arrear of revenue within the meaning of S. 2, Act 11 of 1859, for which the estate could be sold. S. 2 lays down what an " arrear of revenue " is. It says:

" If the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistibandi of any mahal have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue. "

The kistibandi of the mahal has not been produced in the case. But the various robokaris and notices issued by the Collector [Exs. 6 (a), 6 (b), 6 (c), 4 (a), 4 (b), 4 (c), 4 (d), c 1, d 1, to d 4 referred to in the judgment of the Court of first instance] mention Rs. 89-15-9 as arrears of the January kist of 1908. If the amount was on account of the January kist, it could not, having regard to the provisions of S. 2 of the Act, become an " arrear of revenue " until 1st February. The learned District Judge says that the last date of payment of the January kist was 12th January. That obviously is wrong. There are three dates to be considered in connexion with sales under the Act. The first is the kist or instalment of payment fixed by the kistibandi of each estate. That kist, if it remains unpaid on the first day of the following month, becomes an arrear

of revenue (S. 2). The second is the date fixed by the Board of Revenue for each district as the latest day (in each quarter) for payment of all " arrears " (S. 3), and lastly, the date fixed for the sale. The 12th January, no doubt, is one of the dates fixed by the Board of Revenue under S. 3 of the Act for payment of arrears of revenue in the district. But if the amount of Rs. 89-15-9 was due for the January kist, it did not become an araear of revenue until 1st February. It is contended on behalf of the respondent that the expression " January kist " in the judgment of the District Judge was a misuse of the words and that what was meant was the kist of revenue for a period before January, the last date of payment of which was 12th January, in other words, that it was an arrear of revenue payable on that date, and we were referred to the copy of the Touzi Ledger of the Collectorate in support of the contention.

The ledger shows that Rs. 89-15-9 was payable on 12th January 1908. If however the amount was for the January kist as the various robokaris and notices issued from Collectorate show, the Ledger would not, in the absence of the kistibandi, help the respondent, because the revenue for the January kist did not become an arrear of revenue on 12th January, and the entry in the register would be in contravention of the provisions of S. 2 of the Act. The learned Government pleader relied on the passage in the judgment of the Subordinate Judge where he refers to the statement of the son of plaintiff 2, who said that Rs. 89-15-9 were the arrears of revenue for which the mahal was sold, and that the documents of the estate were with defendant 3 and observes that the patta ought to have been produced by the plaintiff.

But the estate was sold for Rs. 89-15-9, the alleged arrears of revenue. Whether it consitituted an "arrear of revenue" within meaning of S. 2 is a question of law to be decided in the case. The statement therefore of the witness cannot prove that it was an arrear of revenue within the meaning of the Act. As for the plaintiffs not producing the bundobasti patta, it does not appear that the patta was either with the plaintiffs or even with defendant 3, all that the witness said was that the documents of the estate were with defendant 3. The plaintiffs have produced various papers issued from the Collectorate in which the arrear is expressly described as being for "January kist," and I think they are entitled to rely upon them. In para. 9 of the written statement the defendant stated that the yearly revenue of the estate is payable in four kists and the sum of Rs. 89-15-9 for which the estate was sold was due in respect of the December kist. The plaintiffs, as already stated, produced a number of papers stating that the arrears were for the "January kist," and the notifications of sale issued under S. 6 of the Act described it as arrears of the January talab. If the words "January kist" or "January talab" were loosely used, as it is contended on behalf of the respondent, nothing was easier for the defendant than to produce the kabuliyat executed by the plaintiffs and which would at once have shown the kists. In the absence of the kistibundi, the plaintiffs are entitled to rely upon the description appearing in the papers issued from the Collectorate and there is no reason why we should hold that the expression "January kist" was used in the papers issued from the Collectorate in a loose way, or that it was used in a sense different from its plain meaning.

I have referred to the evidence on the point, only because the learned Government pleader based his arguments upon it, but we are not entitled to go into evidence in second appeal. Whatever might have been the opinion of the Subordinate Judge, the learned District Judge distinctly refers to the "January kist," and as far as the finding of fact goes, we are bound by it. He, no doubt, says that the last date for payment of the "January kist" was 12th January, and that there "unquestionably was an arrear." That however is a question of law to be decided with reference to the provision of S. 2 of the Act, and is not a finding of fact. In *Haji Buksh Ilahi* v. *Durlav Chandra Kar* (1) the proprietor of an estate stipulated for payment of the whole revenue within 28th June every year, and the revenue remained unpaid on 28th June. The Collector directed the estate to be sold and it was accordingly sold on 16th March 1903 for nonpayment of revenue for the June instal-

1. (1912) 39 Cal 981=39 I A 177=16 I C 821 (P C).

ment of 1902. The Judicial Committee held that the revenue was not in arrear until 1st July 1902 and the estate could not be sold till 28th June 1903. I am of opinion that there was no arrear of revenue within the meaning of the Act on 12th January 1908 and the sale was therefore without jurisdiction (see *Balkishen Das* v. *Simpson* (2).] The next contention is that the purchase by the Collector was in contravention of the provisions of S. 58 of the Act, and is therefore wholly invalid. It appears that at the first sale which took place on 25th March 1908 there were three bidders and one Chandra Kant Mitra bid Rs. 135 and deposited the 25 per cent. of the purchase money, but as he defaulted to pay the balance, there was an order for resale and it took place on 25th June 1908. On that date there were bidders present. The Collector commenced the bid at Re. 1. The highest bid was by one Rajani Kant, and he bid Rs. 50, the Collector enquired whether there were further bids, and as no one offered higher, the estate was purchased by the Government at Rs. 50.

Now, under S. 58, the Collector may purchase the estate on behalf of the Government only in two cases. The first is where there is no bidder and then he can purchase the estate for Re. 1. Here there were three bidders present, and he therefore, could not bid. The second is where there are bidders, and the highest bid is insufficient to cover the arrears and those accruing up to the date of sale, and in such a case the Collector may take or purchase the estate on account of the Government at the highest amount bid. As pointed out by Brett and Mookerjee JJ., in the case of *Halim-un-nissa Chowdhrani* v. *Secy of State* (3)

"that the highest bid here referred to is one not arrived at by competition between the Collector and ordinary bidders."

They observed:

"It appears to be clear that, as in the first class of cases, the Collector is to take no action till he has ascertained that there are no bidders, so also in the second class of cases, the Collector is to take no action till he has ascertained that the highest amount offered by the bidders present is insufficient to cover the amount realizable. We do not think it would be a reasonable construction of S, 58, to hold that it is open to a Collector to compete with the other bidders and after he has been defeated and the highest bid determined against him, that he may turn round and claim the benefit of the second part of S. 58. If the Collector chooses to enter the ring as an ordinary bidder he must be treated as such, and in order to succeed he must outbid the other intending purchasers. If, on the other hand he desires to take advantage of the second part of S, 58, he must wait and see whether the highest bid is or is not sufficient to cover the demand realizable. In the case before us the first bid of Re. 1 offered by the Collector was clearly not one under the first part of S. 58 inasmuch as there was at least one person, the agent of the defaulter, ready to offer bids. When therefore, the second bid of Rs. 10 was offered, if the Collector desired to purchase the property, the only course open to him was to advance his own bid, like any ordinary bidder. We must hold accordingly that the procedure followed by the Collector and the purchase made by him were not in accordance with the provisions of S. 58 of the Revenue Sale Law."

The learned Judges further observed that the sale

"has been brought about by what must be regarded as an abuse of the provisions of S. 58, if indeed it may be regarded as a colourable compliance therewith. The consequence has been that a valuable property has passed into the hand of the Government for a nominal sum while the defaulting proprietor still continues liable for the unsatisfied arrears."

It is contended, however, on behalf of the respondent that in the present case the bid of Re. 1 was the customary (mamuli) or sarkari bid and that the finding of the lower appellate Court is that the Collector did not enter the ring as a bidder and the bid was made by the peons as a matter of form. But in the first place, as pointed out by the Subordinate Judge, the peon made a bid of Re. 1 in the presence of the Collector who did not forbid the peon to make that sarkari bid, and that the bid of Re. 1 could not have been a mamuli one since there was no such bid on 25th March. The learned Subordinate Judge was of opinion that there was no doubt

"that the Collector's acts were illegal as they were not in accordance with the provision of S. 58, of Act 11 of 1859 and that the sale is tainted by illegality."

The learned District Judge, no doubt, holds that the Collector did not enter the ring as a bidder because, in his opinion, the bid by the peon was made by him as a matter of form. The finding, however, cannot be said to be a finding of fact. The Statute does not recognize any bid of Re. 1 as a matter of form. It expressly lays down the case where the Collector may purchase the estate for Re. 1. The peon surely did not make the bid of Re. 1 against the order of the Collector, and if, notwithstanding the ex-

2. (1898) 25 Cal 833=25 I A 151 (P C).
3. (1890) 17 Cal 1036.

press provision of the law, the Collector allows his peon to make the bid of Re. 1 it must be taken to be his bid, and whether it be a matter of form or not, the legal consequences must ensue. It may be pointed out that in the case of *Halim-un-nissa* v. *Secy. of State* (3) cited above, there was also a bid of Re. 1 on both the dates of sale.

The bids must have been made by the peon and not by the Collector himself, and I am unable to see the force of the observation that the bid in the present case by the peon was not made on behalf of the Collector. If the bid was made as a matter of form that itself shows that it was made on behalf of the Collector, and not by the peon on his own behalf. But the bid sheet itself (which is signed by the Collector himself) shows that the Re. 1 bid was on behalf of the Government. The bids by the Government are shown thus: "Government 1.50" i. e. the bids on behalf of the Government were Re. 1 and Rs. 50. The entry of Rs. 50 is obviously incorrect, because there was no bid of Rs. 50 on behalf of the Government, the estate was only purchased at the highest bid of Rs 50 by the Collector on behalf of the Government. But as the estate was purchased by the Government for Rs. 50, it appears to have been mentioned as a bid on behalf of the Government, and at the foot of the bids, it was stated that it was "sold to Government for Rs. 150 only." Under the circumstances the mere fact that Rs 50 was mentioned as a bid cannot detract from the effect of the entry of Re. 1 as a bid on behalf of the Government. The facts in this connection are stated in the judgments of the Courts below, and it is open to us to decide whether the purchase by the Collector was or was not illegal. I am of opinion that the Collector offered the bid of Re. 1, and that being so, he could not purchase the estate on behalf of the Government at the highest amount of bid made by another bidder, Rajani Kant. The purchase, therefore, was in contravention of the provisions of S. 58 of the Act.

The question arises, however, whether the ground was taken in the appeal to the Commissioner. The learned Subordinate Judge apparently was under the impression that it was not, when he observed:

> "It is, therefore, that I remarked that it was a pity that the illegality was not declared and specified in the ground of appeal since S. 33, Act. 11, precludes the plaintiffs from raising new grounds in the plaint."

The ground was not taken in the appeal by plaintiff 1, although he took the general ground that the sale was not held in conformity with the provisions of Act 11 of 1859. But it is not open to the plaintiff, in a suit to set aside a revenue sale, to urge, under cover of a general ground taken in his appeal before the Commissioner, specific irregularities other than those urged before the Commissioner: see *Gobind Lal Roy* v. *Ramjanam Misser* (4) and *Sheik Mohammed Aga* v. *Jadunandan Jha* (5). The ground, however, was taken in the appeal by plaintiff 2 to the Commissioner. Ground 6 of his appeal to the Commissioner runs as follows:

> "That it was illegal on the part of the Collector of Faridpur to bid and purchase the property for Rs. 50 on behalf of the Government under S. 58, Act 11 of 1859, inasmuch as it does not appear that the bidders had refused to increase their bids."

It is contended on behalf of the respondent that the ground now taken on the point was not taken before the Commissioner in that form. That is true. But the invalidity of the purchase on behalf of the Government under S. 58 was taken, though the reason given for it is not the same as that which is urged in the present suit. The words "declared and specified," however, would hardly include the reasons for the grounds, and I am of opinion that the objection to the purchase by the Collector under S. 58, of the Act was sufficiently taken, though not in the precise form urged in the present case.

Besides the purchase by the Collector being in contravention of the provisions of S. 58, no legal rights accrued to the Government under the purchase, and in that view, it need not have been specified in the grounds of appeal to the Commissioner. It is contended on behalf of the respondent that even if the purchase by the Collector was in contravention of the provisions of S. 58, the only person affected was Rajani Kant whose bid of Rs. 50 was not accepted, and that the plaintiff did not sustain any substantial injury by reason of the irregularity complained of. But the amount of the arrears for which the estate was sold was Rs. 89-15-9 (up

4. (1894) 21 Cal 70=20 I A 165 (P C).
5. (1906) 10 C W N 137.

to December 1907 according to the defendant) and there must have been arrears up to the date of the sale (25th June 1908). The estate was sold for Rs. 50 only, so that it was insufficient to cover the amount for which the plaintiff was liable, and even after the sale of his estate, he is liable for the balance of the arrears, and that certainly is substantial injury to him by reason of the irregularity.

The third contention is that the notification of sale under Ss. 6 and 7 of the Act not having been signed by the Collector or other officer authorized to hold sales under the Act, the sale proceedings are void. The notices were signed by one B. K. D. Gupta, a Sub-Deputy Collector (and not a Deputy Collector as stated in the judgment of the Court of Appeal below).

It appears from the Collector's general order-book that he was authorized by the Collector to sign processes, and the learned District Judge is of opinion that there is no provision in the Act requiring notices to be signed by the Collector himself, nor is there any rule prohibiting delegation of his duty by the Collector to any of his subordinates. If the issuing of notifications includes the act of signing the notices, the Sub-Deputy Collector certainly was not an authorized person, because under the rules framed by the Board of Revenue it is the Commissioner of Revenue who can authorize any officer subordinate to him to legally exercise the power of a Collector to hold sales of land, and the word "Collector" in S. 61 of the Act includes a Deputy Collector or other officer exercising by the authority of Government the powers of a Collector or a Deputy Collector. B. K. D. Gupta was not a Deputy Collector, and he does not appear to have been authorized by the Government to exercise the power of a Collector or a Deputy Collector, nor does he appear to have been authorized by the Commissioner to hold sales under the Act, and the fact that he was authorized by the Collector to sign processes would not authorise him to sign notices of sale under the Act, if that is to be done by the Collector or other officer authorized to hold sales under the Act. We were referred by the learned counsel for the appellant to a passage in the judgment in the case of *Baijnath Sahai* v. *Ramgut Singh* (6) where Lord Davey observed:

"It is unnecessary for their Lordships to point out the necessity there is when power is given to a public officer to sell the property of any of Her Majesty's subject that the forms required by the Act, which are matters of substance, should be complied with."

These observations however were made in connexion with the certificate procedure under the Public Demands Recovery Act, in which there is a distinct provision that the certificate is to be signed by the Collector himself. There is no such provision in Act 11 of 1859. The Collector or other officer authorized to hold sales under the Act is required to issue notification, and it is contended on behalf of the respondent that it is sufficient if he settles or directs that notices should be issued and the power of signing the notices may be delegated to a subordinate officer, as was done in the present case by the general order of the Collector. It is pointed out, on the other hand, on behalf of the appellant, that there is no evidence to show that it was the Collector who directed the notices to be issued in the present case. Here the notices were signed by the Sub-Deputy Collector for the Collector, but there is no provision in the Act authorizing the Collector to delegate this function to a subordinate officer. As however the appellants must succeed on other grounds, I do not think it necessary to decide finally whether such delegation is permissible.

The last contention is that the notices under S. 7 were served in the Pangsha Police Station, whereas the lands of the estate are situated within the Police Station of Baliakandi where no notices were served at all. This appears to be so from the returns submitted by the serving peon. The learned District Judge overruled the contention on the ground that the third issue did not specifically raise this point. But the issue should be read with reference to the pleadings in the suit. The plaint (para. 5) distinctly raised the question, and issue 3, as framed, was sufficiently wide to cover it. It was also expressly taken in the grounds of appeal to the Commissioner. The return submitted by the peons bear out the contention, and under the circumstances the Court below ought not to have thrown out the contention. The learned Judge refers to the fact that the ruling in *Rajrani*

6. (1896) 23 Cal 775=23 I A 45 (P C).

Dasi v. *Gonesh Prosad* (7) had not been made when the plaint was filed or the issues were framed and observes that:

"before that ruling the High Court had never made a distinction between admissibility of evidence of service in a wrong mahal after the grant of a sale certificate under the Revenue Sale Law. I am therefore not inclined to believe that the appellants intended specifically to put this matter in issue."

But as stated above, the plaint distinctly raised it and the non-publication of notices under S. 7 referred to in the issue can have reference only to the non-publication complained of in the plaint. The plaintiffs might not have been able to rely on the point if the case in *Rajrani Dasi* v. *Gonesh Prosad* (7) had not been decided in that way before the trial in the present case took place, but that would be no ground for overruling the contention if it was set up in the plaint. The learned Judge observed that there is a conflict of decisions between that case and the case of *Sheikh Mahomed Aga* v. *Jadunandan Jha* (5) as to the effect of S. 8 of Act 7 of 1858. But the question whether that section would prevent the plaintiffs from proving that the notice was served in a wrong mahal was not considered in the case of *Sheikh Mahomed Aga* v. *Jadunandan Jha* (5). It is unnecessary however to discuss this question, because assuming that S. 8 of Act 7 of 1868 does not cover a case of service of notice in a wrong mahal, it has been laid down in several cases that the object of the notification under S. 7 of Act 11 of 1859, being to give notice to the raiyats not to pay rent to defaulting zamindars, non-service of such notices cannot occasion any loss to the defaulter and cannot be a ground for invalidating the sale. Had the matter been res integra, I would have been prepared to hold that although the direct object of the notice under S. 7 might be to give notice to the raiyats not to pay rent, such notice has the effect of giving great publicity to the fact that the sale is going to take place, and making it known to the zamindars and other people in the neighbourhood who would naturally be more interested in purchasing the estate, and the non-service of the notice under S. 7 is a material irregularity. As however a contrary view has been taken in a series of cases see *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (8), *Mahomed Azhar* v. *Raj Chunder Roy* (9) *Azimuddin Patwari* v. *Secy. of State* (10), *Sheikh Mahomed Aga* v. *Jadunandan Jha* (5), it must be held that the non-service of notice under S. 7, does not invalidate a sale. The plaintiffs, however, I think, are entitled to succeed on the first two grounds stated above. The sale must therefore be set aside as invalid, and the suit decreed accordingly, by setting aside the decrees of the Courts below.

Newbould, J.—This is a second appeal by the plaintiffs against a decree dismissing a suit to set aside a sale of an estate for arrears of revenue under the provisions of the Bengal Land Revenue Sales Act, 11 of 1859. The first point urged at the hearing of the appeal is based on the decision of the Judicial Committee in the case of *Haji Buksh Elahi* v. *Durlav Chandra Kar* (1). It is contended that in the present case, as in that case, the estate was put up to sale for an arrear of revenue before the latest date fixed for its payment and that the sale was consequently without jurisdiction. The liability of an estate to sale under the Act depends on three dates. The first is the date on which the instalment of revenue is payable under the terms of the settlement. If it is not paid on this date, under S. 2 of the Act it does not become an arrear of revenue until the first of the following month which is the second date. And though the unpaid sum has become an arrear of revenue the estate is not liable to sale under the Act unless this arrear of revenue remains unpaid on the latest day of payment. This, the third date under S. 3 of the Act, has to be determined for each district by the Board of Revenue. In the Faridpur district where the estate is situated the dates fixed under S. 3 as the latest days of payment are 28th June, 28th September, 12th January and 28th March of every financial year. The estate was first put up to sale on 25th March 1908.

It was subsequently re-sold on account default by the purchaser but this is irrelevant to the present argument. Whether the sale on 25th March 1908 was with or without jurisdiction depends on whether there was or was not an "arrear of revenue," as defined by S. 2, previous to 12th January 1908, the latest day of payment under S. 5 previous to the sale. Whether there was such an arrear depends on

7. (1910) 37 Cal 407=5 I C 65
8. (1883) 13 B L R

9. (1894) 21 Cal 354.
10. (1894) 21 Cal 360.

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whether there was an instalment of revenue due according to the terms of settlement before the 1st January. The difficulty in this case arises from the fact that at the trial neither party have any evidence as to the terms of the settlement and there is consequently no finding as to the actual date when the unpaid instalment of revenue was primarily payable. The plaintiffs-appellants rely on certain robokaris and notices issued by the Collector—Exs. 6 (a), 6 (b). (6) (c), 4 (a), 4 (b), 4 (c), 4 (d), C 1, D and D1 to D4, which mention the January kist of 1908. But as remarked by the learned Subordinate Judge, some of these documents also refer to 12th January, 1908, as the latest day of payment. Relying on this and on the fact that the plaintiffs have not produced the Government band basti pattah, he has held that what is called the January kist was in reality the December kist as alleged in the written statement, for which the latest date of payment was 12th January. The learned District Judge in his appellate judgment has not gone into these details, but has held that the last date of payment for the January kist was 12th January. As his is a judgment of affirmance, he must be held to have supported the finding of the learned Subordinate Judge that the sum of Rs. 89-15-9, which both Courts find to have been arrear of revenue on 12 th January was payable for the December kist.

The findings of the two lower Courts amount to this that what might be expected to happen, has happened. As the proprietor is safe provided he pays his revenue before the latest day of payment, the earlier date on which it is payable under the terms of settlement has been lost sight of in practice and the later date on which the kist must be paid is called the kist date. That is to say, the kist referred to as the January kist is not the kist payable in January under the kistibandi but the kist for which the latest day of payment falls in January. Whether an unpaid instalment of revenue is an arrear of revenue is a question of law, so far as it depends on the application of the provisions of Act 11 of 1859. But whether the unpaid amount Rs. 89-15-9 was payable according to the terms of the settlement in December 1907 or January 1908 is a question of fact. The Court of first instance has found that it was payable in December and as this finding has not been reversed by the lower appellate Court, it is binding on us as a Court of second appeal. On this finding it follows that that there was an "arrear of revenue" on the 1st January 1908 and as this arrear was unpaid on the "latest day of payment", 12th January 1908, the sale on 25th March 1908 was not without jurisdiction. I, therefore hold that the first contention of the appellants fails. The second point taken by the appellants is that as the bidding opened with a bid of Re. 1 on behalf of the Secretary of State, the Collector was not legally entitled to purchase the property for Government at the highest bid that was made. It is found by the lower appellate Court that when the sale was finally held a peon opened the bidding with a bid of Re. 1 as a matter of form according to custom. Even if it be held that this was a bid on behalf of the Collector, I cannot see why this should deprive the Collector, of his statutory right under S. 58 of Act 11 of 1859 to purchase the estate on account of the Government at the highest amount bid, if the highest bid be insufficient to cover the arrears. The real meaning of the preliminary bid of Re. 1 is that the Collector gives notice that he intends to exercise his powers under S. 58. If there is no bid the Collector would purchase the property at Re. 1 under the first provision of the section. If there were a bid of Re. 1 only the Collector would still purchase the property at that price under the second provision of the section. Consequently it would be useless for an intending bidder to make a bid not exceeding Re. 1 and the calling out by the peon of a Government bid of Re. 1 merely announces that. The facts of the case of *Halimunnissa Chowdhurani* v. *Secy. of State* (3) can be distinguished from the facts of the present case and cannot be held to lay down as a principle of law that the commencement of the bidding according to the usual practice with a bid of Re. 1 for Government prevents the Collector from taking advantage of the provisions of S. 58. If the sale is conducted fairly, as was done in the present case, I can see no objection to this practice.

I am further of opinion that the plaintiffs appellants are prevented by the provisions of S. 33 of the Act from raising this contention. This was not declared

and specified in the appeal of either plaintiff to the Commissioner. The only ground that has any reference to S. 58 is the sixth ground in the appeal to the Commissioner of plaintiff 2, Surja Kumar Lahiri, the patnidar of the estate sold. This ground is as follows:

"That it was illegal on the part of the Collector of Faridpur to bid and purchase the property for Rs. 50 on behalf of Government under S. 58, Act 11 of 1859, inasmuch as it does not appear that the bidders had refused to increase their bid."

Had this ground been set out with the omission of the final portion commencing from the words "inasmuch as," it might perhaps be held to cover the point now urged. But when a ground which has been found to be untenable was specified, an entirely different ground, though covered by the preliminary ground, must be held to have been excluded. As pointed out by me in my judgment in *Shamanta Radha Charan Das* v. *Sharfuddin Hossein* (11), the effect of the Privy Council decision in the case of *Gobind Lal Roy* v. *Ramjanam Misser* (4) is to annul to a very great extent the distinction between illegalities and irregularities in applying the provisions of S. 33, and I hold that the present objection to the legality of the Collector's action under S. 58 was one that could not be raised in a civil suit if it had not been specified in the grounds of appeal to the Commissioner. I therefore hold that this second contention of the appellants fails both on the merits and on the ground that S. 33 of the Act precludes the plaintiffs from raising it in this suit.

The third point taken by the appellants is that the sale proceedings were void as the notices under Ss. 6 and 7 of the Act were signed by a Sub Deputy Collector instead of by the Collector or other officer authorized to hold sales under the Act. The arguments on both sides are fully set out in the judgment that has just been delivered by my learned brother and it is unnecessary for me to repeat them. It is enough to state that I accept the contention on behalf of the respondent that there has been a sufficient compliance with the provisions of the Act if the collector or other authorized officer settles or directs that the notices should be issued and the duty of signing the notices on his behalf may be delegated to a subordinate officer. As these notices were signed by the Sub-Deputy for the Collector a legal presumption arises that the issue of the notices was directed by the Collector. I therefore decide this point also against the appellants.

The fourth the and last point argued is that the sale is invalid on account of the notices under S. 7 having been published in the jurisdiction of the Pangsha Police Station instead of in that of the Baliakandi Police Station. The authorities cited by learned brother are conclusive against this contention. I regret my inability to agree with the decision of my learned brother more particularly as the case is one of undoubted hardship, an estate found to be worth Rs. 3,000 having been sold for the inadequate price of Rs. 50. But on careful consideration I find myself unable to hold that the sale is invalid on any of the grounds urged and would therefore dismiss this appeal with costs.

By the Court.—As we are unable to agree in this case, under S. 98, Civil P. C., the decree of the lower appellate Court is confirmed and the present appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

11. A I R 1914 Cal 125=20 I C 423—41 Cal 276.

A. I. R 1918 Calcutta 681

SANDERSON, C. J. AND WOODROFFE, J.

Chutterput Singh—Judgment-debtor—Appellant.

v.

Sadasook Kotary—Judgment-creditor—Respondent.

Appeal No. 5 of 1917, Decided on 26th April 1917, from original order of Chitty, J., D/- 29th November 1916.

(a) Execution—Time-barred—Order in time barred execution is not nullity—It must be set aside.

An order for execution, erroneously made on an application for execution which is barred, is not a nullity as having been made without jurisdiction but will be binding unless set aside by review or appeal. [P 682 C 2]

(b) Civil P. C. (5 of 1908), Ss. 128 and 157—S. 128 whether validates delegation duties not allowed (*Quaere*).

Quaere.—Whether by the operation of S. 128, Civil P. C., 1908, rules made by the High Court delegating judicial duties to the Registrar under the old Civil Procedure Code which did not allow of such delegation are validated. [P 682 C 2]

Jackson and *M. N. Basu*—for Appellants.

N. Sircar and *H. C. Majumdar*—for Respondent.

Woodroffe, J. — This is an appeal from an order on an application made by a judgment-debtor that an earlier order made by this Court, dated 9th May 1916, for his arrest may be "vacated, cancelled and set aside" on the ground that on the date on which the writ of arrest was asked for, the decree was barred by limitation. On 3rd September 1896 a decree was made (ex parte) in the High Court for Rs. 17,626-10-4. On 3rd May 1901, copy of the decree was sent to the District Judge of Murshidabad for execution. On 30th July 1902, a sum of Rs. 322-8-3 was realized. Then some 11 years later on 29th July 1913, an application was made for execution by attachment of the immovable property No 147, Cotton Street, Calcutta, belonging to the judgment-debtor. The Master ordered notice under O. 21, R. 22, to issue. On 23rd September 1913, notice was served upon the judgment-debtor. On 18th November 1913, the judgment-debtor entered appearance through Babu Haripada Dutt. On 22nd November 1913, warrant of attorney on behalf of the judgment-debtor was filed. On 29th November 1913, the Master ordered execution to issue after hearing both sides.

It is said that this order by the Master was invalid as he had no jurisdiction to make it and thus to create a revivor which is a judicial act. On 8th January 1914, the Sheriff actually attached the property. On 26 November 1914, an order was made for sale of the property No 147, Cotton Street. A proclamation was settled, but the sale stood over. On 13th March 1916, the judgment-creditor asked for execution by arrest of the judgment-debtor and on 13th March 1916, notice was directed to be issued under O. 21, R. 22. In the affidavit stating that notice was served on the judgment-debtor, the deponents say that the Master, observing the parties serving the notice, immediately retired to the inner apartment of his house and refused to come out though called upon. There is no denial of this fact by the judgment-debtor, the affidavit of his servant not being of any value on this point. On 9th May 1916, order was made by Fletcher, J., for the arrest of the judgment-debtor. On 22nd August 1916, notice was given of an application to set aside the order of arrest. On 29th August 1916, the application was heard by Chitty, J., and on 29th November 1916, an order was made by Chitty, J., dismissing the application. On 23rd January 1917 a memorandum of appeal was filed by the judgment-debtor, the hearing of which is now before us.

The appellant's contention is that Fletcher, J.'s order was erroneous as the execution proceeedings were then barred, and that Chitty, J.'s judgment is erroneous as it upholds Fletcher, J.'s order. The respondent contends that the order of 9th May 1916 was a good order, having regard to the fact that in 1909 the new Civil Procedure Code of 1908 came into operation and under S. 128, the High Court might make rules delegating to the Registrar any judicial duty. It is thus contended that if the former rules were inconsistent with the former Code in so far as they permitted the Registrar to do what was in fact a judicial act though the Code only allowed of the delegation of quasi-judicial acts, yet under the present Code the Court may delegate also judicial acts, and S. 157 of the new Code contains rules under repealed enactments which are not inconsistent with the Code. For the former rules, whereby the Registrar was empowered to deal with execution proceedings in matters which are properly judicial acts, are consistent with the present Code which allows of the delegation of judicial acts. There appears to be much force in this argument. It is not, however necessary to decide the point, as we think it clear that Mr. Sircar's argument must prevail, namely, that even assuming (without admitting) that execution was barred and that the judgment of Fletcher, J., was erroneous, yet as Fletcher, J., had, as a Judge, admittedly jurisdiction to determine the matter before him, his order could only have been set aside by review or appeal. It would not have been open for Chitty, J., to set aside an order made by a Judge of concurrent jurisdiction on the Original Side of the Court.

It was contended by Mr. Jackson that notwithstanding Fletcher, J.'s order, it was possible that other orders might be subsequently passed in the matter of the judgment-debtors. It may be that an original application based on facts arising after Fletcher, J.'s order may be made. But this is not such an application but application to one Judge to set aside an order of another Judge on the ground that that Judge erroneously held that on

the date when he entertained execution, such execution was, in fact, barred. It is clear that such an application as that before us will not lie. The case of *Khairaj Mal* v. *Daim* (1), which was cited to us after the close of the argument by Mr. Jackson, is not in point. The elementary principle was there affirmed that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record, and that an order which is passed without jurisdiction is a nullity, may be disregarded and need not be set aside. This case has no application to the facts before us where Fletcher, J., had jurisdiction to determine the question arising in the execution proceedings, where the judgment-debtor was a party, was served, and did not choose to appear and where the order sought is one to set aside a previous order on the ground that the Judge erroneously made it though the execution was barred.

We do not say that there was any error in law, but if there was, it was an erroneous decision on a matter over which the Court had jurisdiction. The appeal is accordingly dismissed with costs.

Sanderson, C. J.—I concur.

V.B./R.K. *Appeal dismissed.*

1. (1905) 32 Cal 296=32 I A 23 (P C).

A. I. R. 1918 Calcutta 683

FLETCHER AND NEWBOULD, JJ.

Jatindra Mohan Roy — Appellant.

v.

Ramesh Chandra Ray and *others*—Respondents.

Appeal No. 2504 of 1911, Decided on 28th May 1917, from appellate decree of Addl. Sub-Judge, Khulna, D/. 20th May 1914.

Hindu Law—Joint family—One member building on land usually used by another—Latter though entitled to have building demolished can be granted joint use of the building.

Defendant, a member of a joint family, during the absence of the plaintiff, another member of the family, erected a building on a portion of the joint land which had been used for many years by the members of the family for certain purposes:

Held: that as the portion of the land on which the building was erected was such that neither party could have exclusive use of it without injury to the other, the plaintiff should have joint use of the building with the defendant, though the strict right of the plaintiff would have been to have the building demolished and to have the land restored to its original condition as it was before the defendant put up the building.

[P 684 C 1]

Sarat Chundra Roy Chowdhury and *Bhudeb Chandra Roy*—for Appellant.

Mohendra Nath Roy and *Mohini Mohan Chatterjee*—for Respondents.

Fletcher, J.—This is an appeal by defendant 1 against a judgment of the learned Subordinate Judge of Khulna, dated 20th May 1914, reversing the decision of the Munsif of Satkhira. The plaintiffs brought the suit in the Court of first instance claiming a mandatory injunction and asking for an order on the appellant before us to demolish a certain building that he had erected on a portion of the joint property. In the course of the proceedings, the plaint was amended by permitting the plaintiffs to ask for joint possession. The parties belong to the same family and they occupy a homestead of 60 bighas parts of which are in the exclusive possession of them and the remaining portion is in their joint possession. A piece of land, about one cottah in area according to the finding of the lower appellate Court, for many years had been used on particular ceremonies by different members of the family for certain particular purposes. The user was not continuous throughout the year but whenever proper occasions arose the land had been used in this way by the different parties. Defendant 1 apparently during the absence of the male plaintiff in Calcutta representing himself as being anxious to foster the religious life of the inhabitants of the locality approached a religious minded person and asked him to advance him money as a gift for the purpose of erecting a building in which this religious minded person was told that all the inhabitants of the locality might go to perform their worship. Apparently this religious minded gentleman was deceived by defendant 1 because defendant 1 instead of erecting this building for the benefit of the public at large erected it, as he says, for his own purpose. The learned Judge of the lower appellate Court, has directed that the plaintiffs should have joint use of this building with the defendants.

The building as it appears is going to be used by the defendants for lodging their guests and as the Judge points out there is no reason why the guests of the plaintiffs should not be lodged there also

along with those of the defendants. It is quite true that the use of the building would be substantially different to that for which the person who gave the money to erect it thought that it would be used. That is a matter for that gentleman to settle with defendant 1, if he thinks it worth while to settle. We have nothing to do with that. The point that the learned Judge thought is that this is not an ordinary case of large portion of ijmali land of which either party would take one portion without injury to the other. This is a portion of land of which neither party could have exclusive use without doing substantial injury to the other. This piece of land has for many years been used by the different members of the family on different occasions. The learned Subordinate Judge has come to the conclusion, as far as I can gather, that the strict right of the plaintiffs would be to have the building demolished and to have the place restored to its original position as it was before defendant 1, having deceived the gentleman with the religious mind and during the absence of the male plaintiff in Calcutta, put up this building for the accommodation of his guests. That view I think is right. If the building be removed there is no doubt that the position of defendant 1 would be the same as it was before he approached this gentleman who gave the money to erect this building for the benefit of the public of the neighbourhood. However, the lower Appellate Court has awarded to the plaintiffs joint possession of the building with the defendants. I see no reason to differ from the conclusion arrived at by the learned Judge of the lower appellate Court. The present appeal fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 684

CHATTERJEA AND SMITHER, JJ.

Jogesh Chandra Roy—Plaintiff—Appellant.

v.

Ram Kebal Nath and *another*—Defendants—Respondents.

Appeal No. 3215 of 1915, Decided on 19th April 1917, from appellate decree of Sub-Judge, Chittagong, D/-10th September 1915.

Civil P. C. (5 of 1908), S. 11—Decision about rate of rent is res judicata unless rent alleged to be subsequently changed.

Where in a suit for rent, the question as to what is the rent annually payable for the holding is directly raised and decided by the Court, the decision operates as res judicata in a subsequent suit between the parties or their representatives, unless it is shown that the rent has been subsequently changed. [P 684 C 2]

D. B. Kastgir and *Chandra Sekhar Sen*—for Appellant.

Khitish Chandra Sen and *Probodh Chandra Dutt*—for Respondents.

Judgment.—This appeal arises ont of a suit for rent. The plaintiff stated that the rent was Rs. 6-11-0 per year, while the defendant said that it was Rs. 5-14-6. It appears that there was a previous rent suit in which also the plaintiff claimed Rs. 6-11-0 as rent of the holding. The defence was the same. As in the present suit, an express issue was raised as to the amount of the jama payable by the defendant. In that suit, the Court, upon a consideration of the evidence, came to the conclusion that Rs. 5-14-6 was the rent payable for the holding per year. The present suit is for the period immediately succeeding that for which the previous suit was brought. In this suit the plaintiff again claims rent at the rate of Rs. 6-11-0 per year. The Courts below have held that the decision in the previous suit operates as res judicata. We think that the decision of the Court below is right. As we have said, the question as to what is the rent payable for the holding was directly raised and decided in the previous suit. The plaintiff says that he had no knowledge of the kabuliyat which he has now produced and from which he wants to show that Rs. 6-11-0 which he claims as rent, includes the price of a goat which the defendant's predecessor-in-title agreed to pay. Practically the plaintiff wants to produce additional evidence or urge an additional ground in support of his contention that Rs. 6-11-0 constitute the annual rent. The yearly rent was expressly determined in the previous suit to be Rs. 5 14-6 and it has not been shown nor even suggested that the rent has been subsequently changed. The appeal accordingly fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 685 (1)

FLETCHER AND PANTON, JJ.

Satishchandra Mustafi and *another*—Plaintiffs—Appellants.

v.

Abdul Majid Mahamad and *others*—Defendants—Respondents.

Appeal No. 379 of 1917, Decided on 20th June 1918, from appellate decree of Special Judge, Jalpaiguri, D/- 20th November 1916.

(a) Civil P. C. (1908). S. 100—Finding on value of statement in document will not be interfered.

The weight to be attached to a statement in a rent receipt or any other document is a matter within the cognizance of the Court of first appeal, with which the High Court in second appeal is not entitled to interfere. [P 685 C 1]

(b) Bengal Tenancy Act, (1885), S. 50 (2) —Presumption under S. 50, cannot be rebutted by mere statement in rent receipts that holding is sarasari.

The mere statement in some rent receipts that a holding is sarasari is not sufficient to rebut the presumption arising under S 50 (2), Ben. Ten. Act, from the fact that the rent has been unchanged for more than 50 years. [P 685 C 1]

Nagendra Nath Ghose — for Appellants.

Jitendra Kumar Sen Gupta — for Respondents.

Fletcher, J.—This appeal is preferred by the plaintiffs against the decision of the learned Special of Judge of Jalpaiguri, dated 20th November 1916, affirming the decision of the Assistant Settlement Officer of the same place. The only question is whether the learned Judge of the Court of appeal below was right in holding that the landlords had not rebutted the presumption arising under S. 50, Ben. Ten. Act. The tenants have proved that their rent has been unchanged for over 50 years, and the learned Judge remarks that it is exceedingly improbable in that view that the tenancy was originally a temporary one. What is relied on is this, that the word sarasari appears in some rent receipts. The learned Judge states that the mere statement in some rent receipts that the holding is sarasari would not be, in his opinion, sufficient to rebut the presumption under S. 50, Ben. Ten. Act. The learned Judge, in my opinion, was clearly entitled to come to that conclusion. The weight to be attached to a statement in a rent receipt or any other document is obviously a matter within the cognizance of the learned Judge and, he having arrived at that conclusion, I do not think we are entitled to displace the finding he has arrived at. The appeal fails and is dismissed with costs.

Panton, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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*A. I. R. 1918 Calcutta 685 (2)

FLETCHER AND NEWBOULD, JJ.

Dwarik Bala and *others*—Defendants—Appellants.

v.

Nidhi Ram Bala and *another*—Plaintiff and Pro farma Defendants — Respondents.

Appeal No. 3213 of 1915, Decided on 7th June 1917, from appellate decree of Sub. Judge, Jessore, D/- 9th August 1915.

***Civil P. C. (1908), S. 100, and O. 2, Rr. 6 and 7—Claim for separate possession on allegation of partition and alternatively for joint possession are contradictory.—But if not objected to, decree for joint possession cannot be set aside in second appeal.**

The plaintiff brought a suit in the alternative, first of all, to recover a particular land on the footing that a legal partition had been made between the parties, and if the partition was not legal, then he asked to be put in joint possession with the defendants. The case went to trial without any application by defendants under the provisions of the Civil Procedure Code to exclude one of the causes of action from the trial. The Trial Court awarded the plaintiff a decree for joint possession, which was affirmed in appeal without any objection having been made to the frame of the suit;

Held: that in second appeal the defendant could not urge that the whole of the proceedings culminating in the decree for joint possession should be put an end to on the ground that contradictory causes of action ought not to have been tried together. [P 686 C 1]

Bireswar Bagchi—for Appellants.

Makunda Behari Mullick—for Respondents.

Judgment.—This is an appeal by the defendants against a judgment of the learned Subordinate Judge of Jessore affirming a decision of the Munsif of Jhenida. The plaintiff brought a suit in the alternative, first of all, to recover certain particular specified land on the footing that a legal partition had been made between the parties and, if the partition was not legal, then he asked to be put in joint possession with the defendants. This is not a case where the plaintiff sued to recover a particular land on the footing that there had been a partition and that case having failed, the Court awarded a decree for joint possession. The plaintiff set out his case from the outset and defendants had notice of the alternative case. They might have ap-

plied to the Court under the provisions of the Code to exclude one of the causes of action from the present trial. They, however, did not do so. The case went to trial and was argued in both the lower Courts without any objection, and now in the second appeal we are asked to put an end to the whole of the proceedings on the ground that contradictory causes of action ought not to be tried together. We think there is no force in this contention. Having regard to the fact that the case was tried in that way without any objection in the first Court on the settlement of issue the objection urged in this appeal was not raised and in the lower appellate Court where the present appellants were also the appellants they raised no point excepting the two mentioned by the learned Judge in his judgment as matters for determination and these matters having been determined in the suit against them, the appellants cannot now in the second appeal raise a matter which has not been considered by the lower Courts. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 686

CHITTY AND BEACHCROFT, JJ.

Jnanendra Mohan Sen — Plaintiff—Appellant.

v.

Hari Ram Rabha and *others*—Defendants—Respondents.

Appeal No. 1621 of 1915, Decided on 20th April 1917, from appellate decree of Special Sub-Judge, Dhubri, D/- 31st March 1915.

Practice — Remand — Appeal decided on case not pleaded by parties—Case should be remanded to appellate Court—Practice, New case.

An appellate Court dismissed the plaintiff's suit and affirmed the decision of the primary Court on a case which was neither set up by the plaintiff nor by the defendant and which was inconsistent with the defendant's case:

Held: that the judgment of the appellate Court could not stand and that the case should be remanded to the appellate Court for a rehearing of the appeal. [P 687 C 1]

Sarat Chandra Roy Chowdhury and *Satya Charan Sinha*—for Appellant.

Gobinda Chander De Roy, *Abaninath Bhattacharya* and *Purno Chunder Roy*—for Respondents.

Judgment.—This appeal arises out of a title suit brought by the plaintiff against the defendant Hari Ram Rabha. Plaintiff sought to eject the defendant from about 8 bighas of land, on the ground that he was a trespasser and that the plaintiff was entitled to possession. It appears that defendant 2, Rani Abhoyeswari Debi, purchased certain lakheraj land in 1901. In 1902 plaintiff took settlement from the Rani of the whole 54 bighas of that land. In 1910 he brought a suit against the defendant for rent of the 8 bighas of which the defendant was in possession. In that suit defendant denied the relationship of landlord and tenant and the suit was dismissed on the ground that no such relationship existed. Plaintiff accordingly brought this suit in ejectment against the defendant. Defendant's case as put forward in his written statement was that he was a tenant of the Rani under a settlement from the lakherajdars who had sold to the Rani. Evidence was recorded and amongst other witnesses for the defendant one Chakar Mech was examined. It appears that this Chakar Mech had left the locality in 1304 when he joined the military police and he had not been there since.

The Court of first instance found that there was a settlement in favour of the plaintiff by the Rani, though the learned Munsif threw some doubt on that settlement on the ground that the officer in charge of the Rani's affairs, who had the making of the settlement, was the plaintiff's father. The Munsif also found that the defendant failed to prove his tenancy from the time of the lakherajdars, but he came to the conclusion that the disputed area was held by Chakar Mech as a recorded tenant under the lakherajdar and formed part of his holding. He was further of opinion that Chakar had acquired occupancy rights in his holding before he enlisted in the military police in 1304 and that he had made over the land to Hari Rabha to hold on his account, on a verbal understanding that on Chakar's retirement from the military police he would get it back. During his absence Hari Rabha was to pay rent to the lakherajdar. It has been found also by both the Courts that in one instance, at any rate, Hari Rabha paid rent for Chakar's holding to the Rani (Ex. A). On appeal, the learned Subordinate Judge appears to have accepted the findings of fact arrived at by the first Court without much consideration of the evidence.

The error that is apparent in the Subordinate Judge's judgment is that he has

dismissed the plaintiff's suit on a case which was not that of the plaintiff and was not that of the defendant. So far from its being the case of the defendant, it is absolutely inconsistent with it. The learned Judge has dismissed the suit on a view of Chaker's status which is inconsistent with defendant's own plea, contrary to what Chakar himself claims and which the plaintiff has had no opportunity of contesting. Under these circumstances we do not think that the present judgment of the learned Subordinate Judge can be supported. We are accordingly compelled to set aside his decree and remand the case to the Court of the Subordinate Judge for a rehearing of the appeal. Cost of this appeal will abide the result.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 687 (1)

NEWBOULD AND SHAMSUL HUDA, JJ.

Sukhu Kalwar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 456 of 1918, Decided on 18th June 1918, against order of 4th Presy. Magistrate, Calcutta, D/- 8th May 1918.

Calcutta Police Act (1866), S. 54 (a)—For offence under S. 54, property in accused's possession must be believed to be stolen before considering whether accused has been able to account for his possession of that property.

The preliminary condition which must be fulfilled before effect can be given to S. 54 (a) is that there must be reason to believe that the property found in the accused's possession is stolen property. [P 687 C 1, 2]

The Court has first to find on sufficient materials that there is reason for such belief, and it is not until it has come to such a finding that it can consider the question whether the accused has been able to account for possession of the property. [P 687 C 2]

J. N. Banerjee, Jyotish Chandra Hajrah and *Santosh Kumar Pal*—for Petitioner.

Judgment.—The petitioner has been convicted under S. 54 (a), Calcutta Police Act, which provides that a person in possession of anything which there is reason to believe to have been stolen or fraudulently obtained shall be liable to punishment, if he fails to account for such possession. The preliminary condition which must be fulfilled before effect can be given to this section is that there must be reason to believe that the property found in the accused's possession was stolen property. The reasons given by the Magistrate for coming to this belief in the present case are stated in his judgment as follows.

"First, that this silver bar was found along with other articles alleged to have been stolen and claimed by a certain person, about which there was already a case under S. 411, I. P. C., against the accused; secondly, that the accused was asked to produce the key of the box in which these articles were but he did not, and the box had to be broken open by the Police Officer; and thirdly, that the accused failed to account for the bar."

As regards the first of these reasons, the accused was acquitted of the charge referred to and in the absence of anything to show that the other articles were stolen, no inference against the accused can be drawn from the fact that this silver bar was found with those other articles. As regards the second of those reasons, the failure of the accused to produce the key is not shown to have been wilful. His story is that it was not then in his possession, and this has not been rebutted. The third ground is not one on which the Magistrate is justified in finding reason for believing that the property was stolen. He had first to find on sufficient materials that there was reason for such belief and it was not until he had come to such a finding that he could consider whether the accused had been able to account for its possession. Taking this view, we make the Rule absolute and set aside the conviction and sentence passed on the petitioner. The petitioner is acquitted of the offence charged and his bail bond will be discharged.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 687 (2)

CHATTERJEA AND NEWBOULD, JJ.

Janaki Nath Saha—Defendant—Appellant.

v.

Kailash Chandra Singha and *others*—Plaintiffs—Respondents.

Appeal No. 3807 of 1914, Decided on 11th May 1917, from appellate decree of Sub-Judge, Faridpur, D/- 4th August 1914.

Landlord and Tenant—Purchaser in execution of non-occupancy holding suing for possession—Another purchaser recognized by landlord—Purchaser in execution could not get decree as landlord's recognition of another purchaser amounts to settlement.

Plaintiff, purchased a non-transferable occupancy holding in execution of a money-decree

but he had not been recognized as a tenant by the landlord, and so sued to recover possession from the defendant, who was in possession under a fictitious purchase from the widow of the raiyat and who was accepted and treated by the landlord as a tenant:

Held: that the plaintiff could not get a decree against the defendant, who had been accepted and treated by the landlord as the tenant and as such treatment amounted to a settlement.

[P 688 C 2]

Jogesh Chandra Roy and *Prokash Chandra Mazumdar*—for Appellant.

Sarat Chandra Roy Chowdhury and *Probodh Chandra Roy*—for Respondents.

Judgment.—The plaintiff respondent on 20th November 1908 purchased a non-transferable occupancy holding in execution of a money-decree against one Melon Sheikh, (which was executed after his death against his heirs); but the plaintiff was not recognized as tenant by the landlord. He sued to recover possession of the holding from the defendant who was in possession. The latter set up a purchase in the year 1909 from one of the heirs of Melon, namely, his widow Kulo Bibi who is alleged to have obtained the entire holding from Melon by a deed of gift. He also pleaded that he was accepted as tenant by the landlord. The Court below gave a decree to the plaintiff and the defendant has appealed to this Court. Now, an involuntary transfer of an occupancy holding not transferable without the consent of the landlord, is operative as against the raiyat where the raiyat, with knowledge of the sale, fails or omits to have the sale set aside. As there was no finding whether Melon's widow had any knowledge of the sale in execution of which the holding was sold, the case was remanded for a finding on that point. The Court below has now found that she had no knowledge of the sale.

It is contended on behalf of the respondent that although the sale was not operative as against the widow of Melon, by reason of her not having any knowledge of the sale, the tenant's interests did not pass to the defendant because the heba under which Melon's widow is alleged to have acquired a right to the entire holding, is found to have been a paper transaction and Melon had other heirs also; and that, if the interests of the tenants did not pass to the defendant, the defendant did not acquire any title by recognition by the landlord. But it is the plaintiff's own case that the heirs of Melon had abandoned the land, at the time of his obtaining delivery of symbolical possession. That being so and the defendant having been accepted and treated by the landlord as the tenant, which, in the circumstances of the present case, amounted to a settlement, the former acquired a right to the holding. In this view it is unnecessary to consider the effect of the tenant's heirs not taking steps to have the sale set aside after they had knowledge thereof, which question, moreover, was not argued before us. The appeal must, therefore, be allowed and the suit dismissed with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 688

CHITTY AND BEACHCROFT, JJ.

Sudhir Chandra Das and *another*—Defendants—Appellants.

v.

Kamal Chandra Dutta and *others*—Plaintiffs—Respondents.

Appeals Nos. 364, 413 and 414 of 1914 and 153 to 167 of 1915, Decided on 5th July 1917, from original decrees of First Sub-Judge, Dacca, D/- 1st May 1914.

(a) Practice—Procedure—Money borrowed by executors for carrying on business of testator—Administration suit by creditors in High Court—Other creditors suing executors for debts due to them from estate — Such suits should be postponed and plaintifs allowed to prove claims in administration suits —Administration suit.

The exeutors under a will borrowed large sums of money for the purpose of carrying on a business left by the testator, which ultimately failed. Some of the creditors brought an administration suit in the High Court, while others individually instituted suits against the executors for the recovery of the debts due to them from the estate, and these suits were decreed by the Court against the estate as represented by the executors:

Held: that the Court should have in the exercise of a wide discretion postponed the hearing of these suits and allowed the plaintiffs to prove their claims, along with the rest of the creditors of the estate, in the administration suit which was pending in the High Court, even though no specific order was made by the High Court asking the lower Court to postpone those suits.

[P 690 C 2]

(b) Hindu Wills Act (1870) — Executors have statutory position and estate of testator vests in him.

Under the Hindu Wills Act, an executor under will has a statutory position and the estate of his testator vests in him. His position is not like that of a guardian of a minor or a shebait or a widow succeeding to her husband's estate, but he is the legal representative of the testator for all

purposes and all the property of the testator vests in him as such. [P 691 C 1]

(c) Executors—Liability of—Executor borrowing money is personally liable—Borrowing reasonable—He is entitled to be indemnified out of estate.

An executor who borrows money in the course of the administration for the purposes of the estate is personally responsible for the payment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made. [P 691 C 2]

(d) Executor—Power of—Business left by deceased owner vests in executors—Executor can pledge estate for administration.

In India business left by a deceased owner is undoubtedly a heritable asset which passes to his heirs, and in the case of a will, vests in his executor. In respect of the duties of the executor in carrying on that business, whether he does so for the purpose of winding it up or of making it over as a going concern to the person or persons entitled to inherit it and his duties in dealing with any other part of the testator's estate there does not appear to be any difference between executors in India and in England. An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration, even when it is necessary to carry on a business left by the testator. [P 692 C 1]

(e) Executor — Liability of — Money borrowed by executors—Suit by creditors for recovery of money from estate—Evidence of mismanagement should not be shut up.

In a suit by the creditors against the executors of an estate for the recovery from the estate of money borrowed by them for the purpose of administration, evidence of mismanagement on the part of the executors should not be shut out, as the estate cannot be rendered liable without deciding the question of the propriety or impropriety of the executor's conduct in borrowing the moneys. [P 692 C 1, 2]

Such a suit cannot be decreed against the estate but should be decreed against the executors in their personal capacity subject to the right of indemnity, if any, out of the estate, unless it is established that the borrowing was in all respects proper and for the benefit of the estate. [P 692 C 1]

In such a suit the executors cannot fully represent the estate, as their personal interests as executors are diametrically opposed to those of the estate. [P 694 C 1]

B. Chakrabarty, *Basanta Kumar Bose* and *Bipin Behari Biswas*—for Appellants.

B. C. Mitra, *C. R. Das*, *S. C. Roy*, *Sarat Chandra Basak Upendra Lall Roy*, *Rajendra Chandra Guha*, *Gopi Chandra Das*, *Akhil Bandhu Guha*, *Khitish Chandra Neogy*, *Prakash Chandra Pakrashi*, *Suresh Chandra Duss* and *Shib Chandra Palit*—for Respondents.

Chitty, J.—These are 18 appeals filed by Sudhir Chandra Das, the infant adopted son of Srish Chandra Das, through his guardian ad litem Mr. A. C. Banerjee, and by Mr. K. B. Dutt, receiver of the estate of Srish Chandra Das, against as many decrees of the First Subordinate Judge of Dacca. The 18 suits were heard by the Subordinate Judge and disposed of by him in one judgment. The main questions are common to all these suits but there are points peculiar to some of them which must be separately dealt with. The Subordinate Judge has held the estate of Srish Chandra Das responsible for the debts claimed in these 18 suits, absolving the executors from personal liability. It will be convenient to deal first with the questions which are common to all the suits and then to deal with any points peculiar to any one or more of them.

The facts are not seriously disputed. Srish Chandra Das was a zamindar and Banker carrying on business at Dacca and elsewhere. He had inherited the business from his grandfather Raj Chandra and his father Protap Chandra. The business was carried on in the name of Issur Raj Chandra-Protap Chandra Das. It is with this banking business that we are concerned in these appeals. The method of business appears to have been to take deposits from the public and pay them interest at the bank rate, while presumably out of those deposits, loans were made to other persons at a higher rate of interest. The business undoubtedly had a good name in the district and many people were found willing to entrust their money to Srish Chandra Das. The method of taking deposits was on receiving money from a person to pass to him a hundi payable at 90 days' sight or a promissory note or even a plain hatchitta. These documents appear to have been given rather as evidence of the deposits than as negotiable instruments; that is to say, the depositor was often willing to leave his money with Srish Chandra Das long after the due date of the hundi or promissory note had expired. But we understand that the hundis and promissory notes were as a matter of form renewed from time to time. Srish Chandra Das died on 12th December 1904, having the day previous made his will, by which he appointed his wife Raseswari Chowdhrani, defendant 1, executrix and his cousin and servant Rajani Mohan Das, defendant 2, executor.

The will is very short and simple, and no question turns upon its construction.

He empowered his wife to adopt Nirmal Chandra Das, the son of his daughter, Sarojini, or failing him any other person. To the son so to be adopted the testator left the whole of his estate, subject to an allowance of Rs. 100 a month to be paid to his two eldest daughters and two houses to be given to them. The testator left him surviving besides his wife Raseswari four daughters—Sarojini, who married Bankim Chandra Chowdhury and whose son Nirmal Chandra was to be adopted; Indumati, who married Bipin Behary Biswas; Promila, who married Ghanoda Nath Roy Chowdhury (known as Raja of Dubalhati); and Sukumari. On 22nd February 1905, an application was made to the District Judge of Dacca for probate of the will by the executors. The testater's daughter Indumati filed a caveat and on 4th April 1904, Babu Chandra Kumar Dutt was appointed administrator pendente lite. The probate case was soon afterwards settled. Indumati was paid Rs. 30,000 out of the estate and withdrew her caveat. Probate was accordingly issued to the executrix and executor on 22nd May 1905. On 26th April 1906 Raseswari adopted the boy Nirmal Chandra Das, who was then given the name of Sudhir Chandra and who is one of the appellants before us. The executors continued to carry on the business of the testator and for that purpose appear to have borrowed very large sums of money. Their management was not successful and the estate became more and more heavily involved.

On 26th April 1912, a suit was filed on the Original Side of this Court (Suit No. 415 of 1912) by Sudhir Chandra Das, through his adoptive sister and next friend Promila against the executrix and executor. In that case after contest a preliminary decree was passed by Chowdhury, J., on 6th May 1913. Notices were issued in that suit to all the 107 creditors of the estate and we are told that among the creditors all the plaintiffs now before us preferred their claims. The business had gone from bad to worse and in 1912 it was finally closed. In that year and in 1913, 75 suits were filed against the executors of the estate by various creditors, 6 in the High Court and 69 in the mofussil. Of these the High Court suits and 51 mofussil suits were stayed. The 18 suits now before us were not stayed and have gone to decree. We think that the Subordinate Judge did not exercise a wise discretion in declining to postpone the hearing of these 18 suits also, and allow these plaintiffs to prove in the administration suit along with the rest of the creditors of the estate. The matter was brought to his notice, but he appears to have declined to act without a specific order of this Court upon himself. If his decrees against the estate were in other respects proper and could be supported even then it would give the present plaintiffs a somewhat unfair advantage over the other creditors of the estate, because they would come in with their claims already decided and increased by the costs of hearing in their several suits. It should be stated that in the administration suit Ghanoda Nath Roy Chowdhury was appointed receiver. His place is now held by Mr. K. B. Dutt. In the administration suit Promila was removed from the position of next friend and Mr. S. P. Bose was appointed on 27th July 1912. Later his place was taken by Mr. A. C. Banerjee. On 12th August 1912, Ghanoda Nath Roy Chowdhury as receiver took possession of the estate, and it was at or about that time that the business was closed. For the most part, the debts now in question in these 18 suits were incurred by the executors between the years 1909 and 1912. In two cases (Suits Nos. 21 and 213) it is alleged that the hundis were in renewal of former hundis and that these debts were actually incurred in the lifetime of Srish Chandra Das. In another suit (No. 51) it is said that the hundis were in renewal of debts incurred by Raseswari when she was heiress of the estate, before the adoption of Sudhir Chandra Das. The main question in these appeals is whether the decrees should have been passed, as they have been passed, against the minor and the receiver, that is to say, against the estate of Srish Chandra Das, and not against the executrix and the executor personally.

It is admitted that the claims in all these 18 suits are based on hundis written by an employee of the firm and accepted by Bajani Mohan Das as executor. Rajani Mohan Das died pending the appeals and his sons have been brought on the record as his legal representatives. It was argued by the learned counsel for the plaintiff in Appeal No. 364, which is the main appeal before us, that the executors

had power to carry on the business, to borrow money for that purpose, and to bind the estate by those borrowings. A long and elaborate argument was addressed to us as to the position of an executor under the Hindu law. It was said—and rightly said—that before the passing of the Hindu Wills Act (21 of 1870) he was a manager. It was not until the Hindu Wills Act incorporated S. 179, Succession Act, that the executor acquired a statutory position, and that the estate of his testator vested in him. It was conceded that the powers of an executor under the statute were, if anything, larger than those which he possessed before and it was said that no powers which he possessed before had been taken away. It was argued that, as a widow or a guardian of a minor or a shebait was a manager, therefore an executor, who was also a manager, stood in the same position. The argument is obviously fallacious. The analogy is in no sense complete, and the cases which deal with the peculiar powers of widows, guardians or shebaits have really no bearing upon the present question. A very large number of cases dealing with such persons and their powers were cited before us, and I have been at some pains to examine those decisions. I am, however, entirely unable to see that they afford any assistance for the decision of these appeals. We have to deal with executors and their powers and duties as such. An executor under Statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. S. 4, Probate and Administration Act (5 of 1881) is a reproduction verbatim of S. 179, Succession Act (10 of 1865), which was made applicable to Hindus by S. 2, Hindu Wills Act. The executor is, therefore, in many respects in a different position from a Hindu widow succeeeding to her husband's estate, a guardian of a minor, or a shebait of an idol.

The estate of the testator is absolutely vested in the executor for the purposes of administration and he can deal with it as he pleases, subject, of course, to his responsibility as executor for the due administration of the estate. His powers are defined in Ch. 6, Probate and Administration Act, while his duties are dealt with in Ch. 7. One of the duties of an executor is to collect with reasonable diligence the property of the deceased and the debts that were due to him at the time of his death (S. 100). By S. 105 debts of every description must be paid before any legacy. It has been held in several cases in this Court that the executor who borrows money in the course of the administration for the purposes of the estate is personally responsible for the repayment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made. This principle was laid down in England in the case of *Labouchere* v. *Tupper* (1) and *Farhall* v. *Farhall* (2). It has been applied to the case of Hindus in at least three cases decided by this Court—*Ramanath Paul* v. *Kanai Lal Dey* (3), *Debendra Nath Biswas* v. *Hem Chandra Roy* (4) and *Satya Prashad Pal Chowdhry* v. *Motilal Pal Chowdhry* (5). It is true that in the last mentioned case the Court held the estate liable on hatchittas executed by the executrix but that decision was based on the peculiar facts of that case. *Farhall* v. *Farhall* (2) was referred to and the remarks of Mellish, L. J., were applied. The English law as stated in various passages in Williams on Executors was also accepted. I do not think that it can now be successfully contended that the principle of an executor's personal liability as laid down in England and accepted by this Court as applicable to Hindu executors can be disputed.

But it was said that those cases are distinguishable from the present, inasmuch as the debts there dealt with were ordinary debts on contract and not obligations undertaken in the conduct and for the purposes of a business. It was argued that a business in India is on a different footing from a business in England, that it is here an heritable asset which passes on the owner's death to his heirs. There is no doubt some distinction between the two but it is not a very real one. In England executors do, and must, carry on their testator's business for the purpose, at any rate, of winding it up. As to how long they can do so is a matter to be considered in every case.

1. (1857) 11 Moore P C 198=5 W R 797.
2. (1872) 7 Ch 123=41 L J Ch 146.
3. (1903) 7 C W N 104.
4. (1904) 31 Cal 253.
5. (1900) 27 Cal 683.

Sometimes the conduct of a business by executors in England has been prolonged over a large number of years, as for instance, where a testator has directed in general terms that the sale and conversion of his property might be postponed for such period as to the executor should seem expedient: see *Crowther, In re, Midgley* v. *Crowther* (6). In India business such as this is undoubtedly a heritable asset see *Sakrabhai* v. *Maganlal* (17). It will pass to the owner's heirs, and, in the case of a will, will vest in his executor. In respect of the duties of the executor in carrying on that business, whether he does so far the purpose of winding it up, or of making it over as a going concern to the person or persons entitled to inherit it, there does not appear to be any difference between his duties in so doing, and his duties in dealing with any other part of the testator's estate. An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration, e. g., mortgaging a zamindari for the payment of Government revenue. I am unable to see any distinction between his borrowing money for other purposes of the estate and his borrowing money in order to carry on a business. In either case he can only do so for the benefit of the estate; and in so borrowing the responsibility rests entirely upon him, subject only to his ultimate right to be indemnified out of the estate.

It appears to me, therefore, that in these cases the decrees ought undoubtedly to have been passed against the executrix and the executor personally subject to their right of indemnity against the estate, if in the administration suit they showed that the borrowing was in all respects proper and for the benefit of the estate; I must, of course, assume that they might be able to show that the borrowing was for the benefit of the estate. Here the facts, so far as they have been investigated, point rather in the other direction. The learned Subordinate Judge has, I think, fallen into a serious error in shutting out evidence of anything like mismanagement on the part of the executrix and executor. He has also held that the question of indemnity cannot be gone into in this case. The latter would be a correct decision, if he were making the executors liable, but it is clearly wrong if he is making the estate liable, because in that case he has shut out any question of the propriety or impropriety of the executor's conduct in borrowing these moneys. Even on the present imperfect elucidation of the facts it would appear that the executors acted recklessly in carrying on this buainess. The debts of the business at the time of the testator's death, we are told, amounted to about six lacs of rupees. The executors continued to add to that liability and only succeeded in paying off a portion of it. The result was that the business after six or seven years of such management was found to be insolvent and had to be closed. Rajani Mohan Das himself stated that, had it been closed at Srish's death, the whole estate would have been ruined. This was probably an exaggeration, but it shows that the liabilities of the business as distinct from the rest of the estate were far in excess of its assets, for I do not think that the whole estate including the zamindaris can properly be regarded as assets of the business. No doubt looking at the testator's estate as an entire whole, they might in a sense be so regarded. Rajani Mohan Das also admitted that the executors incurred a liability of some Rs. 50,000 in order to invest in immovable property worth Rs. 70,000, the balance presumably being met from other portions of the estate. If the business was in that condition at the date of Srish's death, it is difficult to see how the executors were justified in borrowing for such a purpose. Nor could they be justified in incurring further debts in the vain hope of saving the business as a going concern.

As to the liability of Rajani Mohan Das, or rather (as he is dead) of his estate, there can be no question. It was argued on behalf of Raseswari, defendant 1, that she had nothing to do with the business and that she was not accountable for the acts or defaults of her co-executor. The evidence, however, shows that this contention is not correct. It was she who decided to carry on the business after her husband's death and did in fact carry it on. She appointed the Manager Babu Chandra Kumar Dutt, and the evidence shows that to some extent she looked into the details of the business. She was at that time in the position of heiress to her husband's estate because until the adop-

6. (1895) 2 Ch 56=64 L J Ch 537.
7. (1902) 26 Bom 206.

tion took place, there was a partial intestacy. She was, therefore, in the dual capacity of executrix and heiress. She cannot, however, escape her responsibility as executrix by pleading that she gave orders in the other capacity. The arguments addressed to us for the plaintiffs-respondents appear to me to be somewhat inconsistent, because it was conceded that the executors could not charge the estate except for moneys properly borrowed and that the creditors were bound to make enquiries to see whether they were justified in lending to the estate, and the plaintiffs seek to make the estate liable without any investigation of those matters That the plaintiffs made no such inquiries is clear. There is no evidence of anything of the kind and it does not appear to have been contended before the Subordinate Judge that they made any such inquiries at all.

It was argued for the plaintiffs that, as the estate had vested in the widow as heiress on the testator's death and in the adopted son from the date of adoption, he being under the guardianship of his mother Raseswari, the estate would be bound as she could assent to the borrowing of these moneys, first in her capacity as beneficiary ,and then in her capacity as guardian of the minor beneficiary. This is also fallacious, because the estate was wholly vested in the executors as such and they were responsible till such time as the administration was complete. Admittedly it is not yet complete and the propriety of their borrowing may yet be investigated in the administration suit. It should perhaps be stated that there is no provision in the will authorizing the executors to carry on the business. So far as they did so, they did it subject to the general law in such matters. In suits Nos. 21 and 213 (Appeals Nos. 758 and 163) it was stated that the hundis were in renewal of former hundis and that the original deposits had been made in the lifetime of Srish Chandra Das. It was urged that in these suits at any rate the decrees should be against the estate. No doubt if the facts are as stated, these cases stand on a somewhat different footing to the rest. It may well be that in those cases the executors would have but little difficulty in establishing their right to indemnity and these creditors would get the benefit of that in the administration suit. There are, however, substantial objections to passing decrees at once against the estate in these cases. In the first place, the evidence that the deposits were made in Srish Chandra's lifetime is by no means complete. It is at present rather a matter of inference than of proof. Secondly, all evidence of mismanagement has been shut out, so that it is impossible to decide one way or other as to the propriety of the executor's conduct in renewing these loans. Thirdly, the question of indemnity has not been and cannot be gone into here and that must be determined before the estate can be charged. I think, therefore, that these claims should stand over with the others for investigation in the administration suit. On the whole I am of opinion that these 18 decrees against the estate cannot stand but that they must be entered up against the executors in their personal capacity, subject to their right of indemnity, if any, in the administration proceedings. This disposes of the main question which is common to all the appeals. With regard to Appeals Nos. 157, 159, 161, 165, 413 and 414, it appears that the hundis in these suits were insufficiently stamped. In Appeals Nos, 161 and 414 the question cannot be gone into, as the Subordinate Judge points out that the objection was not taken until after the admission of those hundis in evidence. As to the other four appeals I think that the Subordinate Judge is right in holding that the plaintiffs were at liberty to give the go by to the hundis which were inadmissible in evidence and sue for the consideration. That appears to be settled law, so far as this Court is concerned: see *Golap Chand Marwaree* v. *Thakurani Mohokoom Koaree* (8) and *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (9). In the administration suit these creditors could certainly come in and claim the executor's indemnity, if they had any, against the estate.

In Appeal No. 156, the plaintiff challenged the validity of the adoption of Sudhir Chandra Das. The learned Subordinate Judge held that the point was beyond the scope of that suit and declined to go into it. In this he was, I think, in error. If Sudhir Chandra Das was on the record as the beneficiary representing the estate, it is clear that the estate could only be represented by him if he was in fact such beneficiary. That would

8. (1877-78) 3 Cal 314=2 C L R 112.
9. (1896) 23 Cal 851.

depend on the validity of his adoption. If the point was raised, as in this case it undoubtedly was, the lower Court ought, I think, to have gone into it. In the view that I take of the liability of the executrix and the executor, the matter becomes of little importance as the suits must fail against Sudhir Chandra Das. In all the other cases the validity of adoption, though at one time in question was not seriously disputed either in the lower Court, or before us on appeal, This is sufficient to dispose of the 18 appeals.

There is, however, another and equally substantial ground on which the decrees of the Subordinate Judge against Sudhir Chandra Das must necessarily be set aside. It is clear from the record in these various suits that the minor Sudhir Chandra Das was not properly represented in the Court below. In Suit No. 91 of 1913 (Appeal No. 162) the minor Sudhir Chandra Das was never made a party at all. The Receiver Kumar Ghanoda Nath Roy was a party, defendant 5, and his place was taken by Mr. K. B. Dutt on 22nd Janurary 1914. The learned Subordinate Judge says that the absence of the minor was immaterial, as the estate was fully represented by the executors. Ordinarily speaking, no doubt, the executors could fully represent the estate, but not in a case like this where their personal interests as executors were diametrically opposed to those of the minor beneficiary and the estate. The minor is spoken of throughout in all the suits [except Suit No. 91 (Appeal No. 162) just mentioned] as represented by his guardian ad litem Janaki Nath Roy. We have been at some pains to investigate the facts which led up to the appointment of Janaki Nath Roy in each and every one of these cases. It is not necessary to go through them in detail at this stage. It is sufficient to say that in most cases the plaintiffs proposed, as was not unnatural, the appointment of Raseswari as guardian ad litem of her minor son. In most cases the notices required by O. 32, R. 3, Civil P, C., were issued on the minor and Raseswari. In some cases no notice at all was issued. In many cases the service of the notice is left in doubt. In several cases there was no formal appointment of a guardian at all. In all the cases however it appears that Janaki Nath Roy, who is a cousin of Raseswari, came forward of his own motion and asked to be appointed guardian ad litem. It is certain that he did so as the nominee of Raseswari. Now it cannot be disputed for a moment that the interest of Raseswari were wholly antagonistic to the interests of her minor son. It was therefore impossible that she could act as his guardian ad litem, nor was it right that her nominee should be appointed to that post. Another extraordinary circumstance is that one at least of the pleaders for the parties, namely, Babu Birendra Chandra Sircar, was appearing both for the minor and his mother. In other cases we find that the pleaders in the Court below were occasionally to be found first on one side and then on the other. Thus Babu Peary Lall Das, who appears throughout as the pleader of the minor or of the receiver, appears in one case to have made an application for the mother. He appears in one case at least to have held a vakalatnamah for Rajani Mohan Das: see the decree in Suit No. 91 of 1913. On 29th May 1914, directly the hearing was over, Janaki Nath Roy put in a petition in all the suits (except No. 91 of 1913) praying to be relieved of his guardianship. This was granted on 20th June 1914, when Mr. A. C. Banerjee was appointed in his place. I should not be disposed to lay much stress on the absence in some cases of a formal order of appointment, in view of the fact that the cases were all tried together, and Janaki Nath Roy was formally appointed in most of them.

The substance however of the objection is that the minor was not properly represented or his case, which was diametrically opposed to that of the executors, properly put before the Court by Janaki Nath Roy. This is shown by the fact that no evidence was called on his behalf. The only witness nominally called by him being a pleader who was called to prove the affidavit in the petition for probate, in other words, to give evidence in favour of the executors. The cases were, except for some desultory cross-examination, conducted practically without opposition on behalf of the minor. As I have before observed, the learned Subordinate Judge (in my opinion erroneously) shut out the evidence of mismanagement on the part of the executors, which the pleader for the minor wished to elicit by cross-examination. It may be said that in most of the cases the receiver was also a party and that he could

and did properly represent the estate. He was made a party simply in his capacity as receiver. He does not appear to have taken any active part in the proceeding. It may be that he had no funds in his hands to enable him to conduct the defence in a more strenuous manner. The fact remains that the real defendant brought on the record to represent the estate was the minor Sudhir Chandra Das, and his interests, which were at stake, have not been properly safeguarded in the trial in the Court below. The learned Subordinate Judge appears to have taken a somewhat one-sided view of the case throughout, and instead of endeavouring to protect the minor and his interests has been too ready to protect the executors at the expense of the minor and his estate. There appears to be no foundation in fact for the suggestion that in the Court below the executors and the guardian ad litem of the minor were combining to defeat the claims of the creditors. The impression left on my mind after a full consideration of the whole case is rather that the executors were playing into the hands of the creditors in order to relieve themselves of liability by throwing it on the estate.

I would accordingly set aside all these 18 decrees of the Subordinate Judge and enter up decrees for the several amounts against the executrix and the executor personally (the executor now being represented by his sons), with liberty to the plaintiffs to claim the executor's indemnity, if any, against the estate in the administration proceedings. The appeals must be allowed with costs, that is to say, the suits will be dismissed against the present appellants with costs (one set only) in both the Courts. The plaintiffs will have their decrees against the executrix and the executor personally with costs in both the Courts. The executrix and the estate of the executor will also be responsible jointly with the several plaintiffs to the appellants for their costs of these appeals.

Beachcroft, J.—I agree.

V.B./R.K. *Appeals allowed.*

A. I. R. 1918 Calcutta 695

MOOKERJEE AND NEWBOULD, JJ.

Manmotha Nath Dey and *another*—Petitioners—Appellants.

v.

Gadadhar Manna—Opposite Party—Respondent.

Appeals Nos. 200 and 201 of 1915, Decided on 26th June 1917, against orders of Dist. Judge, Midnapore, D/- 26th January 1915.

Civil P. C. (1908), O. 43, R. 1 (t) and O. 41, Rr. 17 and 19 — Appeal to special Judge dismissed for default—Application to re hear also dismissed—Appeal lies — Bengal Tenancy Act (1885), S. 109 A-(2).

An appeal lies to the High Court from an order refusing to re-hear an appeal dismissed for default, even though such appeal has been preferred to the Special Judge under S. 109-A (2), Ben. Ten. Act, in a suit under S. 106 of the Act. [P 696 C 1]

Provash Chandra Mitter and *Tarakeswar Pal Chowdhry*—for Appellants.

Probodh Chandra Chatterjee for *Gour Chandra Pal*—for Respondents.

Judgment.—This appeal is directed against an order whereby the Court below has refused to set aside an order of dismissal of an appeal for default. A preliminary objection has been taken to the competence of the appeal. The suit was instituted under S. 106, Ben. Ten. Act and was dismissed by the Court of first instance. An appeal was thereupon preferred to the Special Judge under sub-S. 2, S. 109-A. When the appeal was taken up for disposal neither the appellant nor his pleader appeared and it was consequently dismissed for default. An application was thereupon made to re-hear the appeal. That application has been refused and the present appeal is directed against this last order. On behalf of the respondent, it is contended that the appeal is incompetent and reliance is placed upon the decision of this Court in *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose* (1). In our opinion, that case is clearly distinguishable and has no application to the circumstances of this appeal. There, an order of remand was made in an appeal preferred under S. 109-A, against the decision in a suit under S. 106. An appeal was thereupon preferred to this Court against the order of remand. A preliminary objection was taken that the appeal was incompetent and this contention prevailed. Banerjee, J., observed that an appeal lay to

1. (1903) 7 C W N 440.

the High Court from an appellate decision of the Special Judge, only under Ch. 42, Civil P. C., 1882, which has now been replaced by Ss. 100 to 103 of the Code of 1908. An appeal against the order of remand, if it lay at all, would lie to this Court not under Ch. 42 of the Code of 1882 but under S. 588 which found a place in Ch. 43 of the Code. As Ch. 43 was nowhere mentioned in S. 109-A, the inference was drawn that an appeal did not lie to this Court from an order of remand made by a Special Judge in the exercise of the appellate powers under sub-S. 2, S. 109-A. In the present case S. 109 A, sub-S. 2, made the provisions of the Civil Procedure Code relating to appeals applicable to the appeal before the Special Judge. One of these provisions is embodied in O. 41, R. 17, which provides as follows:

"Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed."

The Special Judge in the exercise of the power thus vested in him did dismiss the appeal. Thereupon R. 19 became applicable. That rule provides that where an appeal is dismissed under R. 17, the appellant may apply to the appellate Court for the re-admission of the appeal. This attracts the operation of O. 43, R. 1, Cl. (t), which provides that an appeal shall lie under the provisions of S. 104 from an order of refusal under R. 19, O. 41, to re-admit an appeal. No question arises as to the applicability of Ch. 42 of the Code of 1882 or of the corresponding provisions of the Code of 1908, as under S. 2 of the latter Code, an order of dismissal for default is not a decree. There is no escape from the position that this appeal is competent under O. 43, R. 1, Cl. (t); in other words, an appeal lies from an order refusing to rehear an appeal dismissed for default, even though such appeal has been preferred under S. 109 A, sub-S. 2, in a suit under S. 106, Ben. Ten. Act.

As regards the merits, we are of opinion that this appeal should be allowed and the appeal preferred under S. 109-A, which was dismissed for default, restored. This order however, is made on terms. The appellant will pay to the respondent two gold mohurs as costs here and in the Court below. This sum must be deposited within one month of the arrival of the record in that Court. If the deposit is made, as directed, the appeal will stand restored and heard on the merits. If it is not so deposited, this appeal will stand dismissed with costs, one gold mohur. It is conceded that this judgment will govern the other appeal (M. A. No. 201 of 1915). In that appeal, however, there will be no separate order for costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 696

WALMSLEY AND GREAVES, JJ.

Kedar Nath Mana—Judgment-debtor—Appellant.

v.

Jogendra Nath Das—Decree-holder—Respondents.

Appeal No. 214 of 1917, Decided on 18th July 1917, from order of Sub. Judge, First Court, Hooghly, D/- 30th April 1917.

Presidency Small Cause Courts Act (5 of 1882), S. 31 (b)—Transfer of decree to Munsif without intervention of District Judge is good.

The transfer by a Presidency Small Cause Court of its decree for execution to a Munsif direct without intervention of the District Judge is perfectly good under S. 31 (b), Presidency Small Cause Courts Act. [P 697 C 2]

Where in the copy of a decree transmitted for execution and the certificate of transfer, the name of the decree-holder was written as Benode Behari Das in the place of Benode Behari Bose, the correct name:

Held: that it was apparently a mere clerical mistake and was of no consequence. [P 696 C 2]

Saroda Charan Maity—for Appellant.

Asiranjan Chatterjee and *Panchanan Ghose*—for Respondent.

Judgment.—This appeal arises out of the following circumstances. One Benode Behari Bose obtained a decree in the Presidency Small Cause Court against the appellant and subsequently sold this decree to one Jogendra Nath Das. At the instance of Jogendra Nath Das the decree of the Small Cause Court was transferred for execution to the Munsif at Uluberia. Before the Munsif three objections were taken and they were all overruled by him. There was an appeal to the Subordinate Judge but that was dismissed. The first objection taken in this Court is that in the certificate, as also in the copy of the decree, the name of Benode Behari Das was written in place of Benode Behari Bose. This apparently was merely a clerical error and

is of no consequence. The second objection relates to the notice of assignment.

The objection that were pressed in both the lower Courts were of an entirely different nature. We cannot, therefore go into the question regarding the notice of assignment. The third point is as follows. The decree was sent by the Small Cause Court direct to the Munsif without the intervention of the District Judge. It is said that this is an error and in consequence the subsequent proceedings will not merely be irregular but utterly void, and our attention has been drawn to the case of *Debi Dial Sahu* v. *Maharaj Singh* (1). But under S. 31 (b), Presidency Small Cause Courts Act it is laid down that the Court may in all other cases (that is to say, other than the cases where execution is sought against immovable property situate within the local limits of a High Court) send the decree for execution to any civil Court within the local limits of whose jurisdiction any immovable property of the judgment-debtor may be found. The Small Cause Court at Calcutta reads that section as meaning that the provision of O. 21, R. 5, Civil P. C., which requires that when the decree is transferred to another Court for execution that decree should be sent in the first instance to the District Judge, does not apply to the decrees of Presidency Small Cause Courts and the printed notice which accompanies the decree sent for execution invites the attention of the Court to which the decree is transferred to the fact that O. 21, R. 5 does not apply. I do not, of course, suggest that this statement by the Small Cause Court, has any legal effect, but I mention it merely to show that in sending the decree direct to the Munsif the Small Cause Court was following its usual practice. Looking at S. 31 (b), I cannot myself understand why there should be such a clause if it did not mean that the procedure of the Small Cause Court was put on a different footing from that of other Courts in the matter of transferring decrees for execution.

The question is one which does not appear to have been discussed on many occasions: but in the case of *Shamsunder Saha* v. *Anath Bandhu Saha* (2) reference is made to this point and it appears to me that the proper interpretation to be put upon the judgment delivered by the late Chief Justice is that he held in that case that the transfer of the decree to the Munsif direct was perfectly good under S. 31 (b), Presidency Small Cause Courts Act and that the incompetency of the Munsif in that case sprang solely from the fact that his pecuniary jurisdiction was not large enough to cover the decree sent to him. On the authority of this ruling as also upon what appears to be the plain meaning of S. 31 (b), I think that the objection is not tenable. I must add that the learned vakil has expressly withdrawn the argument that the Munsif had not territorial jurisdiction to deal with the decree. I am of opinion that the appeal should be dismissed with costs. I assess the hearing fee at two gold mohurs.

V.B./R.K. *Appeal dismissed.*

1. (1895) 22 Cal 764.
2. (1910) 37 Cal 574=6 I C 97.

A. I. R. 1918 Calcutta 697

CHITTY AND BEACHCROFT, JJ.

Janendra Mohun Choudhury and *others* —Plaintiffs—Appellants.

v.

Gopal Chandra Har—Defendant—Respondent.

Appeal No. 2321 of 1915, Decided on 18th April 1917, from the original decree of Special Judge, Mymensingh, D/- 12th June 1915.

Evidence Act (1872), S. 90 — Document, not signed or sealed—S. 9 does not apply.

S. 90 does not apply to an ancient document which is neither signed nor sealed nor purports to be in the handwriting of any particular person. [P 698 C 1]

Jogesh Chandra Roy and *Mukunda Nath Roy*—for Appellants.

Kshitish Chunder Neogi and *Naresh Chandra Sen Gupta*—for Respondent.

Beachcroft, J.—The plaintiff is the appellant before us. He applied under S. 105, Ben. Ten. Act, for settlement of rent payable by the defendant. The defendant claimed that he was a raiyat holding at fixed rates The first Court found that the tenant was not a raiyat holding at fixed rates and it assessed rent at the rate of Rs. 2-8-0 on the whole of the tenant's holding; it also gave an enhancement on account of the rise in prices. Both sides appealed to the Special Judge. The plaintiff appealed against the decision as to the rate of rent and the defendant appealed against the decision as to status. The learned Judge held that the

presumption of S. 50 (2), Ben. Ten. Act, should apply in this case, and applying that presumption he held that the defendant was a raiyat at fixed rates. Some old papers appear to have been filed in the case dating back to 1264, 1275 and 1276. The papers of 1275 and 1276 show that the tenant was holding at the same rate at which he was holding at the time of the institution of the suit. The paper of 1264, however, shows a different rate. This paper, it appears, was neither signed nor sealed, nor is there any evidence to show that it was written by any particular person, and in that state of facts the learned Judge held that S. 90, Evidence Act did not apply. The first argument addressed before us is that the learned Judge is wrong in so deciding and that the Judge ought to have presumed that the document was written by the person whose duty it was to write such documents. In my opinion, this argument cannot be sustained. S. 90, Evidence Act, provides that the Court may presume that the signature and every other part of a document, which purports to be in the handwriting of any particular person, is in that person's handwriting. As already stated, the document has not been signed, nor does the document purport to be in the handwriting of any particular person. We are asked to go beyond the presumption specified in S. 90 of the Act. The first point, therefore, cannot succeed.

The next point taken is that the tenancy was created subsequently to the Permanent Settlement and that, therefore, the presumption raised in S. 50 (2), Ben. Ten. Act, does not apply. As regards that, it is a sufficient answer to say that the learned Judge refused to accept the evidence which bore on the question of the creation of the jote subsequently to the date of the Permanent Settlement; and, that being his finding, the provisions of S. 50 (2), Ben. Ten. Act apply. The result then is that the learned Judge's decision as regards the status of the defendant must be upheld. It is then argued that the learned Judge has not dealt with an appeal of the plaintiff as regards the rate of rent to be assessed. The learned Judge points out that there has been some increase in the area from the date of the earliest papers, which he accepts and he assesses rent in respect of the excess area. He does not, in so many words, accept the rate which is settled by the Assistant Settlement Officer, viz., Rs. 2-8-0 per kur, but as he does not interfere with the rent so settled, it is obvious that he intended to uphold the rent thus settled. Then it is further urged that the Judge ought to have entered into a discussion of the evidence in regard to rent because the landlord claimed some higher rate than Rs. 2/8. As regards that all I need say is that it does not appear that that question was argued before the learned Special Judge. In my opinion, this appeal fails and must, therefore, be dismissed with costs, two gold mohurs.

Chitty, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 698

FLETCHER AND NEWBOULD, JJ.

Mitu Sheikh—Defendant—Appellant.

v.

Amrita Lal Sen and *another*—Plaintiffs and pro-forma Defendants—Respondents.

Appeal No. 1301 of 1916, Decided on 13th July 1917, from appellate decree of Covenanted Sub-Judge, Nadia, D - 29th April 1916.

Bengal Tenancy Act (1885), S. 180 and Ch. 6—Lease of chur land for term of years is not of utbandi nature.

A tenancy of a chur land for a term of years created by a lease in writing unregistered, the rent being payable at the rate of Rs. 2 per bigha in respect of such of the land as for the time being is capable of being brought into cultivation, is not one of an utbandi nature, but is a non-occupancy holding to which Ch. 6, Ben. Ten. Act, is applicable. [P (90) 31]

Mohini Mohan Chatterjee and *Baranashibashi Mukerjee*—for Appellant.

Jotindra Nath Sen—for Respondents.

Fletcher, J.—This appeal arises out of a suit in ejectment brought by the landlords to recover certain chur land, on the allegation that the term of the lease in writing under which the tenant held had expired. The land, as I have already said, is chur land. The learned Judge in the lower appellate Court found that the lease was not admissible in evidence and he decided the rights of the parties apart from the contract of tenancy that they entered into but on the footing of a custom of utbandi. The custom of utbandi is referred to in the various Gazetteers or other official or demi-official works. It is apparently a custom whereby the tenant takes the property for cultivation for a particular season. That clearly is not the tenancy in this case. The tenancy

here, according to the contract between the parties, was for a term of 6½ years. The view of the learned Judge that the lease between the parties cannot be looked at is obviously wrong. The lease in this case was pleaded by the plaintiffs as the foundation of their suit, namely, that the term had expired and they were entitled to recover possession of the land. The lease, it is said, is of an utbandi nature. It apparently is nothing of the sort. The lease is a lease of chur land, the rent being payable at the rate of Rs. 2 per bigha in respect of such of the land as for the time being is capable of being brought into cultivation; that is, when the land becomes dry, it is charged with rent during the continuance of the tenancy. The lease being a lease of chur land, the rights of the parties are governed under the provisions of S. 180, Ben. Ten. Act. Under that section Ch. 6, of the Act does not apply to raiyats holding land under the custom of utbandi. But it does apply to chur land. The defendant in this case clearly does not come under the category of raiyats holding under the custom of utbandi. He was cultivating under the provisions of the lease that is mentioned in the plaint, the expiration of which was the foundation of the plaintiffs' suit. To call the defendant an utbandi raiyat is altogether wrong, if utbandi means a person as described in these Gazetteers and the other official and demi-official works that have been referred to us. This is a man cultivating on chur land under the terms of a lease in writing which is not governed by any custom at all. Therefore, it seems to me quite clear that Ch. 6, Ben. Ten. Act, does apply, to this case.

If Ch. 6 does apply, the defendant either held under a registered lease or does not hold under a registered lease. If he does not hold under a registered lease, then he cannot be ejected except on the ground that he has failed to pay the arrears of rent. If he holds under a registered lease —although apparently the lease in this case is not registered—then, under Art. 1 (a), Sch. 3, Ben. Ten. Act, the suit is barred by limitation, it having been brought more than six months after the expiration of the term granted by the lease. In either view of the case, the tenant of this chur land is, in my opinion, clearly a non-occupancy raiyat to whom the provisions of Ch. 6 do apply. It is not necessary for us to decide between the two conflicting decisions reported as *Ganpat Makton* v. *Rishal Singh* (1) and the other as *Dwarkanath* v. *Tafazar Rahaman Sarkar* (2). I am clearly of opinion that this defendant held this chur land under a lease in writing which regulated the rights of the parties and that those rights cannot be governed by the custom which the terms of the document must have expressly excluded. I think, therefore, that the plaintiffs are not entitled to recover possession of this land. We ought, therefore, to set aside the decree of the learned Subordinate Judge and restore the decree of the Munsif with costs in all Courts.

Newbould, J.—I agree.

V.B./R K. *Appeal allowed*

1. (1916) 33 I C 978.
2. (1917) 44 Cal 267=39 I C 64.

A. I. R. 1918 Calcutta 699

FLETCHER AND NEWBOULD, JJ.

Satis Chandra Basu and *others*—Defendants—Appellants.

v.

Nittya Gopal Haldar and *others*—Plaintiffs and defendants—Respondents.

Appeal No. 1691 of 1913, Decided on 19th April 1917, from appellate decree of Addl. Dist. Judge, 24-Perganhans, D/- 15th March 1913.

(a) Bengal Tenancy Act (1885), Sch. 3, Art. 3—Dispossession by landlord as such is not necessary.

In order that the special rule of limitation as comprised in Art. 3, Sch. 3, Ben. Ten. Act, may apply, it is not necessary that the dispossession must be by the landlord as such. [P 700 C 1]

(b) Bengal Tenancy Act (1885), Sch. 3, Art. 3—Suit by dispossessed raiyat to recover possession from purchasers in execution recognised by landlord is governed by Art. 3.

A suit by a raiyat to recover possession of a holding, from which he was dispossessed by the defendants with whom it was settled by the landlords after they had purchased it in execution of a decree, is governed by Art. 3, Sch. 3, Ben. Ten. Act. [P 700 C 2]

Ramchandra Mojumdar and *Panchanan Ghose* for *Chandra Sekhar Banerji*—for Appellants.

Sashi Sikhar Bose and *Biraj Mohan Mazumdar*—for Respondents.

Fletcher, J.—This is an appeal by defendants 1, 2, 3, and 5 from a decision of the learned Additional District Judge of the 24 Pergannahs, dated 15th March 1913, affirming a decision of the Munsif at Diamond Harbour. The only question raised in this appeal is the question of limitation and that is whether Art. 3,

Sch. 3, Ben. Ten. Act, applies to this case or whether the ordinary rate of twelve years applies. The father of defendants 1 and 2 was the landlord of the plaintiffs and the pro forma defendants. He obtained in the first instance, in the year 1899, an ex parte decree for rent. That was set aside and the case was tried on the merits and a new decree was passed. In execution of that decree the property was put up to sale and purchased by the landlord and possession was delivered in the year 1904. Then the landlord settled some of the lands with the present tenants, defendants 3, 4 and 5. The plaintiffs brought their suit for possession of a 13-anna share of the property, alleging that the dispossession took place in 1909. The only question that has been argued in this appeal is whether the special rule of limitation applies to a case of this nature or whether, as some of the cases say, the dispossession, in order that the special rule of limitation comprised in Art 3, Sch. 3, may apply, must be by the landlord as such. The decisions are not all one way. There are conflicting decisions on this point. The latest decision is one of my own which is in favour of the appellants and, in the view that the matter is one on which different Courts have come to different conclusions, I think my own decision in which Teunon, J., concurred is, with all due respect, as much likely to be right as the others.

The words "as such" do not appear in the article and it is admitted that the special rule of limitation, which was passed apparently for the reason that disputes between landlord and tenant as to ouster should be settled and determined within the shorter period fixed by the legislature rather than the longer period of twelve years, is considerably cut into by the addition of words in the article such as the words "when the landlord dispossesses as such." There are no such words in the article and I do not see why the article should be limited or the generality of the language used therein cut down because it may be a hard case on the tenant. These holdings are of small value as a rule and it is essential that disputes of this nature should be decided within the shorter period mentioned in the article. I see no reason to dissent from the judgment that I delivered in *Fani Bhusan Sarkar* v. *Pulin Chandra Mandal* (1).

1. (1910) 5 I C 838.

That being so, I do not agree in the view of the learned Additional District Judge. The learned Munsif came to this finding. That assuming that the special rule of limitation contained in Art. 3, Sch. 3, Ben. Ten. Act applied, he was of opinion that the evidence did not show that the dispossession took place in 1312 as alleged by the defendants and, therefore, the plaintiffs' suit, in any event, was brought within time. The learned Additional District Judge made no finding in this respect. The case must, therefore, go back to the lower appellate Court for the purpose of making a finding as to whether the suit was brought within time, having regard to the fact that, in our opinion, the special rule of limitation does not apply, and then to pass a decree according to law. Costs will abide the result.

Newbould, J.—I agree.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 700

CHATTERJEA AND NEWBOULD, JJ.

Hadish Bapari—Petitioner — Appellant.

v.

Bogamulla Sheik—Objector—Opposite Party.

Appeal No. 442 of 1914, Decided on 31st January 1917, from original order of Dist Judge., Assam, D/. 20th May 1914.

(a) Mahomedan Law—Guardian — Father has preferential claim to be guardian of minor daughter's property—Guardians and Wards Act (1890), S. 17 (1).

According to Mahomedan law the father has a preferential claim to be the guardian of his minor daughter's property. Though the Guardians and Wards Act gives to the Judge power of appointing anybody as guardian, S. 17 (2) lays down rules which bring the provisions of the Act into line with those of the Mahomedan law. [P 701 C 1]

(b) Mahomedan law — Guardian—Guardianship for marriage—Rules under Mahomedan law are not affected by order under Guardians and Wards Act (1890).

The rules as to guardianship for contracting marriage on behalf of a Mahomedan minor depend exclusively upon Mahomedan law and are not affected by any order made under the Guardians and Wards Act. [P 701 C 2]

Khitish Chandra Chakrabarty and *N. C. Bardalai*—for Appellant.

Judgment.—This is an appeal against an order refusing the application of the appellant to be appointed and declared guardian of the person and property of his minor daughter under the Guardians and Wards Act, 1890. The learned District Judge has refused the application

on the ground that according to the Sunni school of Mahomedans, which prevails in this case, the mother's mother has a preferential claim over the father to the custody of an infant on the death of the mother and also on the ground that it will be in the best interests of the minor that she should remain for the present with her mother's relations. These are good grounds for refusing the appellant's application to be appointed guardian of the person of the minor but no sufficient reason has been given why he should not be declared guardian of her property. According to Mahomedan law he has a preferential claim to be the minor's guardian for this purpose. Though the Guardians and Wards Act gives to the Judge power of appointing anybody, S. 17 (2) lays down rules which bring the provisions of the Act into line with those of the Mahomedan law. We are told that the real dispute between the parties is about the right to give the girl in marriage. It is sufficient to remark that the refusal to appoint the appellant guardian of his daughter's person in no way diminishes his rights as a father under the Mahomedan law in this respect. The rules as to guardianship for contracting marriage on behalf of a minor depend exclusively upon Mahomedan law and, therefore, are not affected by any order made under the Guardians and Wards Act. We accordingly allow this appeal in part and declare the appellant Hadish Bepari to be the guardian of the property of his minor daughter Gul Banu who was born in Sraban 1320 B. S. The respondent did not appear and we make no order as to costs.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1918 Calcutta 701 (1)

FLETCHER AND NEWBOULD, JJ.

Bhabasindlu Haldar and *another*—Plaintiffs—Petitioners.

v.

Kesab Chandra Haldar and *others*—Defendants—Opposite Parties.

Rule Nisi No. 76 of 1917. Decided on 11th May, 1917, against the order of Munsif, Second Court, Diamond Harbour in Misc. Case No. 254 of 1916.

Civil P. C. (1908), S. 115 and O. 47, R. 1—Exercise of discretion in refusing or granting review—High Court can not interfere.

The High Court in revision under S. 115, cannot interfere with the discretion of a subordinate Court as to whether it should or should not review its judgment. [P 701 C 2]

Sarada Charn Maity—for Petitionors.

Judgment.—This is a rule calling on the opposite party to show cause why the order of the learned Judge of the Court below declining to review his judgment should not be set aside. The Judge in the Court below had all the materials before him. He said that the judgment he delivered was alright and he saw no reason to interfere with it and, therefore, declined to grant a review. We cannot interfere with the discretion of a Judge as to whether he should or should not review his judgment. The argument that has been put forward that the application is made not against the order of the learned Judge on the review but against the original order cannot be assented to for one moment. As a matter of fact, the Judge in the original judgment said that the plaintiffs were in serious default. Notwithstanding that they were given time to rectify the default; but they did not do so. The Judge having considered these matters said that he declined to review his judgment. We see no reason to interfere with the judgment of the learned Judge. The rule is, therefore, discharged. We make no order as to costs.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 701 (2)

TEUNON AND SHAMSUL HUDA, JJ.

Wazuddi—Petitioner.

v.

Rahimuddi & others—Opposite Party.

Criminal Revn. No. 615 of 1917, Decided on 29th June 1917.

(a) Criminal P. C. (1898), S. 439—Applications by private person to set aside acquittal should be considered on its merits (Per *Teunon J*; *Shamsul Huda J.*, Cantra).

Per *Teunon, J.*—No hard and fast rule should be laid down that applications made to the High Court by complainants for setting aside acquittals of persons who have been charged with the commission of offences are to be discouraged, as that would result in the High Court abdicating its functions and, in the present conditions of India, in denial of justice. Every such application should be considered on its own facts, [P 702 C 1]

Per *Shamsul Huda, J.*—The practice of the High Courthas always been to discourage such applications when presented on behalf of private parties and this practice should not be departed from. [P 701 C 2]

(b) Cattle Trespass Act (1871) S. 10—Seizure by lessee of grazing land of cattle for Coercing owner to pay rent for grazing in

no offence (*Teunon, J., Shamsul Huda, J.*, Contra)

Per *Teunon, J.*—A lessee of grazing, land is entitled, under S. 10, to impound cattle whose owners, while obstinately refusing to come to any arrangement with the lessee or to pay the customary or any fee, insist on grazing their cattle on the lessee's pasture. The fact that the lessee may hope that in order to prevent the impounding, the owners will make a payment, does not make the lessee's conduct unlawful nor converts the seizure of the cattle into an attempt at distraint. [P 702 C 1, 2]

Per *Shamsul Huda, J.*—Such seizure by the lessee without any intention to take the cattle to a pound for the purpose of coercing the owners of the cattle to pay the arrears of rent for grazing is clearly illegal and amounts to an attempt ot theft, which the owners are entitled to resist by use of force. [P 701 C 2]

Manmatha Nath Mukerjee, and *Jatindra Kumar Das Gupta*—for Petitioner.

Gopal Chandra Das and *Bibhuti Bhusan Saha*—for Opposite Party.

Teunon, J.—On the general question of applications made to this Court by complainants in respect of the acquittal of persons whom they have charged with the commission of offences I adhere to the views expressed in my dissentient judgment in the case reported as *Faujdar Thakur* v. *Kasi Choudhuri* (1). I need add nothing to what I then said beyond this that to lay down as a hard and fast rule that such applications are to be discouraged is for this Court to abdicate its functions and in present conditions in India must necessarily result in denials of justice. Every such application should, in my view, be considered on its own facts. As to the merits on the evidence of the acquittal with which we are now concerned it is unnecessary and in my opinion undesirable to express any decided opinion. It is sufficient to show that the decision of the Magistrate is vitiated by a series of misconceptions which pervade his judgment. He has misappreciated the whole of the evidence regarding the position of Chawk No. 3, and it is not enough to say that if we substitute Fulchara for Chawk No. 3 the error is corrected. That argument overlooks the contention that in Fulchara north of dona there is no grazing ground. Further, the Magistrate has laboured throughout under the impression that the lessee of grazing land is not entitled to impound cattle whose owner while obstinately refusing to come to any arrangement with the lessee or to pay the customary or any fee, yet insist on feeding on the lessee's pasture. This under the provisions of S. 10, Cattle Trespass Act, the lessee is clearly entitled to do, and the fact that he may hope that in order to prevent the impounding, the owners will make a payment does not make the lessee's conduct unlawful, nor convert the seizure, as the Magistrate seems to think, into an attempt at distraint. How far this misconception of the lessee's rights, the consequent erroneous view that even on his own showing the lessee's conduct was high-handed and the gratuitous assumption that pasture land is "waste" has coloured and vitiated the Magistrate's estimate of the value of the evidence we are not in a position to say. There is a large body of positive evidence in support of the prosecution case that while complainant and his companions were engaged in rounding up the cattle grazing on the lessee's land the accused and others, some 100 or more in number, armed with spears, split bamboos and lathis, assembled and attacked them, with the result that seven of the complainants' party were injured.

The Magistrate on his reading of the evidence disbelieved the prosecution as to the site of the seizure. Apart from the misconception under which he was labouring, and certain suggestions seemingly unfounded against the conduct of the Police, the Magistrate has given no adequate reasons for this disbelief. Further, how far even on their own case and with knowledge of the fact that Police Officers were on their way to the spot the accused and their companions were justified in forming what was prima facie an unlawful assembly, and in their subsequent use of the weapons with which they were armed are matters which the Magistrate has apparently failed to take into his consideration. Still less, has he considered the case of those who on the evidence inflicted individual injuries. In short, in my view, everything in this case points to serious miscarriage of justice, and for the reasons I have given I am satisfied that the case has not been properly tried. I am, therefore of opinion that the proper order is to make the Rule absolute, but as my learned colleague has on the merits intimated a different view, and as this is a case of acquittal I am not of opinion that I ought to insist upon a reference to a third

1. (1915) 42 Cal 612=27 I C 186.

Judge. I, therefore, assent to the discharge of the Rule.

Shamsul Huda, J.—This is a Rule issued at the instance of the complainant calling upon the District Magistrate of Noakhali and the accused to show cause why the order of acquittal under S. 258, Criminal P. C., passed by Babu Chandra Sekhar Mukherjee, First Class Magistrate, Noakhali, should not be set aside on ground sspecified in the Rule. Two questions arise for consideration, viz: (1) Whether the order of acquittal is wrong on the merits? (2), Assuming that it is so, whether in the exercise of the discretion vested in this Court under S. 439, Criminal P. C., this is a fit case for our interference? My answer to both the questions is in the negative. The facts are shortly these:— There is a newly formed char called Char Afzaluddin belonging partly to Government and partly to Mrs. Delawney. The char is bounded on the north and west by a dona, on the east by a small river and on the south by the big Feni river. The accused are Bathanias, or owners, of cattle who have their cattle sheds on land immediately to the north of the dona and themselves reside there during the grazing season with their cattle. Since July 1916, Government and Mrs. Delawney have been in possession of separate plots as representing their respective shares. Plot No. 3 among others is in possession of Mrs. Delawney and the plot to the east of it belongs to Government. The land of the whole char is of the same nature and seems only fit for pasturage (P. W. 2).

The story of the complainant as told in the first information was to the effect that complainant's master Munnat Ali had taken a settlement from Government of Char Afzaluddin in order to realise rent from those who grazed their cattle in the char, that he found great difficulty in realising such rent as the owners of cattle not only refused to pay rent but threatened Minnat Ali's men with violence whenever rent was demanded of them, that on the day of the occurrence Minnat Ali having first informed the Police of his difficulties and of his apprehensions of a breach of the peace, deputed some of his men, about 12 or 14 in number, including the complainant, to realise arrears of gorekati or grazing rent, that with this object Minnat Ali's men surrounded about 250 or 300 heads of cattle in the char about 3/8ths of a mile to the south of the northern half of Char Afzaluddin, when some 200 men armed with lathies attacked them and began to snatch away the cows and buffaloes, that Minnat Ali's men thereupon raised a hue and a cry that the Police were coming and on hearing this the attacking party began to run away and the complainant's party began to drive away some 20 or 25 heads of cattle, that at this stage Jaloo chowkidar belonging to the party of the accused came running and shouted "where is the Police? It is all false. Beat the salas." Upon this the rioters numbering about 50 or 60 men came back with lathies, etc., and snatched away the cattle after inflicting injuries on the men on complainant's side.

The accused persons, 16 in number, were accordingly placed on their trial, of whom 7 were discharged after the close of the evidence for the prosecution and the remaining 9 were charged under S. 147 I. P. C. with rioting with the common object of enforcing by use of criminal force their supposed right of grazing cattle free of rent and of preventing Minnat Ali from realising such rent from them. The defence was that the accused had obtained the right of grazing cattle in the plots belonging to Mrs. Delawney, that they grazed their cattle on Mrs. Delawney's land but still Minnat Ali demanded rent from them but they refused to submit to the demand and on the day of the occurrence, hearing of the expected visit of the police, they kept their cattle near their own houses on the north bank of the dona when at about 10 or 11 o'clock about 150 men, with the help of the police, seized their cattle and carried them across the dona to the south, that a cow was killed and the other cattle were removed with the object of realizing the arrears of grazing rent imprcperly demanded from them, that they opposed the seizure of their cattle and were beaten and they also in their turn beat the complainant's men. The medical evidence shows that men on both sides had received injuries, two such injuries on each side being severe. The trying Magistrate has acquitted the accused finding: (a) that the seizure of the cattle by the complainant's party took place on the north of the dona in plot 3; (b) that the seizure was illegal as the complainant had no right to seize the cattle in order to realize arrears of grazing rent from their owners; (c) that the accused were justi-

fied in using force to resist such seizure. The first finding is vitiated by a misapprehension on the part of the Magistrate regarding the position of plot 3 which is to the south and not to the north of the dona and I do not rely on this finding. But an examination of the evidence convinces me that Minnat Ali's men in seizing the cattle did not confine themselves to those grazing in Government khas land but seized them indiscriminately including cattle grazing in plot 3. This plot is not separated from Government land by any ails and although it is demarcated by boundary pillars, the pillars are at considerable distance from one another and the two lands are, as I have already said, of the same nature and not distinguishable except by these distant pillars.

The evidence shows that Minnat Ali's whole object was to get hold of the cattle grazing in the char, irrespective of the place where at the time of the seizure they may have been grazing. The witnesses for the prosecution generally start their story by vaguely stating that on coming to the "char" they surrounded about 300 heads of cattle grazing in it. They speak of the settlement of Char Afzaluddin with Minnat Ali and try to ignore the distinction between the plots of char land belonging to Government and those belonging to Mrs. Delawney. In cross-examination they admit the existence of the plots belonging to Mrs. Delawney and say they confined the seizure of cattle to Government khas land. Several prosecution witnesses had to admit in cross-examination that there were cattle grazing both over Government khas land and plot 3. The Police Sub-Inspector saw from a distance cattle scattered all over the char. As a matter of fact Minnat Ali's kabuliyat is for the whole char and ignores the zamindar's share in it. The same tendency to ignore the existence of land belonging to Mrs. Delawney is shown in the first information, as well as in Minnat Ali's application for taking proceedings against the owners of cattle under S. 107, Criminal P. C., and although this absurd claim was abandoned in Court by the witnesses for the prosecution, Minnat Ali himself was reluctant to giveup his pretensions. In his evidence in Court he claimed the whole of Char Afzaluddin as included in his lease and said he did not know if any other person had any right to the land in this char. It is most likely, therefore, that Minnat Ali's servants and adherents did not in seizing the cattle observe any distinction between those grazing in Government land and those grazing in zamindar's demarcated share of the char of which plot 3 is the largest. I am, therefore, of opinion that the cattle were seized south of the dona indiscriminately and irrespective of the question whether they were grazing on Government land or zamindar's land and that Minnat Ali was claiming rent for the whole char. The next question is with what object the cattle were seized by Minnat Ali's men. The witnesses on the prosecution side have generally stated that they surrounded the cattle in order to compel their owners to pay their grazing fees. The evidence to my mind is clear that there was no intention to take the cattle to a pound. This is clear from the first information also.

The seizure of the cattle for the purpose of coercing their owners to pay the arrears of rent was clearly illegal and amounted to an attempt at theft. *Queen-Empress* v. *Sri Churn Chungo* (2), which the accused were entitled to resist by use of force. If this view is correct it is immaterial where the cattle were seized. Whether more force was used than was necessary I need not discuss. The charge of rioting under S. 147 with the common object mentioned in the charge having failed, the order of acquittal is correct. Except therefore as regards the place of occurrence I agree generally with the view of the case taken by the trial Court and I need not repeat the reasons assigned by the Magistrate for disbelieving the story told by the prosecution. For these reasons I do not think there has been any failure of justice in this case much less such a grave failure of justice as would, having regard to the ruling in *Faujdar Thakur* v. *Kasi Choudhuri* (1), justify this Court in interfering with the order of acquittal. The practice of this Court has always been to discourage such applications when presented on behalf of private parties and this practice should not, in my opinion, be departed from. I would therefore discharge the Rule.

V.B./R.K. *Rule discharged.*

2. (1895) 22 Cal 1017.

A. I. R. 1918 Calcutta 705

BEACHCROFT AND WALMSLEY, JJ.

Gobinda Chandra Pal and *others*—Decree-holders—Appellants.

v.

Kailash Chandra Pal — Judgment-debtor—Respondent.

Appeal No. 76 of 1917, Decided on 22nd June 1917, from order of Sub Judge, First Court, Dacca, D/- 22nd February 1917.

(a) Civil P. C. (1908), S. 11—Execution—Objection to attachmant and sale of property not decided but sale proclamation ordered to issue—Judgment-debtor can raise same objection on subsequent execution application by sale of same properties.

Where on an application for execution by way of sale of certain properties that Court ordered attachment of the properties and issue of notice to the judgment-debtor for the settlement of the sale proclamation, and, inspite of the judgment-debtor's objections to such execution ordered issue of the sale proclamation in his presence but did not in express terms, pass any order for sale or decide that execution could be enforced by sale :

Held : that the orders of the Court would not operate as res judicata on the question of the decree-holder's right to execution by sale of those properties, so as to estop the judgment-debtor from raising the same question on a subsequent application for execution by way of sale of the same properties. [P 706 C 2]

(b) Civil P. C. (1908), O. 34, R. 14 - "Bring property to sale "—Meaning explained.

The words " bring the property to sale " in O. 34, R. 14 include not only all the steps preliminary to the sale but the sale itself,

[P 707 C 1]

Provash Chandra Mitter and *Tarakeswar Pal Chowdhury*—for Appellants.

Sarat Chandra Basak—for Respondent.

Beachcroft, J.—This is an appeal from an order of the Subordinate Judge of Dacca, dismissing the appellant's application for execution. On 18th April 1899 the respondent executed a mortgage-bond in favour of the predecessor of the appellant, and on the same day executed a security bond in his favour. The security bond covered 37 properties which were included in the mortgage-bond. In due course decrees were obtained on both bonds. In the decree made in the suit on the security bond on 25th April 1907, the following words are important,

"this suit be decreed ex parte that the defendant do pay to the plaintiffs the aforesaid Rs. 55,000 claimed and Rs. 1,832 the cost of this suit plaintiffs' lien to the properties mentioned in the security bond is declared, but the plaintiffs cannot get a decree for sale of the said properties mentioned in the security bond as properties mortgaged and that the plaintiff's prayer to the above effect is rejected. "

The decree therefore was a money decree with a declaration of plaintiffs' lien on the properties. In execution of his decree on the mortgage bond the decree-holder purchased nine of the properties covered by both bonds. We have not been told whether the mortgage decree has been satisfied or not, it is immaterial to the present appeal, but apparently it had not at the date of the present application for execution.

A sum of Rs. 11-2-0 only had been recovered on the decree on the security bond prior to the present application for execution, which was filed on 11th December 1912. In the application the amount due was shown to be Rupees 85,353-10-6 and there was a request for an order for attachment and sale of the properties. The Court ordered attachment of the properties returnable on 8th February 1913 and on that date ordered notice for settlement of sale proclamation. On 22nd February the judgment-debtor appeared and asked for time to file objection and time was given till 1st March. In the meantime on 24th February, on the application of the decree holder, issue of sale proclamation was ordered on the valuation given by the decree holder, 9th April being fixed as the date for sale. On 1st March the judgment-debtor filed his objection. There was, as is usual, an allegation that the application for execution was illegal and not maintainable, but the main objection seems to have been as to the valuation of the properties. This petition of objection was supplemented by another on 23rd June in which the judgment-debtor urged that the application could not be entertained as the mortgagee could never sell the equity of redemption —an objection apparently based on the repealed S. 99, T. P. Act,—and that as some of the properties covered by the bond had already been sold in execution of the mortgage decree there should be a rateable distribution of the debt over all the properties.

The last mentioned point was apparently the only point pressed when the objection came to be decided, at least it is the only point touched on in the order of the Subordinate Judge made on 21st February 1914. This order was followed by the appointment of a Commissioner to value the properties. The matter

then came to this Court on appeal by the decree holders. On 19th January 1916 a Division Bench held that in view of the provisions of O. 34, R. 14, the execution could not proceed, and dismissed the application for execution. There was an application for review and on 19th December last the Court held that as no cross-appeal had been filed the application for execution should not have been dismissed. The appeal was dismissed with this reservation :

" We express no opinion of any question which may arise as to any proceedings in execution which the applicant may think fit to take. "

When the case went back to the Subordinate Judge the decree-holder applied for an order in the presence of the judgment-debtor that O. 34, Rr. 14 and 15 had no application. The Subordinate Judge upheld contention of the judgment-debtor that those rules did apply and dismissed the application for execution. The present appeal is against that decision. Four grounds are urged, (1) that it was no longer open to the judgment-debtor to object to the execution because the order for sale having been passed and not appealed against, it was binding on the parties even though it may have been erroneous; (2) that Rr. 14 and 15, O. 34 do not apply, because R. 15 applies only to the charges specified in S. 100, T. P. Act, and in this case the charge being created by judicial order was not such a charge; (3) that the charge being created by judicial order R. 14, O. 34 in terms had no application because the decree-holder was not a charge-holder before he got his decree; (4) that the decree-holder had applied for and got an order for sale, therefore, the objection came too late as under R. 14 the objection must be taken before the property is brought to sale,

The first point taken is that the matter is res judicata and the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) is cited to support the contention. In my opinion the similarity between the present case and the case cited is of the most shadowy character. It is true that the judgment-debtor, when his petition of objection was heard, did not argue the question of validity of the proceedings nor raise the question by way of appeal or cross-appeal on the decree-holders' appeal, but there the similarity ends. In the case cited the judgment debtor was served with a notice under S. 216, Civil P. C. The Court had to decide whether execution was barred and by its order for proceedings to continue impliedly decided that it was not. In the present case the order for attachment was made as a matter of routine on the application for execution. Similarly, the order for issue of sale proclamation was made in the absence of the judment-debtors, though they had appeared in the proceedings. The question of the validity of the execution proceedings was not at any stage dealt with and decided though raised, possibly because it was not argued. In fact there is not in terms any order for sale or deciding that execution could be enforced by sale, there are only the routine order of attachment and the order which would follow as a matter of course for settlement of the sale proclamation and for the issue of the proclamation. These cannot, in my opinion, be treated as impliedly deciding that execution could proceed by way of sale as, it is obvious, the Subordinate Judge never considered the question. And when these facts were pointed out to the learned pleader for the appellant, he urged that the judgment-debtor, having acquiesced in the order and accepted the benefits of orders subsequently passed, could not be allowed to question the original order, in other words, a plea of estoppel. I do not think the decree-holder can raise a plea of estoppel when he must have known that he had himself induced the Court ex parte to pass an order to which he was not entitled.

Not only do the principles of res judicata and estoppel not stand in the way of the judgment-debtor's plea, but it would be a startling result if a decree-holder should be able in execution proceedings to get a relief which his decree expressly declares that he shall not have. It is true that what he asked for in his suit and what was refused was a mortgage sale, while his application in execution was for attachment and sale under O. 21, but the practical result is the same. The decree in effect said that he could not have a sale of the property without a suit under S. 67, T. P. Act, and he is seeking to avoid the effect to that decree by an order in execution. The next argument addressed to us was that Rr. 14 and 15,

1. (1882) 8 Cal 51=11 C L R 113=8 I A 123 (P C).

O. 34 did not apply to this case as the decree-holder's charge was not one within the meaning of S. 100, T. P. Act, in that it had not been created either by operation of law or by act of parties, but by judicial order, viz., the decree in the suit. The fallacy in this argument is that the charge is not created by the decree. The decree only declares the existence of the charge, it was in fact created by the act of parties. And the same answer applies to the argument based on the opening words of O. 34, R. 14 read with R. 15, namely, that the decree-holder was not a charge-holder at the time that he obtained his decree. In fact he was, though his rights had not previous to the decree obtained judicial recognition. The fourth ground depends on the view that the words "bring the property to sale" in O. 34, R. 14, mean nothing more than obtain an order for sale. In my opinion they include not only all the steps preliminary to the sale, but the sale itself. In fact the view urged on behalf of the appllants would be impossible of application, for objection could not be made before the judgment-debtor got notice, and on the appellant's own argument in connexion with the first ground it must be taken that the order for sale was made before the order of 8th February, when notice was issued for the purpose of settling the sale proclamation under O. 21, R. 66. In my opinion all the grounds urged fail and the appeal should be dismissed with costs. We assess the hearing fee at five gold mohurs.

Walmsley, J.—I agree.

V.B./R.K: *Appeal dismissed.*

** A. I. R. 1918 Calcutta 707

SANDERSON, C. J. AND MOOKERJEE, J.

Brojendro Kissore Roy Chowdhury—Defendant—Appellant.

v.

Hindusthan Co-operative Insurance Society, Ltd.—Plaintiff—Respondents.

Appeal No. 19 of 1916, Decided on 21st January 1917, from original decree of Chaudhuri, J., D/- 19th January 1916.

(a) Promissory Note—Liability—"Repayment guaranteed by me" endorsed on note is contract of guarautee — Contract Act, S. 126.

"Re-payment guaranted by me" endorsed on an on demend promissory note is contract of guarantee by the person signing the endorsement whose liability as a surety arises under it from the date of the note, and no demand for re-payment is necessary to create such liability.

[P 708 C 2; P 711 C 2]

(b) Promissory Note — Liability—Default by principal debtor—Surety is liable without notice.

A promissory note payable with interest on demand is present debt and becomes due and payable at once without demand so that limitation begins to run from its date, as the debtor is considered to be in default from that very date. A surety for a debter becomes liable to the full extent of his obligation without being entitled to a notice as soon as the default of the principal debtor is complete, unless there is a special stipulation qualifying his obligation. [P 709 C 1]

****(c) Limitation Act (1908), S. 20—Payment of interest by principal even with consent of surety—Limitation is not extended against surety—Contract Act (1872), S. 128.**

The payment of interest by the principal-debtor with the knowledge and consent of the surety and even at his request does not, under S. 20 extend limitation as against the surety, unless the circumstances are such as to render the payment one on behalf of the surety. For purposes of the application of S. 20 the debt of the surety is distinct from the debt of the principal debtor, though both of them arise out of the same transaction. S. 128, which makes the liability of the surety co-extensive with that of the principal debtor, has reference only to the quantum of the liability and is not intended to affect the application of the Statute of Limitations.

[P 710 C 2; P 712 C 2]

(d) Limitation Acts (1908), Art. 65 and 115—Scope.

Either Art. 65 or 115 governs a suit against a surety to enforce his liability. [P 709 C 1; P 711 C 1]

(e) Contract Act (1872), S. 128—Remedy against principal debtor barred — Remedy against surety may continue.

Per *Mookerjee, J.*—The remedy of the creditor against the surety may continue notwithstanding that the remedy against the principal debtor has become barred. [P 713 C 1]

(f) Limitation Act (1908), S. 20—Principal and surety.

Semble.—A payment of interest by the surety may not keep the debt alive as against the principal debtor. [P 713 C 1]

H. D. Bose and *Remfry*—for Appellant.

N. Sirkar and *C. C. Ghose*—for Respondent.

Sanderson, C. J.—This is an appeal by Brojendro Kissore Roy Chowdhury, defendant 2, against the judgment of Chaudhuri, J., whereby he held that the claim against defendant was not barred by the Statute of Limitations. The facts of the case are not in dispute and are fully set out in the learned Judge's judgment as follows:—

"This is a suit on a promissory note against defendant 1 as the principal debtor and No. 2 as surety. They were interested in a Bank at the time the note was made and the money was apparently borrowed for it. The promissory note was executed by defendant 1 on 25th April 1911, on the back of which defendant 2 made an endorsement on the same date, guaranteeing re-payment. The suit was instituted on 12th November

1914. The plaint alleges that on 13th November 1911 defendant 1, with the privity and knowledge of defendant 2 and at his request, paid to the plaintiff Corporation Rs. 200 on account of interest on the said note. Defendant 1 has not appeared, but defendant 2 denies the allegation and submits that the suit is barred by the Statute of Limitations. The plaintiffs have proved payment of Rs. 200 as interest by the defendant 1 on 13th November 1911. They have further proved that defendant 2 knew about such payment. It appears that the Medical Secretary and and Treasurer of the plaintiff Corporation was under the impression that defendant 1 had not paid any part of the principal and interest on the loan, and complained about it to defendant 2 saying that the Society could not wait but must sue. Defendant 2 thereupon told him, about the middle of December 1911, 'wait a little. I know defendant 1 has paid interest on this loan.' The books were sent for and entry of a payment of Rs. 2000 as interest, dated 13th November 1911, was found, but it appeared against another loan, which had been taken by defendant 1. Defendant 2 thereupon said that he distinctly remembered being told by defendant 1 that he had paid Rs. 200 as interest on the loan guaranteed by him. He asked that the entry should be corrected and the correction was made in his presence. Thereafter defendant 1 came to the office of the plaintiff Society about the end of December 1911, and confirmed what defendant 2 had stated, adding that he had paid the amount as interest on the promissory note in suit, and that the office had made a mistake in crediting it against his other loan.

The General Secretary of the Society says that shortly afterwards defendant 2, referring to this incident, 'complained to him in a half jesting way, saying that the Society had tried to do him out of Rs 200 but he had prevented it.' In answer to his query, 'Is the matter all right now?' defendant said 'yes.' The attorney for the Society has been examined. He said that the plaint was engrossed on 20th March 1912, and was ready to be filed, but defendant 2's manager had a talk with him and the plaint was kept back in consequence. Defendant 2 had at one time been one of the Directors of the plaintiff Society and its treasurer, and the plaintiff Society postponed filing the suit until it became absolutely necessary. Defendant 2 applied for postponement of the case on the ground of ill-health and, as he was out of town. I was prepared to issue a commission for his examination, but the application was abandoned, and the defendant has, for purposes of this case, chosen not to challenge the evidence given but submits that he is not affected by the payment of interest by the principal debtor, even if it be assumed that he consented to such payment and had knowledge of it.'

The first question which arises is as to the correct meaning of the contract entered into by the defendant. The contract of the principal debtor H. P. Ghose was on the promissory note to pay on demand the sum of Rs. 4,000 and interest at the rate of 2 per cent, per annum, and defendant 9 signed an endorsement on the promissory note: "Re-payment guaranteed by me." This, in my judgment, must be treated as a contract of guarantee by defendant 2, and it was not disputed that, in its interpretation, regard must be had to the terms of S. 126, Contract Act 1872. The learned counsel for the respondent admitted that a demand upon the surety was not necessary under this contract, but argued that his liability did not arise until default was made by the principal debtor. Having regard to the wording of the appellants' undertaking and S. 126, Contract Act, in my judgment, this is the correct interpretation, and the next question, therefore, to be considered is, when did default by the principal debtor occur.

The learned counsel for the respondent argued that though it was not possible to specify the exact date of the principal debtor's default, the evidence in the case showed that it could not have been before the middle of December 1911, when the incident referred to in the learned Judge's statement of facts occurred. In my judgment this contention should not be adopted. The promissory note being payable on demand, there was a present debt, which was payable without any demand. In *Norton* v. *Ellam* (1) the note was one payable with interest on demand and the question was from what time the Statute of Limitations began to run and at page 464 Baron Parke says:

"I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request with interest where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent simply it is not denied that the Statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note payable on demand is a present debt and is payable without any demand and the Statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference except that thereby the debt is continually increasing de die in diem. It is quite different from the case of a note payable at sight because there by the terms of the contract it must be shown before the action is brought."

This is the English law, and in my judgment it is the same here, and this is recognized by the provision in the Statute of Limitations, Art. 73, which provides that in the case of a promissory note

1. (1837) 2 M & W 461.

payable on demand and not accompanied by any writing restraining or postponing the right to sue, the period of limitation begins to run from the date of the note. There is some evidence that originally the advance was intended to be for two or three days (see the letter of 25th April 1911) and it is obvious that by the consent of the parties it was allowed to run on for much longer, but there was no qualification of the promise to pay on demand contained in the note. The debt therefore of the principal debtor arose as soon as the advance was made and the promissory note was signed and the debtor was "in default," from the date of the promissory note. Now it being admitted that a demand was not necessary to create the surety's liability, but that the surety was liable when default was made by the principal debtor, it follows in my judgment that in this case the liability of the surety on the guarantee accrued from the date of the promissory note. In the case of a debt as soon as the day of payment arises the default of the principal debtor is complete and the surety, apart from special stipulation, is immediately liable to the full extent of his obligation without being entitled to notice and the reason of the rule is that it is the surety's duty to see that the principal pays his debt.

The next question is, what Article of the Limitation Act applies to the case of the surety. In my judgment it must be either Art. 65 or Art. 115, and for the purpose of this case I do not think it matters which is applied. If S. 65 is applied the period would run from the happening of the specified contingency, viz., the default of the principal debtor or if S. 115 applies the period would run from the time when the contract of guarantee was broken, viz., the failure to re-pay the money on the default of the principal debtor. In my judgment therefore unless the statute of Limitations is prevented from running in the case of the surety by the payment made by the principal debtor on 13th November 1911 the suit which was brought on 12th November 1914, is barred in the case of defendant 2. The next question, therefore, is whether by reason of such payment a fresh period of limitation is to be computed as far as the surety is concerned, from the time when the payment was made. This depends upon S. 20, Lim. Act. The words of that section, so far as it applies to the present case, are:

"Where interest on a debt . . . is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt . . . or by his agent duly authorized in this behalf, . . . a fresh period of limitation shall be computed from the time when the payment was made."

Now, although the payment of interest by the principal debtor on 13th November 1911 was undoubtedly made with the knowledge and consent of the surety, and it may be at his request, there is no evidence in my judgment that such payment was made on behalf of the surety. The point, therefore, to be considered is whether in consequence of the payment of the interest by the principal debtor, by itself a fresh period of limitation is to be computed from the time of such payment in the case of the surety. In England the principle on which the effect of the Statute of Limitations was held to be avoided by the payment of principal or interest is that such payment is an acknowledgment of the existence of the debt from which is implied a new promise to pay the residue or the principal, as the case may be; and, therefore, it is obvious that a payment by one person, unless the circumstances are such that it must be regarded as a payment for another, cannot keep alive the remedy against that other, and there would seem to be nothing in the relation of principal and surety itself which makes payment by the principal binding as payment by the surety. The question, however, is whether S. 20, Lim. Act, has extended and amplified the effect of the payment by the principal debtor so as to keep alive the remedy against the surety.

It was argued that the words of the Statute are simply "a fresh period of limitation shall be computed from the time when the payment was made" and that the Statute does not confine the fresh period to the case of the person by whom the payment was made, but that the words are quite general; and reliance was placed on the judgment of Maclean, C. J. in *Domi Lal Sahu* v. *Roshan Dobay* (2), where he says as follows:

"It is contended that the section only creates a new period of limitation as against the person actually paying the money, and that as the respondent had purchased before this payment was made, the new period of limitation cannot take effect as against him. There is nothing in

2. (1906) 33 Cal 1278.

the language of the section to support that view, and there is nothing to warrant us in introducing words into the section which would authorize that view. The words of the section are general and plain. When the legislature intends that a fresh period of limitation is to operate as against certain persons only, it says so in distinct terms: see S. 19 of the Act. There is nothing in the section to indicate that the extension is only to operate against the person making the payment."

The facts of that case differed materially from those existing in the present case and the judgment must be read having regard to the facts of the case, and being so read that case in my judgment does not cover the present case: In *Domi Lal Sahu* v. *Roshan Dobay* (2) there was only one debt in question, viz. the mortgage debt, and inasmuch as the mortgagor had made payments to the mortgagee, it was held that such payments affected not only the mortgagor, but the respondent who was the purchaser of the equity of redemption and who, of course, claimed through the mortgagor. In the present case there were in my judgment two debts viz., that of the principal debtor and that of the surety: see *In re Powers, Lindsell* v. *Phillips* (3). The same view was taken by Jenkins, C. J., in *Gopal Daji* v. *Gopal* (4). In my judgment the fresh period of limitation created under S. 20 by the payment of interest by the principal debtor can be only in respect of the debt upon which the interest was paid, viz. the debt of the principal debtor. The fact that the interest was paid with the knowledge and consent of the surety and even at his request, makes no difference, unless the circumstances could be said to render the payment one on behalf of the surety, and in this case they do not.

Reliance was placed upon S. 128, Contract Act. The section is as follows:

"The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract."

It was argued that inasmuch as the period of limitation had been extended by the payment of interest in the case of the principal debtor, it was also extended in the case of the surety, and that "co-extensive" applied not only to "quantum" but also to "time". In my judgment S. 128, which is in the nature of an interpretation clause and is directed to defining the liability of a surety upon the terms of a contract of guarantee, was not intended to affect the application of the Statute of Limitations. In my judgment the appeal should be allowed and judgment should be entered for defendant 2 with costs in this Court and the Court of first instance.

Mookerjee, J.—This is an appeal by defendant 2 in a suit for recovery of money due on a promissory note executed by defendant 1 on 25th April 1911. The note was in these terms:

"On demand I promise to pay the Hindusthan Co-operative Insurance Society, Ltd., or order the sum of Rs. 4,000 only together with interest thereon at the rate of 9 per cent. per annum for value received. Hemendra Prasad Ghose."

On the back of the note, defendant 2 wrote as follows: "Re-payment guaranteed by me B. K. Roy Chaudhuri." On 13th November 1911, the principal debtor paid Rs. 200 to the creditor on account of interest then due. The sum was at first credited by mistake to another transaction, but the error was rectified on 14th December 1911. On 12th November 1914 the plaintiff instituted the present suit against the principal debtor and the surety for recovery of principal and balance of interest due on the promissory note. Defendant 1 did not enter appearance. Defendant 2 pleaded the bar of limitation. Chaudhuri, J., has overruled this contention and has decreed the suit against both the defendants. On the present appeal by the surety, the objection has been reiterated that the claim against him is barred by limitation. To determine the question in controversy, we have to ascertain which Article of Sch. 1, Lim. Act, governs this case. The only Articles which have any possible application are those numbered 65 and 115. Art. 65 provides that a suit for compensation for breach of a promise to do anything at a specified time or upon the happening of a specified contingency must be instituted within three years from the date when the time specified arrives or the contingency happens.

Article 115 provides that a suit for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for, must be instituted within three years from the date when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or where the breach is continuing

3. (1885) 30 Ch D 291=53 L T 647.
4. (1904) 28 Bom 248.

when it ceases. There has been some divergence of judicial opinion upon the question, whether Art. 65 is applicable to a suit against a surety for recovery of money on his contract of guarantee. Hill, J., in the case of *Sreenath Roy* v. *Peary Mohan Mookerjee* (5) held that the article was applicable; the Court of appeal (Petheram, C. J., Prinsep and Piggott, JJ.), on the other hand, ruled that Art. 115 and not Art. 65 was applicable. The point, however, was really immaterial in the circumstances of that case, as the claim against the surety was bound to fail whether one Article or the other was applied. It may be mentioned that the recent case of *Dwarkadoss* v. *Chivakala Krishnaiya* (6) is an authority for the proposition that Art. 65 governs a suit of this description. For the purposes of the preset case, it is not necessary to make a choice between Art. 65 and Art. 115, because, whichever article is applied, the time is found to run in favour of the surety from the same date, and the period applicable is also the same in both cases. Under Art. 65, we have to determine the "specific time" at which the surety promised to pay; under Art. 115, we have to determine the time when there was a breach of contract on the part of the surety. Consequently from either point of view, the question is what was the precise nature of the guarantee embodied in the expression "repayment guaranteed by me."

Section 126, Contract Act, defines a contract of guarantee as a contract to perform the promise or discharge the liabillty of a third person in case of his default. The question accordingly arises, when was the principal debtor in this case in "default." Under the law of England, it is well settled that a note payable on demand is a present debt and is due and payable at once without demand. In *Norton* v. *Ellam* (11) Baron Parke observed that the debt which constitutes the cause of action arises instantly on the loan, so that the contract on the note is in a state of being broken perpetually if the party does not pay it. Baron Alderson added that the cases which have decided that the bringing the action is a demand, show that there has been a previous breach. It follows that on a note payable with interest on demand, the Statute of Limitations begins to run from the date of the note. To the same effect is the observation of Bayley, J., in *Rowe* v. *Young* (7)

"If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration not proved upon the trial."

In *Maltby* v. *Murrells* (8) Baron Channel emphasised this by the observation:

"No demand is necessary before bringing an action upon such a note—its payment is a duty which attaches the moment the note is made."

See also *George In re*, *Francis* v. *Bruce* (9). This principle finds recognition in Art. 73, Lim. Act, which provides that the time for the institution of a suit on a promissory note, payable on demand and not accompanied by any writing restraining or postponing the right to sue, runs from the date of the note. See also *Perumai Ayyan* v. *Alagirisami Bhagavathar* (10), where the correct conclusion is based on the doubtful ground that the words "on demand" must be regarded as a technical expression equivalent to "immediately" or "forthwith." From this point of view, it is obvious that in the present case the liability of the surety accrued on the execution of the note by the principal debtor, and, consequently, as between the surety and the creditor, the Statute of Limitations commenced to run in favour of the surety from the date of the promissory note when he became liable to re-pay to the creditor the sum advanced. This conclusion is in conformity with the principle deducible from the cases of *Holl* v. *Hadley* (11) and *Colvin* v. *Buckle* (12). It necessarily follows that the claim against the surety is prima facie barred by limitation under Art. 65, or Art. 115, unless one or other of the provisions comprised in Part 3 of the Lim. Act, is applicable. The only provision on which reliance has been placed, on behalf of the plaintiff, to save the claim from the bar of limitation, is that contained in S. 20. S. 20 (1), Lim. Act—we quote only so much thereof as has any possible application to the case before us —is in these terms:

"Where interest on a debt... is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt... or by his agent duly authorized in this behalf... a

5. (1917) 39 I C 205.
6. (1911) 9 I C 204.
7. (1820) 2 Brod & B 165=2 Bligh 391.
8. (1860) 5 H & N 813.
9. (1890) 44 Ch D 627=59 L J Ch 709.
10. (1897) 20 Mad 245.
11. (1835) 2 Ad & E 758=4 L J K B 126.
12. (1841) 8 M & W 680=11 L J Ex 33.

fresh period of limitation shall be computed from the time when the payment was made."

This must be read subject to the provisions of S. 21 (2), which lays down that nothing in S. 20 renders one of several joint contractors chargeable by reason only of a payment made by any other or others of them; this section apparently indicates the only cases in which and the conditions under which the legislature allows the running of the period as against one person to be affected by the acts of another person, and the case of principal debtor and surety is not expressly or impliedly included in the section: see the observations of Westrop, C. J., in *Hajarimal* v. *Krishnarav* (13). The plaintiff seeks to avail himself of the benefit of S. 20 by proof that, in this case, the principal debtor did, on 13th November 1911, before the expiration of the prescribed period for the institution of a suit by the creditor to recover the money, pay interest thereon with the result that the creditor became thereupon entitled to a fresh period of limitation from the date of the payment. Stress has been laid upon the generality of the expression "fresh period of limitation shall be computed" as used in S. 20 (1), and reference has been made in this connection to the observations of Maclean, C. J., in *Domi Lal Sahu* v. *Roshan Dobay* (2), see also *Coope* v. *Cresswell* (14). The argument of the plaintiff in substance is that the fresh period runs not merely against the principal debtor who makes the payment, but also against the surety: this view is sought to be fortified by the contrast between the phraseology of S. 20 and S. 18; in the latter case, the period is extended only as against the party guilty of the fraud. This contention seems at first sight well-founded, but upon closer scrutiny, must be rejected as fallacious. It is plain that the expression "fresh period of limitation" has reference to the institution of a suit for recovery of the "debt" mentioned previously. The question thus arises, is the debt of the principal debtor identical with the debt of the surety. If there is only one debt, the view may well be maintained that payment of interest by the principal debtor keeps alive the remedy against him as also against the surety. But if the debts must be deemed distinct, the payment of interest by the principal debtor cannot, notwithstanding the generality of the language of the section, extend the period of limitation for the institution of a suit for recovery of the debt of the surety. In my opinion the true view is that though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct; their debts are distinct for purposes of the application of S. 20.

This was the view adopted by Jenkins, C. J., in *Gopal Daji* v. *Gopal* (4), and by Rahim, J., in *Sami Aiyangar* v. *Laxmi* (15), and I accept the position as well founded on principle: *Maddox* v. *Duncan* (16), *Ross* v. *Jones* (17). It may further be observed that the surety, under the terms of the contract, is either jointly or separately liable, along with the principal debtor; if the debts are deemed joint, S. 21 (2) shows that payment by one of them (the debtor) does not extend the time as against the other; on the other hand, if the debts are deemed distinct, the same result follows upon a true construction of S. 20 itself. S. 128, Contract Act, which makes the liability of the surety co-extensive with that of the principal debtor, is of no assistance to the plaintiff, as it must be read along with the provisions of the Limitation Act; it defines the measure of the liability, and has no reference to the extinction of liability by operation of the Statute of Limitations. It is plain that the view we take of the true effect of S. 20 accords with the well-known principle which underlies the rule that the period of limitation is extended by part payment of principal or payment of interest. The true foundation of this doctrine is that any such payment is an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue or the principal, as the case may be: *Morgan* v. *Rowlands* (18), *Green* v. *Humphreys* (19), *Boswell In re, Merritt* v. *Boswell* (20). Consequently, it is fairly obvious that a payment by one person cannot keep alive ths remedy against another: *Astbury* v. *Astbury* (21), unless the circumstances are such that payment by

13. (1880-81) 5 Bom 647.
14. (1866) 2 Eq 106.
15. (1911) 9 I C 8.
16. (1898) 143 Mo 613=41 L R A 581.
17. (1874) 22 Wallace 576=22 Law Ed 730.
18. (1872) 7 Q B 493=41 L J Q B 187.
19. (1884) 26 Ch D 474=53 L J Ch 625.
20. (1906) 2 Ch 359=75 L J Ch 234.
21. (1898) 2 Ch 111=67 L J Ch 471.

the one may be regarded as a payment for the other.

There is nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety: *Cockrill* v. *Sparkes* (22), *Wolmershausen In re Wolmershausen* v. *Wolmershausen* (23), *Henton* v. *Paddison* (24). In the case before us, there is, besides, no evidence to show that the payment by the principal debtor was in any sense a payment by the surety. There is thus no room for application of the principle, which has sometimes been recognised, that payment of interest by the principal debtor, with the knowledge and consent of the surety, extends the period of limitation as to both: *Nichols* v. *Porter* (25), *Deaton* v. *Deaton* (26), *Dwine* v. *Gentry* (27). Conversely, payment by the surety may not keep the debt alive as against the principal debtor: *Suja* v. *Pahlwan* (28), *Coleman* v. *Forbes* (29), *Seager* v. *Aston* (30) *Gardner* v. *Brooke* (31). The case of *Bajarimal* v. *Krishnarav* (13), approved in *Krishto Krishori Chowdhrani* v. *Radha Romun Munshi* (32), shows that the remedy against the surety may continue, notwithstanding that the remedy against the principal debtor has become barred. The decisions in *In re Powers*, *Lindsell* v. *Phillips* (3), *In re Frisby*, *Allison* v. *Frisby* (33), and *Lewin* v. *Wilson* (34), are clearly distinguishable, as they are based on the assumption that a payment by one co-debtor prevents the statute from running against his co-debtor, a principle not recognised in S. 21, Lim. Act. I hold accordingly that in this case, time commenced to run against the creditor in favour of the surety from 24th April 1911, that a fresh period of limitation did not become available to the creditor as against the surety by reason of the payment of interest by the principal debtor on 13th November 1911 and that consequently, the present suit instituted on 12th November 1914 is barred against the surety by Art. 65 or 115 Lim. Act. On these grounds, I agree that this appeal must be allowed and the claim against the surety dismissed with costs throughout.

V.B. R.K. *Appeal allowed.*

22. (1863) 1 H & C 699=32 L J Ex 118.
23. (1890) 62 L T 541=38 W R 537.
24. (1893) 68 L T 405=3 R 450.
25. (1905) 181 Ind 332=103 N E 842
26. (1884) 109 Ill App 7.
27. (1914) 95 Nab 150=145 N W 350.
28. (1878) 30 P R 1878.
29. (1853) 22 P St 156=60 Am Dec 75.
30. (1857) 26 L J Ch 809.
31. (1897) 2 I R 6=3 Ir L R 288.
32. (1886) 12 Cal 330.
33. (1890) 43 Ch D 106.
34. (1886) 11 App Cas 639.

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PEACOCK, C. J. AND MITTER, J.

William Tayler, In the matter of

In re Appeal from original decree No. 67 of 1868, Decided on 24th April 1869.

(a) Tort—Defamation—Publication—Printer publishing letter with name of another attached to it—Failure to prove publication with authority of person signing—Printer must bear responsibility.

If the printer of a newspaper publishes a letter with the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed. [P 731 C 2]

(b) Contempt—Letter amounting to contempt of Court published in newspaper—Court can punish either printer or publisher or both.

When letters amounting to contempt of Court are published in a newspaper, the Court has its election to punish both the author and publisher of the newspaper or either of them. [P 731 C 2]

(c) Tort — Defamation — Printer cannot plead want of knowledge of contents of paper.

If a printer prints anything that is libellous, it is no excuse to say that he had no knowledge of the contents of the paper and was entirely ignorant of its being libellous. [P 732 C 1]

✻ (d) Contempt—Contempt of Court of Record—Modes of proceeding indicated.

When contempt of a Court of Record is committed, there are two modes of proceeding open to it, one by a Rule calling upon the person charged with contempt to show cause why he should not be adjudged guilty of contempt of Court, the other by attachment under which that person might be arrested and brought into Court for a similar purpose. [P 733 C 2 P 734 C 1]

✻ (e) Contempt—Charge of contempt may be made by Court suo motu.

The charge of contempt may be made by the Court itself upon its own knowledge of facts which, if sworn to by any one to the best of his belief, would have made a prima facie case of Contempt of Court. [P 734 C 1]

(f) Contempt—To charge Judge with presumptious tyranny or to publish anything with a view to induce Judge to alter his course amounts to contempt.

To charge a Judge with presumptious tyranny for the mode in which he is proceeding in a matter pending before him or to publish anything respecting that matter, whilst it is under consideration, with a view to induce the Judge to alter his course is a grave contempt of Court. [P 735 C 2]

(g) Contempt — Judge must be protected from unfounded criticism.

It is a high and serious offence to cast unjust and defamatory imputations to a Judge. Judges are subject to be criticized, but they must be protected from unfounded defamation.

[P 738 C 1]

* (h) Contempt—Contempt by misrepresentation or wilful concealment of facts—Apology may mitigate matters.

In cases of contempt of Court by means of misrepresentation or wilful concealment of the true state of facts, a proper apology may mitigate but it cannot wholly excuse or justify the contempt or form a ground for a total exemption from punishment. [P 739 C 1, 5]

Peacock, C. J.—It is always a most unpleasant duty for a Judge to be compelled to vindicate his own honour, or the dignity of the Court over which he presides, by adopting measures which may cause pain, or wound the feelings of any man. But a Judge who would shrink from the discharge of what he considers to be his public duty, merely because it is to him a painful one, is not fit to be entrusted with the office which he holds. To me the duty which I am now called upon to perform is all the more painful, because the gentleman whose conduct is called into question is one with whom in times gone by I have held social and friendly intercourse. The case is one of public importance, and I am anxious that there shall be no misunderstanding of the views and opinions of the Judges and of the reasons which induced them to adopt the course which they have pursued. Above all, I am desirous that there shall be no further misrepresentations such as those with which unhappily we are called upon to deal. I have, therefore, thought it right to enter fully into the facts and law of the case, and I have reduced into writing the greater portion of my judgment. Mr. W. Tayler was formerly a member of the Bengal Civil Service. After his retirement he was admitted as a vakil of the late Sudder Court; and upon the amalgamation of the late Supreme and Sudder Courts, he, in common with all the vakils of the late Sudder Court, was enrolled as a vakil of the High Court. He subsequently carried on business as a mocktear or law agent in the District of Patna, in which, before his retirement from the Civil service, he had acted as Commissioner. Among other clients, he was retained by Ranee Usmedh Kower, the elder Ranee of of Ticaree, for two years, upon a retaining fee of Rs. 500 a month for looking after her suits, in addition to which he was to receive a reward for every case that he might win according to its importance. Matters did not proceed amicably between Mr. Tayler and the Ranee, and the result was that two suits were commenced—one by Mr. Tayler against the Ranee to recover a sum of Rs. 29,773, consisting of 20,910 alleged to be due for principal and interest on a bond given, as Mr. Tayler alleged, for fees due to him, and Rs. 8,000 and interest alleged by Mr. Tayler to be the balance due on account of his salary or retaining fee; the other by the Ranee against Mr. Tayler to recover money alleged to have been received by him on her account. In the suit brought by Mr. Tayler, the Court held that the bond had been improperly obtained, and the result was, that Mr. Tayler's suit was dismissed with costs, and Rs. 6,110 were decreed to the Ranee in her cross suit. The case *Ranee Usmut Koowar* v. *Tayler* (1) is reported in Vol. 2, Weekly Reporter, p. 307.

On 29th January 1866, the Ranee applied to the Judge of Behar for execution, and in the month of February in that year, a tenure called Dergaon, belonging to Mr, Tayler, was attached in execution. That attachment, by virtue of the provisions of S. 240, Act 8 of 1859, prevented Mr. Tayler from selling the estate so long as the attachment was in force. On 26th February a consolidated appeal to Her Majesty in Council was filed by Mr. Tayler in the two suits, and on 8th March he obtained a Rule calling upon the Ranee to show cause why, upon his giving security, the execution should not be stayed pending the result of his appeal to Her Majesty in Council; and the sale under the attachment was stayed pending that Rule.. The Rule was sent to the Judge of Behar for service, and he thereupon passed an order in the execution case that the proceedings should be stayed "for the time," that is to say, until the Rule to show cause should be disposed of; and as there was nothing which he could do in the execution case whilst that Rule was pending, he at the time of transmitting to the High Court his return of having served the Rule upon the Ranee, ordered that the proceedings for execution should be struck off the file of cases pending in his Court.

1. (1865) 2 W. R. 307.

When the Rule nisi came on for hearing in the High Court, it was considered more just that, as the Ranee had obtained a decree, she should be allowed to execute it on giving security, than that she should be restrained from realising the amount upon Mr. Tayler's giving security. Accordingly, upon 18th May, it was ordered that the decree should be executed upon the Ranee's giving sufficient security, to the satisfaction of the Judge, for the due performance of such decree as Her Majesty in Council should make. That Rule was received by the Judge on 29th May, and thereupon the execution case was again numbered and restored to the file of cases pending in his Court. The Ranee, who was a lady of large property, tendered security, which was admitted on 7th December 1866. The delay which occurred between the transmission of the Rule to the Judge and the acceptance of the security which the Ranee offered is not accounted for on the evidence in the cause. I have frequently found in cases in which execution is stayed until the decree-holder gives security, that great delay is caused by inquiries into the sufficiency of the security, to which the debtor or his agent objects merely for the purpose of delaying the execution. Whether this was the case in the present case or not does not appear, and it is not necessary to inquire. It is not likely that the Ranee, who is a lady of large property, would have had any difficulty in finding security for so small an amount, or that Mr. Tayler would have run any risk if she had been allowed to execute her decree without security. But Mr. Tayler, having appealed to Her Majesty in Council, was entitled by law to have security, and it was granted to him.

It is clear that there was no improper delay on the part of the Ranee in completing her security. Delay is not generally the game of the judgment-creditor, and it is expressly found by the Judge that there was no default by the Ranee in carrying on the case. On 11th day of October, Mr. Tayler sold to Mt. Zuhoorun the wife of Ahmedoollah, for Rs. 55,000, the estate which had been attached under the Ranee's decree. Mr. Tayler says that the purchase was made by Ahmedoollah in the name of his wife. That is very probable, and I shall treat the case as if it were so, and give Mr. Tayler he full benefit of that argument. But when Ahmedoollah is described as an old Pleader at Patna, for the purpose of raising an inference that he must have known of the attachment at the time of the purchase, it must be borne in mind that the estate was at Gaya and not at Patna, and that the sale was under an attachment from the Court at Gaya, and not from the Court at Patna.

After the sale by Mr. Tayler, the estate was again attached by the Ranee under her decree, and 25th February 1867 was fixed for the sale. On 13th February Mt. Zuhoorun intervened and disputed the right of the Ranee to sell under her decree, and claimed a right to the property upon the ground that her purchase was completed before the second attachment. The case was decided against her and an order was made that the estate should be sold. Mt. Zuhoorun thereupon satisfied the decree to prevent the sale of the estate which she had purchased and for which she had paid Mr. Tayler Rs. 55,000, and commenced a suit against him to recover Rs. 12,406 the amount which she had been compelled to pay in satisfaction of the Ranee's decree.

In the written complaint in that suit, it was distinctly charged that Mr. Tayler, the defendant, had concealed the fact of his liability to the Ranee under the decree and of the attachment of the estate in execution. The plaintiff stated that she had paid an adequate price for the estate, and that after the defendant, Mr. Tayler, had secured the entire purchase-money, and had conveyed the estate, and had put her in possession of it, the estate was publicly proclaimed for sale; that she intervened and objected to the sale, but that her claim as a purchaser was overruled on 23rd February 1867; that the vendor, Mr. Tayler, having failed to satisfy the decree, she was compelled to pay the amount due under it in order to preserve the estate which she had purchased. The following is a translation of the defence set up in the defendant's written statement put in on behalf of Mr. Tayler and verified by Mr. Kelly, his agent. He says:

"*First.*—On the principle that purchaser is bound to inform himself of all the advantageous and disadvantageous circumstances connected with the property he is going to purchase, plaintiff has no claim upon your petitioner in reference to the judgment-debt payable to Ranee Usmedh Koer, as numerous precedents of the Suddar Dewanny Adawlat and the High Court in support of this argument are extant.

Second.—If the plaintiff, without asking your petitioner and obtaining his concurrence, has, to serve her own ends, liquidated the judgment-debt due to Ranee Usmedh Koer, she cannot by any rule or regulation recover from your petitioner the money so paid. *Third*—At the time of sale, Mouzah Dargaon, in accordance with the proceedings of the civil Court of Gaya, dated 1st February 1866, A. D., and 13th February 1867, A. D., was attached and advertised for sale, and the plaintiff in full knowledge of the circumstances purchased the mouzah, and nothing was kept secret from her: on the contrary, the condition of the property was above board at the time of sale, and the plaintiff in full knowledge of all particulars, in whatsoever way acquired, purchased the property. *Fourth.*—the plaintiff has purchased a most valuable property, namely, a property of the value of upwards of Rs. 88,000, for a small price of Rs. 55,000, and since she procured a property worth Rs. 88,000 for a trifling sum of Rs 55,000, she raised no objection in reference to the decree money of Ranee Usmedh Koer, of which, in consequence of the attachment of Dergaon, she was undoubtedly cognizant, nor did she enter into any arrangements for the deduction of the amount, nor had she any document executed for her satisfaction: on the contrary, considering the bargain for Rs. 55,000, notwithstanding the payment of the decreed money, to be a cheap one, she forthwith upon securing the sale deed paid up in a lump the whole of the purchase-money and took possession of the property. Under these circumstances, she has no reason whatever to complain, hence the suit brought by her is quite uncalled for. Your petitioner prays that for the ends of justice her claim may be dismissed."

Here let me remark that in the defence set up on the part of Mr. Tayler no suggestion was made that the Ranee's attachment had ceased to have effect in consequence of the execution case having been struck off the file, or that the first attachment had been superseded by the second. The point was not attended to, or even suggested: on the contrary, it was admitted that the estate was liable to be sold under the decree. The plaintiff, when she intervened and set up her purchase as a bar to a sale under the attachment, took the objection, but it was very properly overruled by the Judge in a very clear and decisive judgment, and the plaintiff satisfied the decree to save from sale the estate which she had purchased. That judgment was put in evidence in the suit against Mr. Tayler. It might just as well be contended that all the proceedings in a suit in this Court are nullified, and that the parties must commence de novo, if a case is for any reason taken out of the peremptory board The point is too absurd for argument. The suit proceeded, and the case was tried by Baboo Girish Chunder Ghose, the principal Sudder Ameen of Patna, who laid down two issues:

First.—Whether or not the plaintiff has the right to a refund of the amount of Rs. 11,381-13-6 paid by her in order to save the disputed property from sale with interest claimed by her; or whether the suit is barred by the application of the maxim of caveat emptor? *Second.*—Did the plaintiff know at the time of the purchase as to the property being attached by Usmedh Kower in satisfaction of a claim against the vendor? Did the vendor inform her about the said attachment when the negotiations were completed? As to issue 1, Principal Sudder Ameen found that, according to the legal maxim caveat emptor, a purchaser ought to exercise a proper caution in order to ascertain the amount and nature of the interest which he is about to buy; that if without instituting proper and sufficient inquiries within his reach he foolishly purchases any property in which the vendor's interest was not what it was represented to be, he will not be entitled to compensation for the loss he sustains for the defectiveness of title and quality of the property bought, for it is his own folly and laches not to use the means of knowledge within his reach. He then entered into the question whether the plaintiff had made due inquiries and finding that she had not done so, he said she must be presumed to have purchased the estate with all faults, except as to the extent of the right of the vendor. He added:

"It is contended that the fact of the attachment was fraudulently concealed but there is no proof whatever to support the allegation. On the other hand such a thing as the attachment which was known to the world so far as the village was concerned could not by any attempt on the part of the vendor be industriously concealed for it was known to hundreds of people residing in the village sold. The attachment would be known in no time if a proper man had been deputed to make necessary inquiries on the spot. Therefore the concealment, if it was one, was by no means fraudulent and unless fraud be proved, the contract could not be annulled; and had there been anything like fraud on the part of the vendor the plaintiff would undoubtedly have come to the Court for the cancellation of the contract. As there was no legal fraud on the part of the vendor the cause of the complaint falls to the ground and hence it is to be presumed that with the liability existing on the property, the plaintiff has purchased the same."

He, therefore, ordered the suit to be dismissed with costs. In the latter part of his judgment the Principal Sudder

Ameen alluded to a contention on the part of the plaintiff that the execution case had been struck off the file and subsequently revived and added:

"Admitting her contention to be correct I see no force in it for the simple reason that in that case she was not bound to pay the amount due to the decree-holder and in case the property was sold she as a third party might have sued for the cancellation of the sale on the ground that there existed no attachment before the sale."

It is not very clear why such a contention should have been urged on the part of the plaintiff in the suit. It was her contention when she intervened and disputed the Ranee's right to sell under the attachment and probably there may have been some confusion as to the time at which such contention was put forward on her behalf. But it is not very material. The result of that decision if upheld would have been that Mr. Tayler would have had his judgment debt satisfied by the plaintiff and that she would have had no redress against him. Mr. Tayler in his letters has cited from "Shakespeare," but he has not made any quotation from a "new way to pay old debts."

The plaintiff appealed to the High Court from the judgment of the Principal Sudder Ameen; and amongst other grounds she urged to the effect—first, that the defendant could not take advantage of his own wrong; second, that the doctrine of caveat emptor did not apply to a case like this in which fraud was alleged as the cause of action; seventh, that the very circumstance of the defendant's concealing the fact of attachment on decree was sufficient to show a fraudulent concealment, as Mr. Tayler was well aware of such attachment, and sufficient to fix him with liability, unless he proves that the plaintiff purchased with knowledge and paid inadequate value, and eighth, that the case was not one of voluntary payment, for the recovery of the money was sought, not from the judgment-debtor, but from the vendor.

The appeal was heard in the First Bench before the Chief Justice and Dwarkanath Mitter, J. The case was very fully and ably argued by Mr. Paul as counsel on behalf of Mr. Tayler; the evidence on both sides was fully considered, and every attention and consideration was given to the case which it was in the power of the Court to bestow. It was very properly admitted on behalf of Mr. Tayler, for it could not possibly be denied, that the payment was not voluntary, and the Chief Justice was so fully satisfied of the plaintiff's right to recover upon the ground that she had been compelled to pay Mr. Tayler's debt in order to protect from sale, under the Ranee's decree, the estate which she had purchased from Mr. Tayler, that he did not consider it necessary to express any decided opinion upon the other points of the case, viz., whether there was concealment or no concealment, fraud or no fraud. He says:

"It appears to me that this is a very clear case. The plaintiff seeks to recover the sum of Rupees 12,406-7-0, which she paid on account of Mr. William Tayler in discharge of a decree which Ranee Usmedh Koer had recovered against him. It is almost unnecessary to consider whether the plaintiff was a volunteer in paying this money, or whether she paid it under compulsion, because it has been admitted by Mr. Paul, the learned counsel of Mr. Tayler, that the payment was not a voluntary one. It appears that the plaintiff purchased an estate from Mr. W. Tayler for the sum of Rs. 55 000; that before the sale to the plaintiff that estate had been attached in execution of the decree; and that the plaintiff paid the amount of the decree and interest in order to prevent the property which she had purchased from being sold in execution. It is said by Mr. Tayler that although the property was sold for Rs. 55,000 it was worth a great deal more; and in poof of that assertion he has called a witness, who, if he is to be believed, has shown that Mr. Tayler's estimate of the value was very much under the mark, inasmuch as the estate was worth two lakhs. I do not believe the evidence of that witness. It is improbable that he, acting as the agent of Mr. Tayler, would have sold for Rs. 55,000 a property which was worth two lakhs; but whether it was worth Rs. 55,000, Rs 83,000, or two lakhs, is wholly immaterial for the decision of this case. By S. 235, Civil P. C., when property is to be attached in execution of a decree, the attachment is to be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise: and by S. 240 of the same Act, it is enacted that when any attachment shall have been made by actual seizure, any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void. Mr. Tayler, therefore, must, before he sold the property, have been served with an order from the Court prohibiting him from alienating it. He must have have been fully aware at the time of the sale that any sale by him would be liable to be defeated by the decree-holder.

"Several witnesses have been called on the part of the defendant, and have proved that the plaintiff at the time that she purchased the estate was aware of the attachment. Enayut Hossein swore that he informed the husband of the plaintiff of the attachment at the time of the execution of the deed of sale Shaik Eusoof Hossein swore that Enay ut Hossein told the hus-

band of the plaintiff in his presence in the house of Wilayat Ali Khan, where the consideration money was paid; and yet Enayut Hossein, who was acting for Mr. Tayler in selling the property, upon cross-examination, stated that he did not remember at what place he told Ahmedoollah about the lien. Ahmedoollah, on the other hand, swears that he never knew of the attachment and if it were necessary to decide upon the conflicting testimony of the witnesses in the cause, I should have little hesitation in deciding that the plaintiff, at the time of the payment of the purchase-money, was not aware of the attachment. It is hardly likely that if she had been aware of the attachment, something would not have been said upon the subject. Enayut Hossein, who according to his own evidence, took the precaution of telling Ahmedoollah about the attachment, swears that he was acting for both parties; and yet, according to his evidence, nothing appears to have been said at the time of the sale as to whether the plaintiff, in consequence of her being allowed to purchase the estate for what Mr. Tayler calls the trifling sum of Rupees 55,000, was to take upon herself to discharge the debt which Mr. Tayler owed the Ranee. Even supposing the plaintiff made a good bargain in buying this estate for Rs 55,000, there was no obligation on her part, because she got the estate cheap to pay Mr. Tayler's debt.

If it had been intended that she was not only to pay the Rs. 55,000 to Mr. Tayler, but was also to pay off the debt which Mr. Tayler owed to the Ranee, the purchase-money would have been stated, as suggested by Mr. Twidale, to be the Rs. 55,000 and the amount of the debt added; and part of the purchase-money would have been paid to the decree-holder in satisfaction of her decree. It is clearly beyond all doubt that the plaintiff has paid Mr. Tayler's debt; that she was under no legal obligation to pay that debt as between her and Mr. Tayler; that she did not pay the debt voluntarily, but under compulsion, to save the estate which she had purchased, and for which she had paid, from sale in execution of the decree; and under the ordinary rules of law, of justice, and of equity, Mr. Tayler, who has had the benefit of having his debt discharged by the plaintiff, would be bound to repay the amount. Even if the plaintiff knew that Mr. Tayler owed the money, and that the estate had been attached, that fact would make no difference, unless she came under an obligation to Mr. Tayler to pay off that debt in consideration of his allowing her to have the estate for Rupees 55,000, yet Mr. Tayler contends that because she got the estate cheap, she was bound to satisfy the decree against him. I see no reason to believe that Mr. Tayler would have sold the estate to the plaintiff or to anyone else for Rs. 55,000 if he could have got two lakhs, or even Rs. 88,000 from any other persons. This lady was no more bound without a contract, to pay Mr. Tayler's debt, because she got the estate for Rs. 55,000, than she was to repay Mr. Tayler the difference between Rs. 55,000 and Rs. 88,000, the amount at which he now values it, or the two lakhs at which it was valued by his agent.

In the case of *Exall* v. *Partridge* (2), which was decided on the principles of justice, applicable as much in the mofussil as they are in England, it was held that where the goods of a stranger were on the premises of another person and were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent in order to redeem his goods, he might recover the money paid from those who owed the rent. It was said by one of the Judges that the plaintiff could not relieve himself from the distress without paying the rent. It was not therefore a voluntary but a compulsory payment. Under these circumstances the law implies a promise by the three defendants to repay the plaintiff." Another of the Judges said: "One of the propositions stated by the plaintiff's counsel certainly cannot be supported, that whoever is benefited by a payment made by another is liable to an action of assumpsit by that other, for one person cannot, by a voluntary payment, cause an assumpsit against another; but here was a distress for rent due from the three defendants, the notice of distress expressed the rent to be due from them all the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion. Therefore I am of opinion that this action may be maintained against all the three defendants. Here then was a debt of Mr. Tayler's paid under compulsion by a person who was under no obligation to pay it, and the plaintiff is entitled to recover the amount. It is unnecessary, therefore to consider or to decide whether there was any fraudulent concealment on the part of Mr. Tayler of the fact that the estate had been attached, or to enter into the question whether the recital in the deed amounted to a covenant that Mr. Tayler had power to sell. The legal maxim caveat emptor has been misapplied. It is wholly inapplicable, and has no bearing whatever upon the present case.

The Principal Sudder Ameen says that the concealment, if it was one, was by no means fraudulent,' but I feel at a loss to understand what notions the Principal Sudder Ameen entertains of fraud, when he holds that if a gentleman sells an estate which he knows has been attached under a decree against him, and conceals the fact from the purchaser, and receives the purchase-money, the concealment is one which does not fall within the class of fraudulent. Cases have been cited to show that if an execution case is struck off the file, the attachment which has been made under the execution necessarily falls to the ground. S. 245, Civil P. C., enacts, that, if the amount decreed with costs, and all charges and expenses which may be incurred, by the attachment be paid into Court, or if satisfaction of the decree be otherwise made, an order shall be issued for the withdrawal of the attachment; and if the defendant shall desire it, and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment, and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree.' I find no authority in Act 8 of 1859 for saying that at attachment is at an end if the execution case is struck off the file; and, therefore, if it became necessary to decide upon that point, I should refer the case to a Full Bench. No one, I presume, will contend that if a Judge finds that he has struck off an execution case improperly, he cannot restore it to the file, but that the case must proceed de novo. In this case,

2. (1799) 8 T R 308=101 E R 1405.

according to the statement, which must be taken all together, 'the execution decree case had been for a time struck off the register when the sale took place, and subsequently the case was revived, when a sale proclamation issued, on which the plaintiff preferred a claim, and on the claim being rejected, she paid the amount for which the property had been attached. There has been no case cited which goes to the extent of holding that if an execution case is struck off the file, and a proclamation issued upon the attachment which has issued before the case was struck off, the sale would be subject to all encumbrances created by the debtor between the time the attachment was made and the time the property was sold, on the ground that the effect of the attachment was destroyed for ever by striking the case off the file. Though not expressly in point, the case of *Rajah Muhesh Narain Singh* v. *Kishanund Misr* (3) has a strong bearing upon the point. For the above reasons, it appears to me that Mr. Tayler is bound to refund the money which the plaintiff was compelled to pay, and did pay, in order to save the estate, which she purchased and paid for from being sold under the execution."

Dwarkanath Mitter, J., said (and this is the principal grievance of which Mr. Tayler complains in his letters to the Editor of the Englishman)—

"I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover, both upon the ground that she had paid a debt due from Mr. Tayler to Ranee Usmedh Koer when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise."

The finding that there was a fraudulent concealment was upon a point raised in the suit and in the grounds of appeal, and one upon which evidence was gone into on both sides. For pronouncing this judgment upon a point in issue, the learned Judge, as will be presently seen, is charged with "wanton insult and unfounded aspersion." He is charged with having done that for which a District Judge would probably have been suspended. But the charge was made in letters in which the real facts under which the judgment was pronounced were artfully, and I may say wilfully, concealed by Mr. Tayler; and a new state of facts, which was untrue, and which, if true, had never been set up as a defence in the suit, or ever brought to the notice of the learned Judge, was substituted. Mr. Tayler must have known, and I will prove out of his own mouth that he did know, that upon the facts, as they appeared at the time when Dwarkanath Mitter, J., pronounced his judgment, there was not the slightest ground for complaint. It was not because the Chief Justice felt so confident of the plaintiff's right to succeed upon another point, and abstained from finding upon the issue of fraud, that Dwarkanath Mitter, J., was not at liberty to express his opinion upon that point, which was directly in issue, without subjecting himself to such charges as those which Mr. Tayler has preferred against him in his letters. As well might a juryman be charged with wanton insult and unfounded aspersion for pronouncing, upon evidence before him, a verdict of guilty against a man tried upon a charge of theft or embezzlement. The case was one appealable to Her Majesty in Council, and even if it had not been so, it would have made no difference.

Judges, although they may agree as to the judgment which ought to be given in a particular case, do not always agree in the reasons for arriving at that conclusion, or one Judge may have an additional reason, upon which the other has not expressed his opinion. There is no reason why a native gentleman, who by his abilities has raised himself to the Bench of the High Court is to be maligned and slandered because he has the independence to express an opinion of his own, or even to differ from the Chief Justice. What would become of the independence of Judges if this were to be allowed? Mr. Tayler says that this dishonouring and unmeasured imputation, judicially cast upon him by Dwarkanath Mitter, J., has been recorded by him without one tittle of evidence to support it; that it is wholly untrue and manifestly absurd. But, if he was dissatisfied with the finding, he could have appealed to Her Majesty in Council, for the case was an appealable one and it is not too late to appeal even now. But Mr. Tayler knew full well that, if he appealed to Her Majesty in Council, he must have appealed upon the case as it stood when the Judge pronounced his judgment. He therefore preferred to appeal to the Editor of the Englishman, and through him to the public, and to rest that appeal upon a false state of facts and a dishonest concealment of the real one. No one reading the letter of 7th April could have imagined that Dwarkanath Mitter, J's., judgment was a finding upon an issue in the case founded upon what he honestly believed to be the weight of evidence given on both sides.

3. (1862) 1 Suth 488=9 M I A 324 (P C).

If Mr. Tayler had honestly intended to criticize the judgment, with reference to the evidence given in the cause, he might have done so without objection; he might have set the evidence and commented upon it, so that those who read the criticizm might have been able to form their own judgment as to his conclusions.

I now pass from the charge against Dwarkanath Mitter, J., in reference to his original judgment to the charge bought against him in respect of his refusing to retract upon review. Here let me again point out that throughout the whole of Mr. Tayler's so-called criticizm he treats Dwarkanath Mitter, J's finding upon a material issue in the cause as a gratuitous, uncalled for aspersion, and as a wanton insult which he could retract at pleasure. But this is not so. Dwarkanath Mitter, J., had expressed his judgment upon a material point in the case, and he could not, without granting a review, retract it. The finding had been come to and the judgment had been recorded. The case was one which might have been appealed by Mr. Tayler to Her Majesty in Council, and the plaintiff would have been entitled to have the finding returned with the record. The case set up by Mr. Tayler in review was, like the case set up in his letters, entirely different from that which had been set up or even suggested on his behalf in the lower Court.

In the lower Court it was admitted in para. 3 of the written statement that at the time of sale the estate was attached under proceedings of the civil Court of 1st February 1866 (now said Mr. Tayler to have been at an end by the striking of the case off the Judge's file) and of 13th February 1867 (the attachment stated in Mr. Tayler's letter of 13th April 1869 to have been discovered by him only within the last two days), and the contention then was that plaintiff purchased with full knowledge of the first attachment; that she bought for Rs. 55 000 an estate which was worth Rs. 88 000; that she paid off the decree against Mr. Tayler to serve her own ends and that the maxim caveat emptor applied. In the petition for review, the case set up was that in Mr. Tayler's belief the attachment had been ipso facto withdrawn before the sale, by reason of the case in execution having been struck off the file in consequence of the Ranee's having neglected to furnish security in pursuance of an order of the High Court and that Ahmedoollah was aware of the fact when the sale was completed. Mr. Tayler said:

"Your petitioner having just returned to India has read, he need not say, with pain and mortification the decision of the High Court in the case of Mt. Zuhoorun passed on 19th November 1868. Your petitioner cannot reasonably demur to the decision based as it is on the defence set up by his native Mookhtear, and supported by the evidence which he has volunteered in the case. All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false made and given without the approval, concurrence or knowledge of your petitioner, and in direct opposition to the instructions given by your petitioner to Enayut Hossein before his departure from India. When the High Court is informed that Enayut Hossein is now in the criminal jail, convicted of fraud and embezzlement against your petitioner, and that your petitioner himself has been compelled to come out to India at great loss and inconvenience principally for the purpose of counteracting his nefarious proceedings, it will without difficulty appreciate your petitioner's position."

He then proceeded to state what he called the facts of the case, to the effect that the Ranee attached the estate in February 1866, under the decree; that being about to appeal to Her Majesty in Council, he obtained an order from the High Court that she should be required to give security before execution; that the Ranee not having complied with the order, the decree case was struck off the file; that whatever might have been the strict legal consequence of the order, he confidently believed that it necessarily involved the withdrawal, ipso facto, of the attachment; that he truly and conscientiously believed that no obstacle existed to the absolute sale of the property, that he gave instructions to his agent to sell it; that negotiations for sale were carried on for several months, and were finally concluded at nearly the end of the year, when the sale was completed, the deed registered, and possession given, the Ranee having during the whole of that period failed to comply with the Court's order, and the attachment being still, as generally believed, removed; that he heard nothing more until a few days before he left India, when Enayut Hossein informed him that the estate had been brought to sale, and that Ahmedoollah had paid the amount of the decree; that in the meantime a correspondence had been going on between Enayut Hossein and the Ranee's Dewan, and that the

latter had proposed a compromise of the decree on a cash payment of Rs. 6,000 or Rs. 7,000; that when Mr. Tayler heard that Ahmedoollah had without the slightest intimation or reference to him paid the full amount, and thus for his, Ahmedoollah's, own benefit deprived Mr. Tayler of the advantage of the reasonable compromise just about to be concluded, he instructed Enayut Hossein to represent the circumstances to Ahmedoollah and effect an amicable compromise with him if possible for the amount which, but for the sale under the decree would have been effected with the Ranee: that he never disputed nor wished to dispute his liability for the payment made.

He then went on to say that he left a few days afterwards for England; that when some months afterwards he heard that an action had been brought against him, not then having reason to distrust Enayut Hossein he concluded that if he defended the suit at all it would only be to the extent of the equitable plea above mentioned according to the instructions received; that it was impossible to divine for what purpose Enayut Hossein put in the false and dishonest statement on which the High Court had commented; but he positively asserted that both himself, and, to the best of his belief, Ahmedoollah and the numerous other persons cognizant of the lengthened negotiations, were all under the conviction that the attachment had ceased, and everything was concluded with the greatest openness and publicity; that Ahmedoollah,.the purchaser in his wife's name, to the best of his belief, had the same conviction, being, as he believed, perfectly aware of all that had passed; that Enayut Hossein's statement as to the attachment, the value of the estate, and the information said to have been given to the purchaser, as well as his plea as to the non-liability of Mr. Tayler, were totally and wickedly untrue.

He prayed that the Court would accept his statement, which he was prepared, if required, to substantiate on oath, and relieve him from the harsh and dishonouring animadversions which it had recorded —a modest request certainly, when in the petition he accused Enayat Hossein of perjury and with having misrepresented to Mr. Kelly, Mr. Tayler's own agent, the effect of the written statement which Mr. Kelly had verified upon oath; and when the petition stated, in direct contradiction of Ahmedoollah's evidence given in the cause upon oath, that he, Ahmedoollah, was to the best of Mr. Tayler's belief fully cognizant of all that had passed, and was under the same conviction as he that the attachment had ceased. In his petition and in his affidavit he declared that it was not his intention to dispute his liability for the amount paid. He stated that he directed Enayut Hossein to endeavour to compromise with the plaintiff if he could. He does not state what instructions he left with Enayut Hossein as to the defence to be set up if the plaintiff should refuse to compromise, but merely that, when he heard that the action had been brought, he considered that if Enayut Hossein defended at all it would only be to the exent of the equitable plea above mentioned according to the instructions received. This was explained by an additional affidavit, in which he swore that he believed that the only plea which he would ever have allowed to be advanced on his behalf was, that a compromise had been agreed to by the Ranee's Dewan for a sum (as far as he could remember) of Rs. 7,000, and that the plaintiff, by paying the full amount of the decree, without notice, had deprived him of the benefit of the compromise. He also annexed extracts from a correspondence between himself and Mr. Kelly. In one of the letters to Mr. Kelly he appears to have said :

"I certainly would not pay Amedooliah more than Rs. 7,000, which is the sum I should in all probability have been able to compromise with the Ranee for. He had no right to pay the money on his own authority and without my concurrence, and thus entail on me a liability to the whole without compromise and without the time which the Court would undoubtedly have given me. So if he does not accept this, let him bring his action. But in this matter also, you had better exercise some discretion in consultation with Enayut Hossein and Waliyut Ali."

That letter is dated 3rd May 1867. The plaintiff's suit was not brought before 3rd December following. Though Mr. Kelly and Mr. Tayler both made affidavits, not one syllable was stated by either of them as to any offer of compromise having been made to the plaintiff. All Mr. Kelly swore upon that subject was, that if there had been a compromise he had funds in hand sufficient to pay Rs. 7,000 or 8,000 to the purchaser. That

no compromise had ever been effected with the Rance is clear from her proceeding with the execution without any attempt on the part of Mr. Tayler to prevent it. It is clear that no compromise was made with the plaintiff, from the fact that her suit was afterwards brought, and no such compromise was set up as a defence. The only defence that Mr. Tayler could have set up under these circumstances was, that the attachment was not in force when the sale took place. If he had made that defence, he might have dictated his own terms, for in that case the plaintiff had paid in her own wrong; and no doubt Mr. Tayler would have set up that defence and dictated his own terms, if he had believed that the attachment was not in existence when the sale took place, or that it was superseded by the second attachment; but no such defence was suggested by him either to Enayut Hossein or to Mr. Kelly in any one of his letters. It is also to be remarked that nothing is said either in the petition or in the affidavits as to whether any and what consultation ever took place between Mr. Kelly, Enayut Hossein, and Wilayut Ali, as recommended in Mr. Tayler's letter of 3rd May 1867. Mr. Tayler was heard in support of his petition for review, and on 13th March 1869 the following judgments were delivered. The Chief Justice said:

"It appears to me that there is no ground for reviewing the judgment. I have read very carefully the judgment which I delivered in this case and I see nothing in it which I can retract. I did remark upon the judgment of the Subordinate Judge, but I abstained from expressing any opinion as to whether there was any fraudulent concealment on the part of Mr. Tayler."

Dwarkanath Mitter, J. said:

"I am of opinion that this application ought to be refused. It is not contended that the remarks made by me in the judgment, which is now sought to be reviewed, were not warranted by the evidence then before me nor is it contended that the decree which followed upon that judgment is in any respect contrary to law or justice. But it is urged that the written statement put in on behalf of the petitioner, and the evidence adduced in support of it, were all concocted by one Enayut Hossein, the native agent of the petitioner, contrary to the instructions expressly given to him by the petitioner, and I have been accordingly asked to withdraw certain remarks which I had made with reference to the conduct of the petitioner, as disclosed by the evidence on the record which I had before me when I heard the appeal. I do not think that an application of this sort, which does not ask for any substantial interference either with the judgment or the decree which followed upon it can be legitimately treated as an application for review, and on this ground I decline to entertain it. I wish to add, however that I should not be justified in withdrawing the remarks in question upon an ex parte proceeding of this kind. Enayut Hossein is not before the Court and so far as the plaintiff is concerned, she is in no way interested in opposing this application, inasmuch as the petitioner is not seeking for any interference with the decree which has been passed in her favour. I express no opinion whatever as to the correctness or otherwise of the statements contained in the affidavit filed by the petitioner. I can only say that if the charges brought against Enayut Hossein are true the petitioner ought to prosecute him upon those charges and I have no doubt that such a prosecution, when brought to a successful termination, would be a sufficient vindication of his character. As matters stand at present, I cannot upon an ex parte application like this, hold Enayut Hossein guilty of the serious offence with which he has been charged by the petitioner, and this I must do before I can withdraw the remarks in question.

"I wish further to add that I am by no means satisfied with the explanation given by Mr. Kelly with reference to the verification of the written statement. Mr. Kelly says in his affidavit, 'I received from Mr. Tayler a letter, dated from London 17th April 1867, and another dated from the said place 3rd May of the said year, and in these two letters were contained instructions for the settlement of the claims of Mt Zuburconnissa, and the purport and substance of these instructions were communicated by me to the said Enayut Hossein. When the suit of Mt. Zuburconnissa was brought, the written statement on the part of Mr. William Tayler was prepared by the said Enayut Hossein, and was represented to me as being in conformity with the purport and substance of the instructions of Mr. William Tayler in the said matter, and upon this assurance I verified the written statement. In the first place I remark that the affidavit does not disclose the precise instructions which Mr. Kelly gave to Enayut Hossein in case he, Enayut Hossein, should fail to bring about an amicable settlement, nor does it appear that the letters referred to are very clear on the point. But be that as it may, it appears to me that Mr. Kelly was in no way justified in verifying the written statement in question merely upon a general assurance from Enayut Hossein that it was prepared in conformity with the purport and substance of the instructions of Mr. Tayler. When a gentleman puts in a verified written statement, it is his bounden duty to satisfy himself, by every possible means in his power, that every allegation which is contained in that written statement is in strict conformity with truth; and it is no excuse whatever for him to say that he is ignorant of the language in which the written statement was drawn up, or that he was generally assured by some one else that everything stated therein was in conformity with his instructions. It may be that Mr. Kelly was misled by Enayut Hossein; but without expressing any opinion upon this point, one way or the other, I do not feel the slightest hesitation in saying that, upon his own showing, the explanation offered by Mr. Kelly is altogether unsatisfactory. I reject this application."

Before those judgments were pronounced, the Chief Justice and Dwarkanath Mitter, J., consulted together upon the subject of Mr. Tayler's application for review. I pointed out to Dwarkanath Mitter, J., that I did not see how he could revoke his finding upon the issue of fraudulent concealment without virtually expressing his opinion, behind the back of Enayat Hossein, of the charges brought against him by Mr. Tayler in his petition and affidavits. I fully concurred with my honourable colleague in the course which he proposed to adopt, and which he did adopt, in the judgment which I have read. Without setting out the judgment, or even stating the nature of his reasons, Dwarkanath Mitter, J., is charged with having, on the narrowest grounds of technicality, refused to retract an unfounded and unjustifiable accusation and a slander recorded against an absent suitor without one tittle of evidence to support it; and this though the accusation had been clearly disproved. If this is fair criticism, I confess I do not understand what fair criticism is. Mr. Tayler, in his affidavit put in on Tuesday last, swears that the several letters written by him were written for the sole and single purpose of removing the stigma which attached to his name in consequence of the remark recorded by Dwarkanath Mitter, J., and to prove, by a searching criticism before the public and his friends, that the facts of the case did not warrant such inference. If that is true, Mr. Tayler has far exceeded the means necessary for the end. To show the animus with which the letters were written, I proceed to read them. They are all artistically framed, and like the chapters in some novels, each is headed with a quotation to give some short general idea of what is coming. Some of the insinuations are artfully penned, but there can be no doubt that they are defamatory. It is plain who are the persons alluded to, and what is the meaning and to quote the words of Lord Hardwicke in a similar case·*The St.·James Evening Post Case* (4)] of contempt:

"As a Jury, if this fact was before them, could make no doubt, so as I am a Judge of facts, as well as law, I can make none."

The first letter, that of 7th April, begins with a quotation from Shakespeare:

"My reputation, Iago, my reputation,
Othello.

To the Editor of the Englishman.

Sir—I was in hopes that, long ere this, I might have sent you for publication the proceedings of the High Court in the matter of my application for a review of judgment in the case in which Dwarkanath Mitter, J., did me the honour to record that I had 'perpetrated a fraud;' but as I have not yet been able to obtain authenticated copies, I do not wish to delay any longer the remarks which I consider myself called upon to make injustice to myself in regard to this insulting, and as I shall show, utterly unjustifiable, charge. Condemnation or censure passed by Court of Justice on a suitor (if without sufficient ground or reason) is the most mischievous, the most intolerable of slanders. The Judge on the Bench, like the Parson in the Pulpit, has it all his own way for a time; but the Preacher attacks man in general, the Judge deals with the individual. General condemnation hurts no one. Individual censure may be ruin to the object of it. I now propose to show, and that by clear and unanswerable evidence, that this dishonoring and unmeasured imputation judicially cast upon me by Mr. Dwarkanath Mitter, J. has been recorded by him without one tittle of evidence to support it; that it is wholly untrue and manifestly absurd; and I beg you to observe that the learned Judge who placed it on record has not condescended to give one single reason, ground, or argument in support of his denunciation. "If a District Judge had so acted, he would in all probability have been suspended, or, at all events, subjected to some such ordeal as Mr. Beaufort underwent not long ago. Whether elevation to the Bench of the High Court carries total exemption from responsibility with it remains to be seen."

This is a distinct charge, that the learned Judge had been guilty of such conduct that if he had been a District Judge he would in all probability have been suspended; but where is the promised clear and unanswerable evidence to support it? It not-only asserts that the Judge's conduct was such as to justify suspension, but Mr. Tayler declared that it remains to be seen whether, in consequence of his high position, he will be exempt from responsibility by Government. There was a charge sufficiently grave to justify the Secretary of State in calling for explanation. Was the learned Judge to wait, or immediately to vindicate his honour and his character? The letter proceeds:

"The facts of the case, as far at least as they regard this judicial insult, lie in a nutshell."

Mr. Tayler then proceeds to detail the facts, not as they appeared on the record, on which alone the Judge had to decide, but upon Mr. Tayler's statement. He says:

"In October 1866, I sold an estate then in my possession in the Gaya District for Rs. 55,000 to one Ahmedocliah, an old Patna vakeel, who purchased it in the name of his wife. Nine

4. (1742) 2 Atk 469=26 E R 683.

months after the sale this estate had been attached by the delicious old maid of Ticaree under the decree which, to her utter amazement and bewilderment, she obtained from the Hon, ble Loch and Norman, JJ., for Rs. 12,000—a decree which robbed me of the hard earnings of a year."

I shall have occasion in another place to refer to this description of the Ranee. I merely ask here, was it necessary for the vindication of Mr. Tayler's character in this matter under consideration? But what was the meaning of the assertion that she obtained that judgment to her utter amazement and bewilderment? What was the meaning of describing the decree as one which had robbed him of the hard earnings of a year? Could any other meaning attach to those words than that the decree was an unjust one? Was it necessary for the vindication of Mr. Tayler's character, with reference to the question whether he had fraudulently concealed the attachment from a purchaser of the estate, to enter into the merits of the decree under which that estate was attached? I should have thought that Mr. Tayer would have been glad to allow all questions as to that decree to be buried in oblivion; for, notwithstanding the Judges did on review, and upon reading a deposition of Mr. Tayler which had been taken irregularly and not before the Court on the first hearing of the appeal, withdraw certain remarks which reflected seriously upon Mr. Tayler's character. still the ugly fact remained that Mr. Tayler endeavoured in a certain suit against the Ranee, his former client, to enforce payment of a bond which he had obtained improperly from her, and by the doctrine of estoppel to bind her to certain untrue statements which had been introduced into the bond. Norman, J., in that case made the following remarks:

"Mr. Tayler however raises the issue that his client is estopped by the admission in the bond. There cannot be a greater mistake. Mr. Tayler stood towards the Ranee in a fiduciary position as her confidential legal adviser."

And again:

"We think Mr. Tavier is not entitled to recover on the bond, and it must be set aside as improperly obtained from his client."

The attempt made by Mr. Tayler in that suit to pervert justice by a misapplication of the doctrine of estoppel was not unlike the attempt which was made by him in the suit brought by Mt. Zahoorun to pervert justice by a misapplication of the maxim caveat emptor. And here I may ask why, if Mr. Tayler believed that the decree passed by Loch and Norman, JJ., was unjust or erroneous, did he not proceed with his appeal which he preferred to the Privy Council, and which he withdrew before the date of this letter? The letter continues:

"After this attachment, she was required by the High Court to give security before her decree was executed, and on failing to comply with the order, the case of execution of decree was struck off without reservation. Some time after this, I gave directions for the sale of the estate. The negotiations were conducted with the utmost publicity by my agent while I was at Simla. They were carried on for months together, and finally completed nine months after the case had been struck off."

This allegation not only contains a false fact, but suppresses the truth. It is false as regards the statement that the attachment was struck off for default of the Ranee. It is a suppression of the truth, inasmuch as the facts stated were not those upon which the Judge decided, and the validity of the attachment, or of the Ranee's right to sell the estate under it, had never been disputed or set up as a defence by Mr. Tayler. It is not necessary to decide that Mr. Tayler, when he wrote in this letter that the decree had been struck off for default of the Ranee, stated what he knew to be false, but it is a very remarkable fact that it was made after the Judge in his judgment in the intervention case had declared that the case was not struck off for default of the Ranee, and that the precedent which had been cited by the pleader to show that the attachment was invalidated by striking the case off the file was applicable only to a case in which the decree is struck off owing to the negligence of the decree-holder. That judgment having been filed as part of the evidence in the suit against Mr. Tayler, that gentleman in his letter brings his case within the rule by the false statement that the decree was struck off in consequence of the Ranee's having failed to comply with the order that she might give security. It will make the case clearer if I now read the Judge's judgment in the intervention suit, which was put in as evidence in the suit brought by the purchaser against Mr. Tayler, and compare it with these assertions of Mr. Tayler:

"To-day this case came on for hearing in the presence of the pleaders for both parties, and the papers of the case have been taken into consideration. The particulars of this case are as follows: On 27th January 1866, Ranee Usmedh Koer filed a petition for execution of decree, with

a view to realize the costs and interest payable to her under the decree of the High Court, dated 29th April 1865, by Mr. William Tayler. At that time she also submitted a schedule of the properties which she intended to attach, that is to say, a schedule of sixteen annas of mokuraree right in Mouzah Dargaon in Pergunnah Sumai. On 1st February 1866 an order for attachment was passed by this Court, and also the usual processes were issued and the estate was attached on 9th March 1866. An order was sent by the Court to the effect that the decree-holder should show cause within two weeks why the execution of decree should not be postponed if the judgment-debtor would find sufficient security until the appeal preferred to the Privy Council shall have been decided. On the receipt of the order afore alluded to, this Court passed an order, to the effect that the execution proceedings should be postponed for the time. Also on 13th March at the time of the transmission of the return to the superior Court, this Court made this order, that the proceedings for execution of decree should be struck off from the files of pending cases.

On 29th May 1866, an order was received from the High Court, purporting that in the event of tender of sufficient security, the decree in favour of the decree-holder might be executed. In obedience thereto, the case for execution of decree was again numbered on the file. On 7th December 1866, the security tendered by the decree-holder was admitted, and the property having been again attached, the 2nd February 1867 was fixed for another sale. On 13th February 1867 Mt. Zahoorun, the objector, filed a petition praying that the property attached might be exempted from sale, because she having purchased the property in dispute under a deed of sale of 11th October 1866 had been in possession, and the purchase in question took place before the second attachment. In this case the point for trial is whether the order of this Court in the matter of stricking off the case for execution of decree for the time being from the file of pending cases can be prejudicial to the previous attachment, and render the same null and void.

The opinion of the Court is that an order, like the one passed by this Court, cannot be prejudicial to the interest of the decree-holder under the circumstances of the case, and with reference to the fact that the proceedings in execution of decree were thrown out for a short time and no default was committed by the decree-holder in carrying on the case. Hence, as the decree-holder has furnished sufficient security, and the case for execution of decree has been numbered on the file by order of the Court, the parties to this suit have been placed in the same position in which they were at the time of the striking off of the case for a short time. Hence the Court finds that the first attachment has been in existence and in status quo. The precedent relied on by the pleader for the objector, of 3rd May 1855, p. 221, can be applicable to a case in which the execution of in decree is specially struck off the file, owing to the negligence and default of the decree-holder. Hence, believing that the first attachment did not become null and void, and as the first attachment had taken place prior to the purchase made by the objector, the Court does hereby order that the objection be rejected, and the property attached be sold by auction for the realization of the money decreed."

The letter goes on:

"Now I ask you, and through you the public, the whole service to which I had the honour to belong, and with which I am still connected by so many ties, and finally I ask the Hon'ble the Chief Justice and the Judges of the High Court to say what was the fraud which I prepetrated in thus disposing of my properly ?"

I will answer the question. The fraud consisted, not in selling the estate, but in selling it without informing the purchaser of the attachment, receiving the whole purchase money from her, leaving her subject to have her estate sold under that attachment, and when she had been obliged to satisfy the decree in order to save her estate from sale, refusing to pay her the money which she had so paid, and of which Mr. Tayler got the benefit in satisfaction of the decree, and setting up the doctrine of caveat emptor and other similar sham defences. Mr. Tayler was not so innocent as not to know that the fraud charged was not the simple fact of his selling his property. The letter further says:

"Is it not, and has it not for years passed been the unvarying custom throughout the District Courts to consider an attachment dead when an execution case has been struck of the file? Will Dwarkanath Mitter, J., dispute this ?"

This question has already been answered by the Judge of Gya, who held that striking off an execution case does not invalidate an attachment unless the case is struck off for default of the decree-holder. The facts in this letter, as stated, bring the Ranee's attachment directly under this category; but they are false, as has been already shown. Mr. Tayler's letter proceeds:

"On what ground, then, on what evidence, did this Judge in the first instance record this grave accusation? Not on the evidence of Enayut Hossein, my native agent, for his evidence was set aside by the Court as unworthy of trust."

Enayut Hossein's evidence was disbelieved as to the fact that the purchaser was informed of the attachment, and that the amount of it was fixed at Rs. 14,000. The concealment was proved by Ahmedoollah and the other witnesses produced by the plaintiff. Further the letter goes on:

"Whatever may have been the dishonesty of his pleading and answer to the suit, where were the materials to justfy the charge that I perpetrated a fraud in selling my estate in October 1866?"

Mr. Tayler must know that that was not the charge, and that the fraud alleg-

ed consisted of his suppressing the fact of the attachment. The letter proceeds:

"And if the original charge is thus shown to be without reason, ground, or evidence, what will be said when it is known that after the solemn affidavits taken by me before the Court, and the full proof I have given of my entire blamelessness in the matter, Dwarkanath Mitter, J., refuses, on the grounds of the narrowest technicality, to expunge his remarks, and tells me that a criminal prosecution against my native agent, if conducted to a successful termination, will be a complete vindication of my character. (I quote from memory of what he said at the time.")

Here again the judgment and the reasons for it are suppressed. I cannot understand what Mr. Tayler's notions of justice are, if he holds that a refusal to act upon a charge of perjury against a man behind his back is a matter of the narrowest technicality. Mr. Tayler proceeds:

"I should certainly have thought that a Judge, endowed with those high qualifications which are generally believed to be essential to the due discharge of his duties, would have gladly seized the opportunity, when he found that he had unwittingly and unjustly slandered an absent suitor, to retract his words and expunge them from the record, instead of referring me to a process not only of doubtful issue, but which is actually impracticable in execution, for there is no criminal charge which could be framed against my agent in this case. He cannot be indicted for perjury without the express sanction of the civil Court. He cannot be charged with false verification because he induced Mr. Kelly, my English agent, to verify the statement put in on his behalf. He certainly disobeyed my instructions, but he fought the case and gained a decree in my favour in the District Court."

If Enayut Hossein was guilty of perjury, as charged by Mr. Tayler, he might clearly have been charged with perjury. Mr. Tayler would in all probability have had no difficulty in obtaining leave to prosecute him. If Mr. Tayler had no evidence to prove perjury, he ought not to have made the charge. Mr. Tayler continues:

"On what possible grounds could I frame or conceive a criminal charge against him with the slightest chance of bringing such charge to a successful termination? So the happy sequal is, that I am unjustifiably accused. The accusation is clearly disproved My accuser refuses to retract, and refers me for vindication of my character to an impossible remedy. It is a satisfaction at least that the Honourable the Chief Justice has publicly disclaimed all participation in this cruel wrong."

All that I stated was that I had nothing to retract. I left it to Dwarkanath Mitter, J, to say what he thought right with reference to his own judgment. The next letter is that of 12th April; it runs thus:

"*First Fury.*—Thou thinkest we will rend thee, bone from bone,

And nerve from nerve, working like fire within?

Prometheus.—Pain is my element, as hate is thine!

Ye rend me now, I care not."

Prometheus unbound.

To The Editor of the "Englishman."

"Sir,—Two or three days ago, I addressed you on the subject of Dwarkanath Mitter J's., charge against me of "fraud." What I am now about to relate is an appropriate and somewhat amusing supplement to the narrative. At the very time I was in person protesting against this insulting and unfounded imputation, what was taking place in the same district and before the same Court in which the attachment of my estate had taken place? Listen, and be edified. Some weeks ago, I had myself attached a house beloging to a judgment-debtor against whom I held a decree for Rs. 5000. The house was worth about that sum. Before the sale, however, my irresistible old maid of Ticaree, who is in dangerous rapport with all the Amlah of all the Courts, having a stray claim against me of Rs. 500 for costs, attached my decree for Rs. 5,000."

Here is a direct charge against the Ranee that she is in rapport with all the Amlah of all the Courts. Was it necessary for the vindication of Mr. Tayler's character that the discharged Mookhtear should turn upon his former client and endeavour to bring her into ridicule and contempt? The lady who is styled "my irresistible old maid of Ticaree" is a lady of rank and position: above all, she is a Hindu widow, a state which Mr. Tayler from his experience must know is one in which she is removed from all worldly pleasure. Is it because she discharged Mr. Tayler from her service, or because she holds some stray decrees against him which she seeks to enforce, that she is to be slandered and ridiculed? Her sex, her misfortune, ought to have protected her from insult and indignities. I have no doubt that the charge was intended to convey the imputation that all the Amlah of all the Courts in the district are under undue influence exercised over them by her. But even if this was not the meaning of the slander, there was the intention to ridicule; and why was this? Mr. Tayler has positively sworn that the only object of this letter was to vindicate his character. Would he have thus written if he had continned to be the Ranee's Mookhtear on a salary of Rs. 500 a month, with extra reward for winning suits? Is this part of the edification which he promises to those who listen? Let me not be misundrstood. I do not charge this as part of the contempt of the Court.

I refer to it merely as evidence of Mr. Tayler's animus, and to test the credibility of his affidavits. Mr. Tayler goes on:

"And now for judicial wisdom! Instead of allowing the sale to proceed, subject to this lien for Rs. 500, which would, of course, have been paid out of the proceeds, to the satisfaction of justice and all the parties concerned, the Judge strikes the case off the file! The Ranee steps in with another decree against the same party and the house is sold for her benefit. Meanwhile my agent at Patna, directly he hears of the attachment of my decree, sends off Rs. 500 in cash and prays for the sale of the house. What is the order? Your case has been struck off. Ergo. your attachment has fallen to the ground, and another has reaped the fruits of your diligence."

This judgment is not intelligible, but, right or wrong, it did not justify the aspersions on Dwarkanath Mitter. J. The letter proceeds:

"Now, just observe how I am dealt with. Because, in the one case I acted in the belief that the attachment of my own property had ceased in consequence of the case being struck off the fild, Dwarkanath Mitter, J., declares I perpetrated a 'fraud.'"

Now is this true? Did Dwarkanath Mitter, J., declare that Mr. Tayler perpetrated fraud because he acted in the belief that the attachment had ceased in consequence of the case being struck off the file? The fact was not before him when he delivered the first judgment. His reasons for not withdrawing the remarks were given in this judgment in review. The letter continues:

"Because, in the Court of Gaya, my case of execution had been struck off the file (and that inexcusably), I am robbed of Rs. 5,000 on the ground that the attachment had ceased. Thus justice, like the sword of Ali, strikes me at one and the same moment with both edges of the redoubtable Zoolfikar, and each time, as was Ali's pleasant custom, with a shout of insult and derision. At the voice of Dwarkanath Mitter J., down goes my reputation; on the dictum of the District Judge away goes my money; both Judges acting on grounds diametrically opposed to each other."

What was meant by the words shouts of insult and derision" with reference to Ali's sword, except that Dwarkanath Mitter, J., who was compared to one of the edges, insulted and gloried in his insult? Mr. Tayler proceeds:

"With all respect to the Majesty of the ermine, I cannot but think that such instances of human frailty should teach our Judges, whether high or low, the melancholy lesson that after all they are but fallible mortals, and at least make them pause before they aggravate the wrong of an erroneous judgment by the far greater wrong of wanton insult and unfounded aspersion."

The last letter is dated 13th April 1869; it commences thus:

"*Dogberry.*—Come you hither, Sirrah; a word in your ear, Sir! I say to you, it is thought you are false knaves.

Borachio.—Sir, I say to you, we are none.

Dogberry—Well, stand aside. "Fore God, they are both in a tale.

Have you writ down that they are none?,"

Much Ado about Nothing.

Here let me ask how it was necessary for the vindication of Mr. Tayler's character to introduce Dogberry into the scene?

"To the Editor of the Englishman.

Sir.—Well you allow me a few more last words about the late assault of Mr. Justice Dwarkanath Mitter, and forgive me for again referring to the irrepressible 'ego.' Thackeray's pithy defence of egotism is, that if a man tread on my corns, I am the sufferer, and who so well as myself can describe my woes? But this matter has public as well as private interest; others have corns, and there are more than one Mitter who may tread on them. But what I am now about to represent is a new incident in the case, and one which renders the Judge's accusation so thoroughly absurd that I am bound to give it publicity. The only conceivable ground hitherto supposed to exist for casting a stigma upon me was that the Judge sold my estates under the former attachment, and therefore, that that attachment did exist at the time of my private transfer of the estate. This could not really alter the case as far as my "fraud" was concerned, because, even if he had done so, he would have acted in direct opposition to the established practice, and it was quite enough for my moral absolution to show that I believed, and was justified in the belief, that the attachment had ceased. No judicial ex post facto eccentricity could alter or affect this state of things. But I have within these two days ascertained that even this little homeopathic globule of justification does not exist! but that the Judge, before he brought the estate to sale, directed a new order of attachment, thus showing by his own proceedings that he also deemed the old attachment to have become null and void."

Here there is again falsehood and concealment; falsehood in representing that the second attachment was a new incident in the case and concealment in keeping out of sight the fact that in one defence set up to the suit, the validity of the attachment or of the sale under it was never questioned. The question was, admitting the validity of the attachment and of the right to enforce it by sale of the estate, whether the plaintiff knew of it at the time of sale, and if not, whether Mr. Tayler knew of it and fraudulently suppressed or concealed it. The discovery of the fact of the second attachment, even if not known to Mr. Tayler before, could not affect the question whether he fraudulently concealed the first attachment, or the fact of the

first attachment continuing in force. But it is clear that this attachment, stated to have been discovered by Mr. Tayler only two or three days before writing the letter, was a matter known when the written statement was put in on behalf of Mr. Tayler, and was actually referred to in para. 3 as the proceeding of 13th February 1867, and was also decided by the Judge of Gya not to have affected tha first attachment. The Judge speaks of the property having been again attached, of the intervenor's objection that she purchased before the second attachment, and he decided that the first attachment did not become null and void by reason of the second attachment. So much for Mr. Tayler's discovery. The letter goes on:

"Thus the infinitesimal peg upon which Dwarkanath Mitter, J., suspended his insulting imputation subsides into space! The confident and uncompromising tone of his accusation had deceived even me, and I had hitherto concluded that he had at least thus much of fact to justify his anathema. But it now appears that be made no enquiry whatever as to whether the sale took place under a fresh attachment, or not!! before he thus vilipended me."

There was no necessity to enquire, because the matter was no part of the defence set up. The letter concludes:

"We have all heard or read among the myteries of human nature of that strange idiosyncrasy which enables some men to detect, by a certain internal irritation, the presence, though unseen, of a cat. It appears to me that of late years some such element of anti-felini irritation must appertain to my unhappy person, for there is a certain class among the official principalities of Bengal who, directly I am brought into contact with them, appear to be at once affected by an overpowering internal excitability, which affects the understanding even of the wise and good and intensifies the folly of the foolish, but at the same time always issues in one result—injury, insult, or wrong to myself. When the true history of mesmeric repulsion is unravelled, perhaps the cause may be traced."

Can any one doubt after reading the context, the reference to the judgment of Loch, J. and Norman, J., in the first letter, that the words "official principalities" are intended to include the Judges of the High Court, or some of them, and to accuse them of a want of impartiality, fairness, and courtesy in all cases in which Mr. Tayler is concerned as a suitor, which always result in injury, insult and wrong to him? I will read a passage or two from Lord Hardwicke's judgment in a similar case. Lord Hardwick said in *St. Jame's Evening Post* case (4):

"Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced. But, to be sure, Mr. Solicitor-General has put it upon the right footing that, notwithstanding this should be a libel, yet unless it is a contempt of Court, I have no cognizance of it. For whether it is a libel against the public or private persons, the only method is to proceed at law. The defendant's counsel have endeavoured two things—first, to show this paper does not contain defamatory matter; secondly, if it does, yet there is no abuse upon the proceedings of this Court, and therefore there is no room for me to interpose. Now, take the whole together though the letter is artfully penned, there can remain no doubt in every common reader at a coffee house, but this is a defamatory libel."

The Lord Chancellor then stated, with reference to the course which had been followed in that case of alluding to the persons libelled by the initial letters of their names, that

"All the libellers of the kingdom know now that printing initial letters will not serve their turn, for that objection has been long got over."

He then proceeded:

"It is plain therefore who is meant; and as a jury if this fact was before them, could make no doubt, so as I am a Judge of fact as well as of law I can make none. I might mention several strong cases, where even feigned names have been construed a libel upon those persons who were really meant to be libelled. I shall take notice but of one, and that is the case of Mrs. Dodd, who printed a letter abusing the late King' under the name of Merriweis Sophy of Persia; it was tried before a jury of gentlemen of great honour. who were so well satisfied of the real meaning that notwithstanding the whole was concealed under fictitious names they found the publisher guilty. Next as to the expression in the paper that 'there were even here in England some gentlemen of note and character who did not scruple to turn affidavitmen, Mr. Solicitor-General has insisted this may be taken in a good sense as well as a bad one, because a man who swears true, is as much an affidavit man' as if he swears false, and the Court should take it in mitiori sensu. I will not take upon me to say whether, upon an action at law this could be supported as libellous upon the strict rules. But, I believe, there is nobody who is conversant in the proceedings of this Court, but must know that this expression means persons who are ready, upon all occasions, to make affidavits, without regarding whether they have any conuesance of the facts."

The use of the words "a certain class of official principalities of Bengal" cannot deceive the Court. There is no doubt it includes one or more of the Judges of the High Court, and I have no more

doubt as to what Mr. Tayler meant by the words

"being affected by an overpowering internal excitability which affected the principalities when they came into contact with him, and which always resulted in injury, insult, or wrong to him,"

than Lord Hardwicke had as to the meaning of the words "affidavit-men." These letters are not fair criticizms: they are slanderous effusions, as regards the Ranee of a disappointed Mookhtear who has been dismissed from her service, and, as regards the Judge of a disappointed suitor who has failed in his case. The charge against Dwarkanath Mitter, J., of casting upon Mr. Tayler an unmeasured imputation without one tittle of evidence to support it, was not only false, but false within Mr. Tayler's own knowledge. This I will prove out of his own mouth. In the letter to the Editor of the Englishman, dated 12th February 1869, Mr. Tayler says:

"I have just arrived from England, and one of the first pleasant things presented to me has been your paper of 1st December, containing the decision of the High Court in the appeal Mt. Wuzeerun (appellant) versus William Tayler (respondent). From this decision I find that, in a suit instituted against me after I had left India, and conducted on my behalf by my native Mookhtear, Enayat Hossein, the High Court has declared me guilty of fraudulent concealment of attachment (in its legal sense) in regard to an estate which I sold. I do not complain of this decision, for it is based on statements and evidence put forward by Enayut Hossein which are quite sufficient to justify the conclusions of the Court, which regards them as mine."

Again, in his petition of review, on 17th February last, Mr. Tayler says:

"Your petitioner, having just returned to India, has read, he need not say, with pain and mortification, the decision of the High Court in the case of Mt. Zuhoorun passed on 19th November 1868. Your petitioner cannot reasonably demur to the decision, based as it is on the defence set up by his native Mookhtear, and supported by the evidence which he has volunteered in the case." All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false, made and given without the approval, concurrence, or knowledge of your petitioner, and in direct opposition to the instructions given by him to the said Enayut Hossein before his departure from India."

Holding this opinion, Mr. Tayler, knew that, according to the case as it stood when Dwarkanath Mitter, J. pronounced judgment, he was fully justified in pronouncing it as he did. Mr. Tayler substituted a fresh state of facts, which was false, and wilfully concealed the real one, and he criticized the judgment with reference to that statement. Was this honest? Was it fair criticizm, in good faith, of the acts of a public man? I could scarcely believe that I correctly understood Mr. Tayler's observations which he made with reference to his letter of 12th February, and his attempt to reconcile the passage which I have quoted with the slanderous imputations in his subsequent letters. He stated that when he wrote the first letter he was under the impression that the Chief Justice as well as Dwarkanath Mitter, J. had imputed fraud to him, but that he had since been gratified by finding from the explanation of the Chief Justice that he had put only a hypothetical case; that if the observations of the Chief Justice had been to the effect which he had supposed, he would have had no cause to complain of Dwarkanath Mitter, as he would then have been concurring with the Chief Justice, after he had considered all the facts.

I called his attention to the fact that he had reiterated the same thing in his petition for review. He then stated that it was not until after the hearing of that petition that he had heard the explanation of the Chief Justice. I can scarcely trust myself to characterize this explanation of Mr. Tayler. I wish merely to ask whether it was just and fair or manly on the part of Mr. Tayler to impute to Dwarkanath Mitter, J., that which he would not have imputed to the Chief Justice, if he had come to a similar finding. How is it possible that there could have been evidence sufficient to justify the Chief Justice alone, or the Chief Justice and Dwarkanath Mitter, J., jointly, in imputing fraud if there was not one tittle of evidence to support the imputation when made by Dwarkanath Mitter, J., alone? I have now shown beyond all doubt that there was not a shadow of justification for Mr. Tayler's charges against Dwarkanath Mitter, J., and that the public could not have been misled by any criticizms if they had been based upon the truth, the whole truth, and nothing but the truth. I have also criticized what Mr. Tayler has been pleased to style his intellectual and searching criticism, and I have no hesitation in declaring that his letters do not contain fair criticizms, but slanderous assertions and false statements. A fair critic must not

misrepresent, and he must not wilfully conceal the truth. He is not bound to extenuate but he must not set down aught in malice.

Mr. Tayler's first object in writing the letters may have been to vindicate his own character, but vindication was not the sole object of all that he inserted in them. Besides, every honest man knows that he has no right to vindicate his own character by reflections upon the character of another, based upon false statements and wilful suppression of the truth. I do not believe that there is an editor of a single journal in this country, or in any other, who, having all the facts before him, would, unless influenced by malice or improper motives, have criticized the judgments of Dwarkanath Mitter, J., in the way in which Mr. Tayler has had the audacity to write about them. There can be no doubt that the publication of such letters is a contempt of Court. It is unnecessary to refer to many cases in support of that position.

"Nothing, said Lord Hardwicke in the case already cited is more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented."

It is a matter of the greatest importance that Judges should possess the confidence of the public. Such confidence tends much to the satisfactory administration of justice. In *Mr. Lechmere Charlton's case* (5) Lord Cottenham said:

"The power of committal is given to Courts of justice for the purpose of securing the better .... administration of justice. Every writing, letter or publication which has for its object to divert the course of justice is a contempt of the Court. It is for that reason that publications of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempts. It would be strange, indeed, if the Judges of the Court were the only persons not protected from libels, writings, and proceedings, the direct object of which is to pervert the course of justice. Every insult offered to a Judge in the exercise of the duties of his office is a contempt, but when the writing or publication proceeds further, and when not by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order."

In *Crawford's* case (6) Patteson J. said:

"It is ..... objected that the Court could have no general power of commitment for a libel published out of Court some time before. This point has not been expressly decided upon. In *Van Saudan's* case (7), the libe appears to have been published both in Court and out of it. In *Peg.* v. *Almon* (8) there was a very learned judgment by Chief Justice Wilmot which he intended to deliver, though it was not delivered in fact, the case having been dropped. He satisfactorily shews that a Court of Record has power to punish, by commitment for contempt, a libel published while the Court is not sitting. There must be a choice as to the mode of proceeding; for he says that the punishment may be by indictment or by committal for contempt: he treats it throughout as a matter of election. That may be an answer to the difficulty suggested by my brother Coleridge to Mr. Peacock. (The difficulty suggested was whether a commitment for contempt could be pleaded as an answer to an indictment for the same publication). We need not however determine as to this: it is enough for us to see that the Court has the power; and that is clear law. If that be so, the question whether the particular publication be libellous or contemptuous is clearly, as has been said in many instances, a question for the Court which commits. We have not to inquire into this matter, which has been adjudicated upon by a Court of competent jurisdiction ..... The fact of the authorship is admitted by Mr. Crawford, who comes forward to avow it, openly and very properly. The construction of the publication was for the Court. We therefore cannot interfere unless there has been some error in the manner and form of the proceeding."

In the same case Erle, J., said:

"Then is there here a lawful ground for committal? The power of Courts to commit for contempt in this country has been discussed: and it has been established, on good reason, that a Tribunal has power to protect itself by committing for a contempt relating to the exercise of its powers. *The commitment here was for a contempt in publishing, while the Court was not sitting, and perhaps at some distance of time and place, a libel on the proceedings of the Court.* In the elaborate judgment to which my brother Patteson has referred, it is shown that such a publication may have a strong and immediate tendency to paralyze the proceedings of this Court. Such cases may easily be conceived; the propriety of the decision in the particular case is a question for the Court itself."

In re Wallace (9) a barrister and attorney of the Supreme Court of Nova Scotia wrote a letter to the Chief Justice reflecting on the Judges and the administration of justice in the Court. The Court suspended him for it. On appeal to the Privy Council, the suspension was reversed. Lord Westbury, in delivering judgment said:

"The letter was a contempt of Court which it was hardly possible for the Court to omit taking cognizance of. It was an offence however committed by an individual in his capacity of a suitor in respect of his supposed rights as a

5. (1837) 2 My & Cr. 316=40 E R 661.
6. (1849) 13 Q B 613=18 L J Q B 225.
7. (1845) 6 Q B 773=14 L J Q B 154.
8. (1765) Will 243=97 E R 94.
9. (1866) 1 P C 283=4 Moore P C 10.

suitor and of an imaginary injury done to him as a suitor and it had no connexion what ver with his professional character, or anything done by him professionally, either as an advocate or an attorney. It was a contempt of Court committed by an individual in his personal character only. To offences of that kind there has been attached by law and by long practice a definite kind of punishment, viz., fine and imprisonment ..... We think ..... there was no necessity for the Judges to go farther than to award to that offence the customary punishment for contempt of Court."

After Mr. Tayler had been brought into Court, I asked him whether he had caused the letters in question which bore his name to be published. He at first hesitated. I do not state this by way of complaint against him, for he was possibly taken by surprise at the moment, and he almost immediately afterwards did, as I should expect Mr. Tayler or any other gentleman, who had sent a letter to a newspaper for publication would do, he very properly admitted that he was the author of the letters, and that he had caused them to be printed and published. I am not quite certain whether I spoke before his admission of what I should do, or spoke after it of what I should have done, if he had not admitted the publication. My belief is that it was the former, and that I said that if Mr. Tayler disavowed the letters, I should be compelled to send for the printer and publisher of the paper, who was just as liable in point of law to be punished for contempt as Mr. Tayler, or words to that effect. This opinion has been challenged, and I proceed to prove that it was well founded.

There can be no doubt that the publication in a newspaper of letters like these has in fact a much more injurious effect than the mere writing and sending them to the editor of a neswaper. If the editor of the Englishman had torn up Mr. Tayler's letters and put them into his waste basket, no great injury to the public, or to any one else, would have been caused. But when they were published in the Englishman, they were spread over the country wherever that newspaper had circulation. If the writing of those letters was injurious, the injury was increased a thousand fold by the publication of them in the newspaper to all the readers of that journal. The printer and publisher of the paper doubtless had no feeling upon the subject. The real guilt of publication was mainly that of the author who sent them to the editor in order that they might be published. Under these circumstances, the Court had its election to punish both the author and publisher of the newspaper, or either of them. In this case the Court saw no necessity to punish both. They intended to deal only with the author, if the auther when brought into Court had disavowed the publication, the Court would not have allowed justice to be defeated or baffled. It would have sent for the publisher of the paper, and if he had failed to produce the letters or to bring the case home to the author, the Court would have held him responsible.

If the printer of a newspaper publishes a letter with the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed. Notwithstanding all that has been said in the newspapers, I unhesitatingly affirm that that is the course which I should have adopted. I trust that I am firm enough and conscientious enough not to be influenced by anything that has been publicly said upon this subject. If I had intended to punish the publisher, I should have punished him, notwithstanding the remarks which have been made. I did not intend to punish him after Mr. Tayler avowed the authorship, and nothing that has been said would induce me to hold the publisher responsible. I have pursued the same course precisely as that which I should have pursued if no remarks upon the subject had been made in the public newspapers.

Now with regard to the liability of the printer, there can be no doubt, assuming that the letters are not fair criticisms. If they were fair criticisms, of course, both Mr. Tayler and the publisher of the newspaper were justified in publishing them. In the case of *St. Jame's Evening Post case* (4), which I have already cited from 2 Atkyns, the contempt was committed by publishing a libel reflecting upon certain suitors in matters pending in the Court. The libel had been published in the Champion newspaper, and also in the St. James's Evening. Post. Lord Hardwicke said that there were three sorts of contempt:

"One was scandalizing the Court itself: another was abusing the suitors; there may also be another contempt in prejudciing mankind against

persons before the case is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties" (and I may add the Judges) "may proceed with safety both to themselves and their character."

It was held that the libel was a contempt of Court, and Lord Hardwicke remarked:

With regard to Mrs. Read the publisher of the St. James's Evening Post by way of alleviation, it is said, that she did not know the nature of the paper which she had published, and that printing paper and pamphlets was the trade which she got her livelihood by. But though it is true, this is a trade, yet they must take care to do it with prudence and caution; for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous; and so is the rule at law, and I will always adhere to the strict rules of law in these cases. Therefore, Mrs. Read must be committed to the Fleet, according to the common order of the Court upon contempts. "But as to Mr. Huggonson" (the printer of the "Champion" newspaper), "who is already a prisoner in the Fleet, I do not think this any motive for compassion, because these persons generally take advantage of their being prisoners to print any libellous or defamatory matter which is brought to them, without scruple or hesitation. If these printers had disclosed the name of the person who brought this paper to them, there might have been something said in mitigation of their offence; but as they think proper to conceal it, I must order Mrs. Read to be committed to the Fleet, and Mr. Huggonson to be taken into close custody of the Warden."

In *Crawford's* case (6), which has already been referred to, it was ordered that Robert Fargher, the printer and publisher of the Mona Herald newspaper, should attend the Court on 1st February "to answer for unlawfully and contemptuously printing and publishing" an article tending to scandalize and defame the Court. It appeared that Fargher attended and admitted that he was the printer and publisher and expressed his regret that, in consequence of bad health, he had not given the article the consideration it ought to have had, and regretted that it should have given offence to the Court, and he tendered an apology and offered to publish it in all the insular newspapers. The Court did not accept the apology, but forthwith committed Fargher for contempt of Court. Crawford then stated to the Court that he was the author and was willing to take the responsibility, provided the Court relieved Fargher, but that he would not acknowledge the right of the Court to act in a vague, informal, and summary manner. The Court, however, committed Crawford, and he and Fargher were immediately removed from Court in custody.

In a case of *Cann* v. *Cann* (10) it appears that—Mrs. Farley, having been committed to the Fleet upon motion of the plaintiff for having published an advertisement in the "Bristol Journal," relating to the answer in Chancery put in by the defendant, Sir Robert Cann, moved to be discharged, having paid for costs of the contempt and submitted; as also the defendant did, confessing the advertisement was put in at his instance. The plaintiff did not oppose the discharge of Mrs. Farley, and left the matter to the Court. Lord Hardwicke, Chancellor, said, his reason for committing was not only for the sake of the party injured by the advertisement, but for the sake of the public proceedings in Court, to hinder such advertisements, which tend to prepossess people as to the proceedings in the Court. But as on a prosecution for a libel in the King's Bench for publishing a scandalous advertisement, if they confess in what manner it was brought to them and everything about it, that Court takes the matter into consideration to alleviate the punishment; so here, though Mrs. Farley's ignorance of law was no justification for the publishing the advertisement, yet having discovered in what manner it was brought to her with other advertisements, and disclosed everything, it was a ground to alleviate the punishment. Therefore, he granted the motion. In *ex parte Jones* (11) Lord Erskine, whom no one will venture to charge with having endeavoured to shackle the liberty of the press said:

"In this dedication the object is avowed by defaming the proceedings of the Court, standing upon its Rules and Orders, and interesting the public, prejudiced in favour of the author by her own partial representation, to procure a different species of judgment from that, which would be administered in the ordinary course; and by flattering the Judge to taint the source of justice. This pamphlet has been sent to me. As to the printers, as Lord Hardwicke observes, it is no excuse, that the printer was ignorant of the contents. Their intention may have been innocent; but, as Lord Mansfield has said, the fact, whence the illegal motive is inferred, must be traversed; and the party, admitting the act, cannot deny the motive. The maxim '*actus non facit reum, nisi mens sit rea*,' cannot be made applicable to this subject in the ordinary administration of justice; as the effect would be, that the ends of justice would be defeated by contrivance.

10. (1754) 2 Ves. Sen. 520=2 Dick. 795.
11. (1806) 13 Ves. 237=33 E. R. 283.

But upon the satisfactory account, given by three of these printers, though undoubtedly under a criminal proceeding they would be in mercy (those words in their legal sense meaning amerced) in a case of contempt, though I have the jurisdiction, I shall not exercise it. The other printer appears upon the affidavits under different circumstances. Having made the observation that this pamphlet ought not to be printed, being totally uninteresting to the public, yet he does print it; and though the locus poenitentia was afforded to him, and he was called upon not to print any more, he proceeded, until he had notice of this petition. Let the Committee and his wife, and the printer, to whom I have last alluded, be committed to the Fleet prison."

Let me not be misunderstood. I have not cited the above cases as precedents as to the mode in which the Court ought to exercise its discretion. Discretion as to punishment must depend upon the facts of each particular case. I cite the cases merely to show what the law is, and what the power of the Court, not to show what the Court ought to do in the exercise of that power. If a printer were to publish defamatory and contemptuous libels sent to him for publication by a gentleman beyond the jurisdiction of the Court, or libels published in another paper beyond the jurisdiction, or if a printer should refuse to give up the name of the real author of the libel, his case would be very different from that of a printer who, having committed an errror, should apologize and give up the name of the author. I am free to admit that I alone am responsible for all that has been done in this matter, though my honourable colleague does not desire to be relieved from any part of the responsibility. I sat with my honourable colleague both on the hearing of the appeal and on the hearing of the petition of the review. I knew him before he was raised to the Bench. I have sat with him frequently as a colleague, and I believe that I have had as good an opportunity as any one of forming a just estimate of his character. Though now speaking in his presence, I may be permitted to say that he is a man of ability and learning, very unassuming, yet high-minded, of a gentle, kind, and amicable disposition, independent and always ready to maintain his opinion so long as he conceives it to be right, and equally ready to abandon it if convinced that it is wrong. He is a man to whom I am sure it would give pain to injure the reputation or to wound unnecessarily the feelings of any one. He is the second native gentleman who by his own abilities has raised himself to the high position of a Judge of the High Court.

I saw the letter of 7th April on that day, but being particularly engaged I did not read it attentively. On the following Monday, the 12th, I saw the letter of that date, and in the evening, after I returned from Court, I read it carefully in conjunction with that of the 7th, to which it referred. I then considered it necessary to vindicate the honour and character of my honourable colleague and the dignity of the Court; and having heard and believed that Mr. Tayler was about to leave Calcutta for Engiand on the following morning, I wrote to my honourable colleague at a late hour of the night to meet me at 6 o'cloek on following morning. He did so, after consulting together we considered it necessary to take proceedings for contempt. We adjourned to the Town Hall, where we were met by the Under Sheriff and the Registrar, and we ordered a writ of attachment to be issued. I may here remark that, up to the time of our meeting on the Tuesday morning, my honourable colleague had never uttered one syllable of complaint to me regarding the charges that had been made against him. If the character of any other of the Judges had been similarly assailed I should have thought it necessary to adopt a similar course. But it appeared to me to be especially necessary in the present case, when the attack had been made upon a native gentleman, the only one of his country who had a seat on the Bench of the High Court.

It now appears from the affidavit of the Sheriff's officer that Mr. Tayler intended up to the Monday to leave for England in the steamer which was to sail on Tuesday, and that on that day he was allowed by the Peninsular and Oriental Company to postpone his passage until the next steamer. The letter of Monday, the 12th, could not have been sent to the editor of the Englishman later than Saturday or Sunday, at which time Mr. Tayler must have had the intention of leaving the jurisdiction of the Court on the day following that on which the letter could be published, and in all probability he had the same intention at the time when he sent to the editor the letter published on Tuesday, the 13th instant, which we also had before us when we issued the attachment. There were two modes of proceeding open to us: one by a rule calling upon Mr. Tayler to show cause why

he should not be adjudged guilty of contempt of Court,—the other by attachment, under which Mr. Tayler might be arrested and brought into Court for a similar purpose. If we had gone through the farce of making an affidavit of the facts founded on our own belief, in order to satisfy our own minds that a contempt of Court had been committed and had issued a rule to show cause, which Mr. Tayler probably considered was the only course which the Court could adopt (for on his being arrested he asked the Sheriff's officer why he had not had notice) if, I say, we had made such an affidavit and issued a rule to show cause to be served on Mr. Tayler on board the steamer on the eve of his departure, we should have deservedly brought ourselves, and we should also have brought the Court and its process, into utter derision and contempt. If we had asked the Registrar to make an affidavit, he knew no more of the facts than we did. He could merely have sworn that he had seen the letters in the papers with Mr. Tayler's name attached to them, and that he verily believed that Mr. Tayler had caused them to be published: and, further., that he had heard and believed that Mr. Tayler was about to leave the jurisdiction of the Court.

We had as much knowledge ourselves of the facts without such an affidavit as we should have had with it. We, therefore, determined to act upon our own knowledge of those facts, which, if sworn to by any one to the best of his belief, would have been sufficient to support a Rule to show cause. There was no private complainant. The charge was made by the Court itself upon its own knowledge of facts, which, if sworn to by any one to the best of his belief, would have made a prima facie case of contempt of Court. We concluded that the editor of the "Englishman" would not have published letters with Mr. Tayler's name attached to them without having had them authenticated, and we were right in our conclusion that Mr. Tayler had caused the letters to be published. The writ of attachment which was issued was not a commitment for contempt, but a process to bring Mr. Tayler in Court to answer a charge of contempt. It was necessary, under the circumstances, not merely to vindicate the honour of the Judge and the dignity of the Court, but also to teach gentlemen like Mr. Tayler that they cannot commit contempts of Court with impunity even though they are about to sail the next day for England, and also to prove to the public that justice is not to be baffled or defeated by artifice. I will cite two or three out of many authorities to show that the Court is not powerless in such cases. In Bacon's Abridgment, Tit. "Attachment," p. 386, it is said:

"An attachment is a process that issues at the discretion of the Judges of a Court of Record against a person for some contempt for which he is to be committed, and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment, or information for though by the statute of Magna Charta none are to be imprisoned *sine judicio pariun vel per leqemterrue*, yet this summary method of proceeding being absolutely necessary to the furtherance and execution of justice, seems to have been long practised, and is certainly now established as part of the law of the land."

The rule is laid down to the same effect in Comyn's Digest, "Attachment," A. i., and in Hawkins' Pleas of the Crown 213. *In Rex* v. *Jones* (12):

"The defendant having treated the process of the Court contemptuously, an attachment went against him, without a rule to show cause, (according to Salk. 84) and there being intimations that he relied on the assistance of his fellow workmen to rescue him, the Court sent for the Sheriff of Middlesex into Court, and ordered him to take a sufficient force."

I am now speaking in the presence of a large and enlightened audience, and before a learned and independent Bar, a profession of which the members, from their education and habits of mind, have ever been the watchful guardians of the rights and liberties of the people, and the foremost to protect against any arbitrary or unconstitutional exercise of power. If I have exercised tyrannically the powers committed to me (as I have been charged with doing), or if I have exercised them unconstitutionally, I know that my conduct is subject to be criticised by the Bar and by the public; but I have no misgivings, because I know that if criticised it will be criticised honestly and fairly, and independently. I claim not to be free from criticism: I am always open to conviction, and if convinced of error, I am ready to acknowledge it. Before I conclude I wish to say a few words as to the course which has been taken out of doors since these proceedings were commenced. On 16th April, whilst this matter was pend-

12. (1795) 1 Strange 185=93 E. R. 462.

ing an article appeared in the "Englishman" which I will read:

"We are not surprised to find that our views respecting the action of Sir Barnes Peacock, in summarily arresting and dragging Mr. Tayler before the Court for writing to a newspaper, are likely to be shared in by contemporaries who have some influence on public opinion. The Friend of India says:—'Sir Barnes Peacock stated that the printer and publisher of the Englishman also was liable to prosecution,—an opinion which raises an interesting question as to the liberty of the press in India.' The Pioneer, having heard the news of the arrest by telegraph thus comments:—'If the letters alluded to be those in the Englishman of 7th and 12th instant and if the fact be that Mr. Tayler has been abruptly arrested by the High Court solely in consequence of having written them, we do not wonder at there being excitement. Such an act would naturally seem to every Briton an act of presumptuous tyranny. But we can hardly believe the fact of the arrest, or if it has been made, it must have been made on some other ground than merely that Mr. Tayler challenged and quizzed the decision of a Judge of the High Court, Sublime personage as he is, a Judge's judgment is no more sacred from fair criticism than any other publication and well for the purity of justice that it is so."

Having made the above quotation from the Pioneer, the Englishman proceeds:

"We suspect that Sir Barnes, if he attempts to carry out his dictum too for, will raise a storm not easy to quell. There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the press concerning the public acts of public men. A Judge's acts are no more exempt from public criticism than those of a Chairman of the Justices."

Again, to show how little the facts of the case were understood, I will read an extract from an article in the same paper, dated 19th April. It is there said:

"Attention has been drawn to the fact, which no one, as far as we have heard, questioned, that Sir Barnes Peacock originally held, in the case which seems likely to gain so much notoriety, that Mr. Tayler had been guilty of fraud, and that this opinion had been concurred in by Mitter J. The contention raised in Tayler's letter is however, that he was afterwards allowed an opportunity of explanation, and that the Chief Justice then acquitted him of fraud, whilst Mitter J, moderated his decision in no way whatever."

I have already shown most distinctly that I never did find Mr. Tayler guilty of fraud; that I had no charge to retract, and that I never did, after hearing his explanation, acquit him of anything. It would have been well if all the public newspapers had followed the calm and dignified course which in the first article which I have read is reported to have been taken by the Friend of India. In that paper the opinion expressed by the Chief Justice was brought to notice, and was treated as one which raised an interesting question as to the liberty of the press in India. That course left the question as to the liability of the printer and publisher open to discussion, after the Court should have explained the grounds upon which it had acted, and had referred to the authorities in support of the opinion which it had expressed. But, notwithstanding the very proper course which had been taken by the Friend of India, we were told in a journal published on Saturday evening last that the members of the Fourth Estate had protested against this unexpected attack on the liberty of the press, and that with happy unanimity they had warmly denounced the action taken by the Chief Justice. To say that the press had unanimously denounced, without waiting for the explanation of the Judges, is a libel rather upon the press than upon the Chief Justice.

I have referred to the above articles for the purpose of now declaring publicly that to charge a Judge with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him, or to publish anything respecting that matter whilst it is under consideration, with a view to induce the Judge to alter his course, is a grave contempt of Court. The Englishman by publishing the article from the Pioneer has rendered itself as responsible for the article as though it had been one of its own. I am willing to believe that the expressions in the article of 16th April, to which I have referred, were made without duly reflecting that the matters to which they related were then sub judice, though they would not have been justifiable at any time. I am an unflinching advocate of the liberty of the press. I believe that its feeedom is one of the main bulwarks of the rights of the people. I claim no exemption as regards my public acts from the most rigid scrutiny and the most unsparing criticism. All I claim is, that there shall be no misrepresentation and no wilful or unfair concealment of facts; and that those who deny infallibility to the Judges shall not claim infallibility for themselves. I have had no cause to complain of the public press since I have been in this country. Speaking generally, I believe it to be fair,

independent, and impartial. There has not, I believe, been a single criminal prosecution against a newspaper since I have had the honour to hold the office of Chief Justice, and there have been only one or two private actions for libel. The press in this country addresses itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves. The press is fair, it is not scurrilous, the public are not captious; and public men do not object to have their public acts freely discussed and fairly criticised. Our Courts, therefore, are generally free from all complaints against the press, either civil or criminal, an the ground of defamation.

And now I wish to declare publicly and emphatically that the Judges are not, and cannot be, influenced in the discharge of their duty by any attacks made upon them by the press. Nothing that has been said by the press upon this subject, and nothing that can be said, no fear of the threatened storm, can even divert me or my honourable colleague from pursuing that plain, straightforward course which our consciences dictate. No unfair criticisms can disturb my equanimity, nor in the slightest degree affect my happiness. They are based on the consciousness that the honest and conscientious discharge of my duty has ever been the ruling principle of my life. That is a foundation too strong to be undermined by critics, who attempt to criticise that which they do not understand, or to be shaken by any storms which it is in their power to raise.

I am a servant of the public, and I respect their opinion. If they believe that I have exercised in an arbitrary, tyrannical, or oppressive manner the great powers which have been entrusted to me, or if they believe that I have exercised them unconstitutionally, let them express that opinion in a manner which cannot be misunderstood, and I am ready to bow to their verdict. But I shall not accept the expressions of a few newspapers as the general expression of public opinion. If ever I have the misfortune to lose, whether justly or otherwise, the confidence of the public, I shall be ready to lay down those powers which, without that confidence, I shall be no longer able to exercise for the public good. And now permit me to conclude in the words of Lord Mansfield:

"I wish popularity, but it is that popularity which follows, not that which is run after. It is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong, to gain the daily praise of all the papers which issue from the press. I will not avoid doing that which I think right, though it should draw upon me the whole artillery of libels, all that falsehood and malice can invent or credulity can swallow."

Mr. Tayler was then addressed by the Chief Justice as follows:

William Tayler, the Court has considered all that you have urged, and it adjudges that you have committed grave contempts of Court in having published the letters of 7th, 12th, and 13th April in the 'Englishman." I have already fully stated my reasons for holding that those letters were not fair or honest criticisms, but that they were founded upon misrepresentation and wilful concealment of the true state of facts. There can be no doubt that you must have known, when you published those letters that the reflections which you were casting upon the learned Judge had no reference to the state of facts which appeared before him when he pronounced the judgment complained of but to a new state of facts, which whether true or false, you knew were not before him at the time. It is unnecessary for me to say whether your assertion that as the time you sold the estate you were under the belief that it was not subject to the attachment in execution of the Ranee's decree, was a wilful misrepresentation or not. You must have known, as I have already shown, that the charge which you preferred against Dwarkanath Mitter, of casting an unmeasured imputation upon you without one tittle of evidence to support it, was false and without any foundation. You know that, according to the case as it stood, when Dwarkanath Mitter, J., pronounced judgment he was fully justified in saying what he did. You substituted a fresh state of facts, of which part, to say the least of it, was false within your own knowledge, and having wilfully concealed the real state of the case you criticised the judgment and founded the charges which you made against the Judge with reference to that statement.

It is not even necessary to show that any part of the misrepresentation was

wilful, for whether it was so or not, you are responsible for it. You knew that the learned Judge could act only upon the facts as they appeared before him at the time, and that according to those facts there was no ground of complaint. It is no justification or excuse to say that you were not in the country when the action against you was defended, and that your agent acted fraudulently in that defence which he set up. If a person undertakes to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism, and he is bound not to conceal wilfully anything which would show that the criticism is not well founded.

You have stated in your affidavit that the letters written were written for the sole purpose of vindicating your own character. I have shown that, whatever were the reasons which induced you to write those letters, you introduced into them matters which were wholly unnecessary for that vindication, and which reflected on Dwarkanath Mitter, J., and others of the Judges. I have also shown the animus with which those reflections were made. This affidavit, instead of mitigating, rather aggravates the guilt of your contempt. When you were before the Court on Tuesday last, I called your attention to the difference between the statement contained in your first letter and in the grounds of review and the assertions which you made in the letters which you subsequently published in the newspaper. In the former you stated that you had no ground of complaint against Dwarkanath Mitter, J., based as it was on the defence set up by your native Mookhtear, and supported by the evidence which he volunteered in the case. In the letter you charged the learned Judge with casting upon you an unmeasured imputation without one tittle of evidence to support it.

I do not think that you have mitigated your offence by the mode in which you have endeavoured to reconcile those conflicting statements. You have endeavoured to do so by stating that when you wrote your first letter to the Englishman, and when you applied for a review of the judgment, you believed that the Chief Justice as well as Dwarkanath Mitter, J. had imputed the fraud to you. I have shown in my judgment that if there was not one tittle of evidence to support the imputation when made by Dwarkanath Mitter, J., alone, there could not have been a tittle of evidence to justify the imputation if it had been made by Dwarkanath Mitter, J. in conjunction with the Chief Justice. I have no doubt whatever, looking at that statement, that your charge was an unmanly one, and that you made a charge against Dwarkanath Mitter, J., which you would not have ventured to make against the Chief Justice. Further, I am of opinion, that you have aggravated the contempt by contending that the charge in the last paragraph of the letter of the 13th April was not intended to apply to any of the Judges of the High Court. I have not the slightest doubt that in using the words "official principalities" you did intend to refer to the Judges of the High Court. You say the words had reference to something gone by long ago. But the letter, on the face of it could not have referred to those by-gone acts, as those acts had, and could have, no connection with the charge against a Judge of the High Court. Besides, those transactions occurred many years ago and in the paragraph to which I am referring you say:-

"It appears to me that of late years some such element of anti-feline irritation must appertain to my unhappy person, for there is a certain class among the official principalities of Bengal who, directly I am brought into contact with them, appear to be at once affected by an overpowering internal excitability which affects the understanding even of the wise and good, and intensifies the folly of the foolish, but at the same time always issues in one result—injury, insult, or wrong to myself."

In one of the letters in which you charged Dwarkanath Mitter, J., with wanton insult and unfounded aspersion, you introduced the words which I have read, and if they apply to the transactions to which you say they do apply, they have no bearing whatever on the subject, and you have sworn positively that your only object in writing the letters was the vindication of your character. But, whether you had such intention or not, you made use of language which must have conveyed that meaning to others, and was such as to lead any ordinary reader to believe that you intended it to apply to at least one or more of the Judges of the High Court. I have no hesitation in saying that the words, in the reasonable and ordinary construction of them, had reference to one or

more of those Judges, and charged them with a want of impartiality in all cases in which you were a suitor. It is a high and serious offence to cast unjust and defamatory imputations on a Judge. Judges are subject to be criticised, but they must be protected from unfounded defamation. Had you been charged in an indictment in England with writing such letters, I cannot think that any less punishment than imprisonment and fine would have been passed upon you, and probably the imprisonment would have extended to a year. It is not the wish or desire of this Court to impose any excessive punishment on you. You have admitted that you have committed a contempt. I do not say that that has aggravated your offence; it has mitigated it. You no doubt did intend to make charge against the learned Judge, which were not justified by the real facts, but which the public would be induced to believe were well founded, because they were based on misrepresentation, and because you concealed the real state of the case.

Taking all the circumstances into consideration the Court orders that you stand committed for one month to the civil side of the presidency Jail and that you pay a fine of Rs. 500, and that you be further imprisoned till the fine be paid. You state that you are willing still further to apologise. I have endeavoured to show (whether I have been able to satisfy your mind or not I cannot say) that the charges against Dwarkanath, Mitter, J., were without the slightest foundation. The other charge to which I have referred is equally unfounded and whatever your intention in publishing that part of the letter may have been or whatever meaning you intended to convey, you were not justified in using language which would induce an ordinary reader to believe that you referred to the Judges of the High Court. If you think fit to add to the apology which you have already published (and it is for you to decide whether you can conscientiously do so or not) the Court is willing to mitigate the sentence. If after what you have heard you state that upon reflection you find that the charges which you made against Dwarkanath Mitter, J., were unwarranted and wholly without foundation and that you are sorry for having made them, you may do so; and you may add, if you wish it, either that you did not intend to cast any reflection upon any of the other Judges, or that the reflection cast was unfounded and if you publish that apology in the "Englishman." you may apply on Monday the 3rd of May next, for your discharge on payment of the fine.

On Tuesday, the 27th April, Mr. Tayler addressed a petition to the Chief Justice and Dwarkanath Mitter, J., which was sent to the Chief Justice at an early hour in the morning. A writ of habeas corpus was forthwith issued by the Chief Justice to the Superintendent of the Presidency Jail, commanding him to bring Mr. Tayler into Court at halfpast nine o'clock. The petition was as follows:

"That on the 24th April instant your petitioner was committed for contempt of Court in having caused to be published in Calcutta certain letters in the Englishman newspaper relating to a decision of the Honorable, Dawarkanath Mitter, J., in the case noted in the margin and was ordered to pay a fine to Her Majesty of Rs. 500, and to be further imprisoned until such fine was paid or until the further order of the Court. That the Court was pleased to intimate to your petitioner that in the event of his publishing in the Englishman newspaper a further apology in the terms suggested by the Court in addition to the apology published by him on the 22nd instant he was to be at liberty to apply to the Court for his discharge. That your petitioner has paid the fine of Rs. 500 imposed upon him by the Court as will appear from the certificate of the Accountant-General of the Court, already submitted. That your petitioner has also published in this morning's Englishman the further apology required of him. That your petitioner is very sorry for having written the letters against Dwarkanath Mitter, J., and is also sorry for having made use of expressions which have been considered as reflecting upon the other Judges of the Court. That your petitioner can truly say that he never intended to reflect upon the other Judges of the Court. That your petitioner's health which was previously in a weak state has been seriously affected by the anxieties attending his trial and by his imprisonment at this season of the year. That your petitioner had taken his passage to England, and arranged to leave by the steamer which will leave at 11 o'clock this morning. Your petitioner having fully complied with the order of the Court, and made all the reparation in his power prays that the remainder of the term of his imprisonment may be remitted and that he may be forthwith discharged from custody."

Upon taking his seat the Chief Justice addressed Mr. Tayler to the following effect.

Mr. Tayler, the Court has read your petition which is a very proper one. You have now fully submitted. You state that you have paid the fine and that you have

published in this morning's Englishman the further apology required of you. You further state that you are very sorry for having written the letters against Dwarkanath Mitter, J., and that you are also sorry for having made use of expressions which have been condemned by the Court as reflecting upon the other Judges; and that you can truly say that you never intended to reflect upon them. You state that your health, which was previously in a weak state, has been seriously affected by the anxieties attending your trial and by your imprisonment at this time of the year; that you had taken your passage to England, and had arranged to leave by the steamer which is to leave at 11 o'clock this morning. You then, after stating that you have fully complied with the order of the Court and have made all the reparation in your power, pray that the remainder of the term of imprisonment may be remitted, and that you may be forthwith discharged out of custody.

You have also forwarded a copy of a medical certificate from Drs. Macrae and Brougham, dated 25th April, in which it is stated, amongst other things, that for the last three months you have been suffering from attacks of recurrent gout with aggravated dyspepsia, from which you have become greatly debilitated; that a prolonged imprisonment, from its depressing influences, would be attended with risk of serious impairment to your health, if not with mere grave consequences, and that you ought not to remain in this country a day longer than can be avoided; in fact, that you had been advised to leave India a month ago. When you were before the Court on Tuesday last you expressed yourself willing to apologize. I then stated that whatever apology might be made, it ought to be published as widely and extensively as your letter to the editior of the Englishman. The case was adjourned until Saturday last, in order to give you an opportunity of publishing in the Englishman such an apology as you might see fit; and, without dictating or recommending any particular form of apology, I called your attention to the fact that you had not retracted the charges which you had publicly preferred against Dwarkanath Mitter, J. In cases of this nature a proper appology may mitigate, but it cannot wholly excuse or justify, or form a ground for a oral exemption from punishment. On 22nd April you published an apology in the Englishman, but it contained no denial or disavowal of the truth of the charges which you had preferred. The Court, considering all the circumstances of the case, ordered you to stand committed to the Presidency Jail for one month, or until further orders, and to pay a fine of Rs. 500. The month was fixed as the maximum of the imprisonment which, under any circumstance, you were to undergo. A maximum was fixed in consequence of a doubt thrown out in *Crawford's* case (6), whether a commitment for contempt could be "until further orders," which might amount to imprisonment for life. It was not necessary to consider whether the usual mode of framing commitments for contempt until further orders, which was the form adopted by Lord Cottenham in *Mr. Lechmere Charlton's* case (5), and had been adopted in numerous other cases, could be supported or not. A month was fixed as the maximum, and the words "or until further orders" were added in order to enable the Court to discharge you at an earlier period if you should make your apology complete; and you were informed that you might apply for your discharge on Monday next. You have now made your apology complete and have sent it to this Court under your signature: and you have also published a copy of it in the Englishman this morning. In addition to the apology * which you published on the 22nd instant, you say that you regret to

* The apology is as follows:—

"To the Editor of the "Englishman"

Sir,—You are no doubt fully informed of the result of yesterday's proceedings in the matter of the charge against me of contempt of Court, for which I was arrested on the 13th instant.

Considering that the fact of my arrest was sufficient evidence that the Court held my former letters to your address to "constitute such contempts," I resolved, after consultation with my friends and my learned counsel, to submit on this point to the decision of the Court; and, as I had never intentded to commit, and never thought that I had committed, such contempt, but had written with the sole purpose of vindicating my character, I at once tendered, both orally and by affidavit, a full and unreserved apology both to Dwarkanath Mitter, J., and the Court at large. But the Hon'ble the Chief Justice, in postponing the case for final orders until Saturday, suggested that I should give the same publicity to the apology as was given to my former letters. In compliance with this intimation, and as my apology is in truth without reservation or stint, I shall be much obliged by your printing his letter, if possible, in your journal of to-morrow.

(*Continued on next page*)

state that, upon reflection, you find that the charges made by you against Dwarkanath Mitter, J., were unwarranted and wholly without foundation. Further, you declare that you had no intention to cast any reflection upon the High Court or upon any of the other Judges of the Court. The Court has already determined that they could put no other meaning upon the last part of your letter of 13th April than that it was intended to charge want of impartiality on the part of the Judges in cases in which you are concerned, which always resulted in injury, insult, or wrong to you. Whether you intended it or not you are responsible for publishing words which, in the opinion of the Court, were susceptible of no other meaning. You have been punished for your offence, you have now fully and very properly apologized; and whatever opinion the Court may entertain, it cannot fairly ask or endeavour to compel you to admit that in publishing the letters in the Englishman you had any intention or knowledge which as a gentleman, you disavow.

The Court agrees with you that you have now made all the reparation in your power, or that the Court could fairly expect, and they do not wish to do anything which would add further pain to the anxiety which you have already undergone, and to the humiliation which you have suffered. You have already undergone sufficient punishment to be a warning to yourself and to others; no additional amount of punishment could add to that warning. The Court sat at this early hour, not for their own convenience, nor for any other reason, except that you might proceed to England by the steamer, and that you might not be detained in this country an hour longer than was absolutely necessary. In the course of his address, the Chief Justice pointed out that there was a clerical error in the letter published in the Englishman this morning which made Mr. Tayler say that he had no intention to cast any reflection "upon any of the Judges," instead of any of the other Judges, which were the words of the original apology signed by Mr. Tayler. He said this for the sake of the Court and for the sake of Mr. Tayler. The Court, after Mr. Tayler's apology with regard to Dwarkanath Mitter, J., could not fairly ask him to say that he never intended to cast reflection upon any of the Judges, nor could Mr. Tayler, as a gentleman, have made such a statement.

Mr. Tayler wished to be allowed to say that the application for his discharge from imprisonment which had been made to the Lieutenant Governor was made by his friends without his sanction. He wss fully aware that the Lieutenant-Governor had no power to interfere in a case like the present, or to order his discharge from imprisonment. The Chief Justice said that he had seen the medical certificates which had been forwarded to His Honour the Lieutenant-Governor, that without entering into the question whether the Lieutenant-Governor had the power or not, he thought that the certificates were not such as could have justified the exercise of it. They were not even such as would have induced the Court to discharge Mr. Tayler before the end of the month, if the additional apology had not been furnished, but they were certificates which might very properly influence the Court after that apology had been made. Even without those certificates, the Court would have had no desire to inflict any further pain on Mr. Tayler, after he had so fully submitted, and had made so complete an apology, and presented so proper a petition. Mr. Tayler was then discharged.

V.B./R.K. *Petition discharged.*

There is only one other point which it is desirable to mention.

The Hon'ble the Chief Justice remarked that he did not observe in my apology anything which showed that I retracted my charge against Dwarkanath Mitter, J. In accordance with this suggestion, I beg to say that I have no hesitation whatever in retracting all such expressions and observations as may have been deemed by the Court to be improper or contemptuous: and I may observe that I had intended my apology to include such retraction.

I hope that this public expression will be satisfactory to Dwarkanath Mitter, J., and meet the suggestion of the Hon'ble the Chief Justice.

W. TAYLER."

Calcutta, 21st April 1869

A. I. R. 1918 Calcutta 740

CHATTERJEA AND NEWBOULD, JJ.

Surja Datta Sarma Daoloi—Plaintiff—Appellant.

v.

Ekadahia Koch—Respondents.

Appeal Nos. 1218 to 1221 of 1915, Decided on 14th February 1917, Sub-Judge, Gauhati,

D/- 4th December 1914.

Hindu Law— Religious endowment —Defendant holding temple lands on persoonal service—Manager commuting personal services into rent—Subsequent manager suing to enforce services or claiming full rent—

Defendant must show circumstances justifying arrangement — If arrangement is only temporary, suit within 12 years of denial of right to set aside arrangement would not be barred— But if permanent, suit must be brought within 6 years.

The defendant held certain lands belonging to a temple at half the Government rates and was also liable to render certain personal services. A former manager of the temple commuted the services into a money-rent of one rupee only. The plaintiff, who became the manager ten years before the suit, claimed the personal services which the defendant used to render or in the alternative full rent for the lands:

Held: (1) that the power of a Doloi or manager of a temple being similar to that of a manager for an infant heir, it was incumbent upon the defendant to show the existence of some special circumstances of necessity justifying the arrangement which was made between him and former manager; [P 741 C 2]

(2) that if that arrangement was temporary one and as a matter of convenience, the suit would not be barred, if brought within 12 years of the denial of the plaintiff's right to set aside the arrangement, inasmuch as the claim of the plaintiff in the suit was either to assess rent, which was a recurring right, or to enhance rhe rent; [P 741 C 2]

(3) but that if the arraugemnt was a permanent one, and the rent was fixed in perpetuity, then it would amount to the creation of a permanent tenure at a fixed rent by a shebait, and unless it was set aside by the plaintiff within six years of his succession as manager of the temple, his suit for the full rent or the personal services would be barred by limitation under Art. 120. [P 741 C 2]

Mohendra Nath Roy, A. N. Bose & Monmotha Nath Roy—for Appellant.

Kshitish Chandra Chakraburty and *N. C. Bardaloi*—for Respondents.

Judgment.—The plaintiff as the Doloi or manager of a temple brought the suit, out of which this appeal arises, for a declaration that the defendant was liable to render certain personal services or in the alternative to pay full rent for the lands held by him, and for realisation of rent at the full rate. It appears that the lands, held by the defendant, were of two descriptions, viz., bhogdani and paikan. For the former the defendant pays the rent at half the Government rates and supplies materials for bhog of the deity on certain occasions in the year. It is found that there has been no breach of the conditions on which the bhogdani lands are held, and so far as these lands are concerned the plaintiff's suit must fail. The other class of lands, viz. paikan lands, were originally held at half the Government rates, and the tenant used to render certain personal services. The former manager commuted the services into a money-rent of one rupee only, but the present manager (who became the manager about 10 years before the suit) gave a notice to the defendant calling upon him either to render personal service or pay full rent. The learned Subordinate Judge held that it would not be

"fair to throw on the defendant the onus of proving that the arrangement by which the personal services were commuted to a fixed money payment was equitable and was necessitated by the circumstances."

But the power of a Doloi or manager of a temple is similar to that of a manager for an infant heir, and it is upon the defendant to show the existence of any special circumstances of necessity justifying the arrangement. It is stated on behalf of the respondent that the tenant had to render personal service by cultivating certain lands in the khas possession of the temple, and that at the time of the commutation of the rent, those khas lands were settled with others at full rent and there being no other khas lands for which personal service could be rendered the services were commuted into payment of money-rent. These matters, we think, should be gone into by the Court below. The next question is whether the Court below is right in holding the suit to be barred by limitation under Art. 120, Lim. Act. Now, if the arrangement was a temporary one and as a matter of convenience, we do not think the suit would be barred as the right to assess rent is a periodically recurring one and the right was denied within 12 years. Nor would it be barred if the claim is one for enhancement of rent. If, however, the arrangement was a permanent one, and the rent was fixed in perpetuity, it would stand in the same position as the creation of a permanent tenure at a fixed rent by a shebait, and in such a case the arrangement would have to be set aside by the succeeding manager before the full rent can be assessed. In that case the right to set aside the arrangement first accrued when the plaintiff succeeded as manager, and cannot be said to be a periodically recurring right, and the suit, not having been brought within 6 years, would be barred under Art. 120 as it is not a suit for possession coming under Art. 144. The case is accordingly sent back to the lower appellate Court for a fresh decision accordingly to law, having regard to the observations made above. If the claim in respect of the

paikan lands be held to be well founded and not barred by limitation, the Court below will determine what those lands are and make a decree accordingly, as it appears that those lands are mixed up with the bhogdani lands in the schedule to the plaint. The claim in respect of the bhogdani lands will be dismissed in any case. Costs will abide the result. This judgment governs the three other appeals.

V.B./R.K. *Case sent back.*

A. I. R. 1918 Calcutta 742

FLETCHER AND RICHARDSON, JJ.

Ganga Prasad Dutt—Decree-holder—Appellant.

v.

Hemangini Debi and *others* — Judgment debtors—Respondents.

Appeal No. 343 of 1915, Decided on 9th January 1917, against appellate order of Sub-Judge, Pabna, D/- 31st May 1913.

(a) Civil P. C. (1908), O. 20, R. 12—Profits are assessed by inquiry in suit itself and not in execution.

Under the terms of O. 20, R. 12, Civil P. C., mesne profits are assessed by an inquiry in the suit itself and not in execution, and the mesne profits so assessed form part of the money recoverable under the decree: 19 *Cal.* 132 and 15 *I. C.* 709, *Foll.*; 28 *Cal.* 242 and 7 *C. L. J.* 301, *Foll.* [P 743 C 1]

(b) Civil P. C. (1908), O. 20, R. 12—Decree directing ascertainment of mesne profits in execution is not legal.

A Court acts in excess of its powers under the new Civil Procedure Code of 1908, if it passes a decree directing that mesne profits should be ascertained in execution. [P 743 C 1]

(c) Civil P. C. (1908), O. 20, R. 12—Application for ascertainment of mesne profits dismissed for default — Subsequent applications are barred.

The dismissal for default of an application for ascertainment of mesne profits bars subsequent applications even though the decree in terms directed its ascertainment in execution. [P 743 C 1]

(d) Civil P. C. (1908), O. 20, R. 12 — Decree for mesne profits—Form of.

Per *Richardson, J.*—The proper way or ways of drawing up a decree for mesne profits are indicated in Mulla's Edition of the Civil Procedure Code in the notes to R. 12, O. 20. [P 743 C 1]

Purna Chandra Roy—for Appellant.

Preo Sanker Majumdar—for Respondents.

Fletcher, J.—This is an appeal preferred by the decree-holder against an order of the learned Officiating Subordinate Judge of Pubna, dated 31st May 1913. The appellant, the decree-holder, brought a suit for recovery of possession of certain land and also for mesne profits. The decree was made as long ago as 1909. The first, what is called in this country the execution case, was in 1909 in which possession was given of the land. Then there was another execution case to realize the costs of the suit. Then came a series of applications to the Court for assessment and realisation of mesne profits, the last of which is the present application presented to the Court on 25th March 1913. On this application coming on before the learned Officiating Subordinate Judge, he held that the application was not one made in execution of the decree but an application in the suit itself and that, the former applications having been dismissed for default of the decree-holder, the decree-holder had precluded himself from applying to the Court for assessment and realisation of the mesne profits. In the present appeal, various cases have been cited. On the one hand we have got the Full Bench decision in the case of *Puran Chand* v. *Roy Radha Kishen* (1) which seems to me to be obviously against the appellant. On the same side we have got the decision in the case of *Upendra Chandra Singh* v. *Sakhi Chand* (2) that is also clearly against the view put forward by the appellant. On the other side, we have got the decision in the case of *Ram Kishore Ghose* v. *Gopi Kant Shaha* (3) which is opposed to the decision reported as *Upendra Chandra Singh* v. *Sakhi Chand* (2). That decision in *Ram Kishore Ghose* v. *Gopi Kant Shaha* (3), was followed in a case in *Upendra Chandra* v. *Sakhi Chand* (4).

But the learned Judge who presided over the Court in that case was the same Judge who presided over the Court that decided the case reported as *Ram Kishore Ghose* v. *Gopi Kant Shaha* (3). The case in *Ram Kishore Ghose* v. *Gopi Kant Shaha* (3) has received judicial notice on several occasions and so far as I can see from the reports, it never received such notice with approval except in the case reported as *Upendra Chandra* v. *Sakhi Chand* (4). The case does not end there. The present Code is materially different from the old Code.

1. (1892) 19 Cal 132.
2. (1912) 15 I C 709.
3. (1901) 28 Cal 242.
4. (1908) 7 C L J 301.

Under the present Code, it cannot be suggested that mesne profits are assessed in what is called the execution department. Under the term of O. 20, R. 12, it is quite clear that mesne profits are assessed by an inquiry in the suit itself and the mesne profits so assessed form portion of the money recoverable under the decree. Whatever might be argued under the former Code, it seems to me, under the terms of the present Code, that there are no grounds for suggesting that mesne profits are assessed in what is called the execution department.

The last argument that was placed before us by the learned vakil for the appellant was that the decree in this case stated that mesne profits would be ascertained in execution. It was in excess of the powers of the Court to suggest that mesne profits would be ascertained in any manner other than that prescribed by the law. The method in which mesne profits are ascertained under the present Code of Civil Procedure is not by an inquiry in execution but by an application in the suit itself. I am of opinion that the learned Judge in this case came to a correct conclusion. The present appeal therefore fails and must be dismissed with costs. We assess the hearing fee at seventy-five rupees.

Richardson, J.—I agree. The provisions of the present Code on the subject are clear, and the inaccurate language used in the decrees before us must be construed in a sense conformable with those provisions. It may be worthwhile to add that the proper way or ways of drawing up a decree for possession and mesne profits is indicated in Mulla's Edition of Civil Procedure Code in the notes to R. 12, O. 20.

V. B./R.K. *Appeal dismissed.*

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*A. I. R. 1918 Calcutta 743

MOOKERJEE AND WALMSLEY, JJ.

Balakeshwari Dabi—Petitioner.

v.

Jananda Banerjee—Opposite Party.

Rule Nisi. No. 471 of 1917, Decided on 4th July 1917, against order of Sub-Judge, 2nd Court, Burdwan, in Misc. Case No. 25 of 1917.

*** Civil P. C. (1908), S. 132 (1)—Pardanashin lady appearing in Court to institute criminal complaint does not cease to be exempt from personal appearance in civil Court.**

A pardanashin lady, who according to the customs and manners of the country ought not to be compelled to appear in public, does not cease to be exempt from personal appearance in Court under sub-S. (1), S. 132, in consequence of her appearing on a previous occasion in a criminal Court for the purpose of instituting a complaint. [P 744 C 1]

Biraj Mohan Mozumdar and *Ajendra Nath Dutt*—for Petitioner.

Jadunath Kanjilal—for Opposite Party.

Judgment.—We are invited in this rule to set aside an order, whereby the Subordinate Judge has refused an application for the issue of a commission for the examination of the petitioner, who is a pardanashin lady. The petitioner moved the Court below to institute proceedings under the Legal Practitioners Act against the opposite party, who is alleged to have acted as her pleader. On 6th June last, she applied to be examined on commission in support of her allegations. The application was opposed on the ground that as the applicant had appeared before the criminal Court on 2nd June to institute a complaint against one Bhakta Das, she should appear before the Subordinate Judge and be examined in Court. The Subordinate Judge thereupon refused the application. In out opinion the order cannot possibly be supported.

Section 132, sub-S. (1), Civil, P. C., 1908, provides that women, who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. It is not disputed that the petitioner is a pardanashin Hindu lady, and, according to the customs and manners of the country, ought not to be compelled to appear in public. The question consequently arises, whether she has forfeited the exemption she enjoys under sub-S. (1), S. 132, by reason of the fact that she has appeared in a criminal Court to institute a complaint; on that occasion, the Court-room was cleared and she was examined in camera. In our opinion, the question should be answered in the negative, in accordance with the principles explained by this Court in the cases of *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose* (1) and *Mohesh Chunder Addy* v. *Manick Lall Addy* (2). In the earlier of the two cases, Trevelyan, J., observed

1. (1899) 26 Cal 651n.
2. (1899) 26 Cal 650

that he should be exceedingly careful before he forced into the public gaze a woman, even though she might have gone outside the parda once, either by way of experiment or otherwise. In the second case, Stanley, J., ordered a commission to issue, although it was established that the lady had on a previous occasion appeared in Court and was examined seated inside a palanquin. The Subordinate Judge has overlooked the obvious distinction between the voluntary and the compulsory appearance of a pardanashin lady in Court to be examined as a witness. No doubt, a pardanashin lady may completely alter her mode of life, and cease to be included in the statutory description of a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public

When this transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in S. 132. But if she is, in fact, a pardanashin lady she is not deprived of the statutory protection, merely because she may have previously appeared in public. It it not necessary for our present purpose to investigate exhaustively the law applicable in this respect to criminal cases; but, as the Subordinate Judge has relied upon the fact of the voluntary appearance of the petitioner in a criminal Court, to her detriment, we may point out that, as regards criminal cases, there has perhaps been a slight divergence of judicial opinion on the question of the examination of pardanashin ladies on commission. In this Court, it has been sometimes maintained [*In the matter of Harro Soondery Chowdhrain* (3). *In re Din Tarini Debi* (4), *Abhoyeswari* v. *Kishori Mohan Banerjee* (5), *Hem Coomaree Dassee* v. *Queen-Empres* (6)] that she is entitled to be examined on commission. In Allahabad, on the other hand [*In the matter of the petition of Farid-un nissa* (7), *In the matter of the petition of Basant Bibi* (8)], it has been said that a pardanashin lady is not entitled as of right to be exempt from personal attendance in Court, although, as a matter of prudence, she should not be compelled to appear. But, whatever may be the exact rule of procedure applicable to criminal cases, the true scope of S. 132, Civil P. C., is not open to serious discussion. We are, consequently, of opinion that in the present case the application by the lady to be examined on commission should not have been opposed in the Court below or in this Court, and we cannot but express our surprise that a person in the position of the opposite party should have thought it proper to take up and maintain such an attitude. The result is that this rule is made absolute. We direct that a commission do issue for the examination of the petitioner in accordance with law. As the rule has been opposed, the petitioner will have her costs in this Court. We assess the hearing fee at two gold mohurs.

V.B./R.K. *Rule made absolute.*

2. (1879) 4 Cal 20.
4. (1888) 15 Cal 775.
5. A I R 1914 Cal 479=23 I C 700=42 Cal 19.
6. (1897) 24 Cal 551.
7. (1883) 5 All 92.
8. (1890) 12 All 69.

A. I. R. 1918 Calcutta 744

FLETCHER AND SMITHER, JJ.

Meyoa Lal Ghose and *others*—Defendants—Appellants.

v.

Gobinda Sunder Sinha Chowdhury—Plaintiff—Respondent.

Appeals Nos. 2397 and 2427 of 1914 Decided on 2nd April 1917, from appel late decrees of Dist. Judge, Murshidabad, D/- 11th May 1914.

(a) Landlord and Tenant—Landlord suing for khas possession of land contiguous to tenants' holding—Onus is on plaintiff to show that land is not within limits of defendant's holding.

Where a landlord brings a suit against a tenant for khas possession of a plot of land, which is contiguous to the tenant's holding, on the ground that it was not included within the holding, the onus is upon the plaintiff to show that the land was not within the limitsof the holding of the defendant. [P 745 C 2]

(b) Bengal Tenancy Act (1885), S. 23—Prima facie tenant has right to fell timber.

A tenant prima facie has the right to fell the timber growing on the land so as to put the holding, on which the tenant has a right of occupancy, to the best use as an agricultural holding. If the landlord alleges a custom depriving the tenant of that right he must prove that custom. [P 746 C 1]

(c) Bengal Tenancy Act (1885), S. 23—Raiyat's right to fell and appropriate timber are two totally different things.

The right of an occupancy raiyat to fell tree growing on the holding is not affected by, and is a totally different right from, the right to appropriate the timber when so felled. [P 746 C 1]

(d) Bengal Tenancy Act (1885), S. 23—In absence of custom, timber felled by tenant belongs to landlord—Tenant failing to prove custom—Landlord's right may be declared and injunction need not be granted.

The number of trees felled by the tenant in exercise of his right belongs to the landlord, apart from any special custom entitling the tenant to appropriate the same. The burden of proving such special custom is on the tenant.

Where on the failure of an occupancy raiyat to prove a special custom entitling him to appropriate the timber growing on the holding, the lower Court granted a perpetual injunction to the landlord restraining the tenant from cutting down and appropriating the trees growing on the holding :

Held : that the injunction granted was much too wide and that the landlord's right would be amply protected if a simple declaration were made that the tenant was not entitled to appropriate any tree felled by him and growing on any prortion of the land held by him as tenant of the plaintiff landlord. [P 746 C 1]

Dwarkanath Chuckerbutty, *Gurudas Sinha* and *Panchanan Ghose*—for Appellants.

Samatul Chandra Dutt—for Respdt.

Appeal No. 2427 *of* 1914.

Fletcher, J.—This is an appeal by plaintiff against a decision of the learned District Judge of Murshidabad modifying a decision of the Subordinate Judge of Barhampur. The suit was brought by the plaintiff for a declaration of his patni right in certain lands, for khas possession and also for damages against the defendants for cutting and appropriating 14 palm-trees. The defence was that the lands were parts of a raiyati holding of the defendants and that there was a custom in the locality under which the tenants had the right to cut down trees and appropriate the timber. The learned Judges in both the lower Courts held, on the question as to whether the trees felled were growing on the land that formed a portion of the raiyati holding of the defendants, that having regard to the facts, the onus lay on the plaintiff. The present appeal is preferred wholly against the learned Judges having placed the onus on the plaintiff in that manner. Now, it is found as a fact by the learned Judges in the Courts below that the lands on which the palm-trees were standing are contiguous to the land comprised in the raiyati holding of the defendants and, therefore, it has been urged on behalf of the respondents that, according to the decision of this Court, the Judges rightly placed the onus on the plaintiff and required him to show that these lands were not within the limits of the holding of defendants. The cases in which that rule has been recognized are many. First of all there is the decision in the case of *Rajendro Kumar Bose* v. *Mohim Chandra Ghose* (1). That decision has, no doubt, been considered in other cases, but the rule laid down in that case as applicable to cases where the land is contiguous to the holding of the defendant has been recognized in some recent decisions which are reported in 19 Calcutta Weekly Notes. Those decisions are *Gopini Debi* v. *Lokenath Tewari* (2), *Protap Chandra Roy* v. *Judhister Das* (3). There is also another case in the same Volume at p. 149. *H. Manners* v. *Harihar Dutt Koer* (4). Those cases recognize the rule that where the land is found to be contiguous to the holding of the defendant, the onus is on the plaintiff to show that he is entitled to recover khas possession. But it is sought to distinguish those cases on the ground that the land which is called the contiguous land is of a different character to the land which forms the raiyati-holding of the defendants. That I do not think is well founded. The findings made by the learned Judge in the primary Court was that other tenants in the locality had palm-trees growing on their jote lands. I do not think that the mere fact that a portion of the jote has palm-trees growing on it whereas the other portion is cultivated with paddy, shows that the land is of a different character to the land which has admittedly formed a part of the jote of the defendants. I see no reasons to think that the learned Judge did not rightly apply the land when he came to the conclusion that the land was contiguous to the raiyati-holding of the defendant and that therefore, the onus lay on the plaintiff. In that view, the present appeal fails and must be dismissed with costs.

Smither J.—I agree.

Appeal No. 2397 *of* 1914.

Fletcher, J.—This appeal arises out of the same judgment which was the subject-matter of appeal No. 2427 of 1914 just now disposed of. It is preferred by the defendants against the decree passed by the learned District Judge in so far as it granted perpetual injunction restrain-

1. (1899) 3 C W N 763.
2. (1911) 11 I C 696.
3. A I R 1914 Cal 698=23 I C 69.
4. A I R 1914 Cal 506=12 I C 563.

ing the defendants, the tenants, from cutting down and appropriating the trees growing on their holding. The judgment of the learned Judge has been attempted to be supported by the plaintiff on the ground that the trees in the present case were presumably growing on the holding at the time when the property was let out to the defendants. Whether that is so or not, I do not think there is any evidence to show when those trees began to grow and became timberlike trees. The case, I think, is a perfectly simple one and is covered by the general rules that have been laid down having regard to S. 23, Ben. Ten. Act. The rules are these without doubt: first, that the tenant prima facie has the right to fell the timber growing on the land so as to bring the holding on which the tenant has a right of occupancy to the best use as an agricultural holding. If the landlord says that there is a custom under which the tenant has not that right, then the landlord has got to prove that custom. The second proposition is that the timber of the trees, felled by the tenant in exercise of his right, when felled, belongs to the landlord apart from any special custom for the tenant to appropriate the same. If the tenant says that there is a special custom for the tenants to appropriate, then he has got to prove that special custom. But that does not in any way interfere with the right of the tenant to fell the trees growing on the holding, which is not affected by and is a totally different right from the right to appropriate the timber when so felled. There was no reason for the learned Judge to interfere with the decree passed by the Court of first instance with reference to the injunction and, in my opinion, the injunction ought to be dissolved. The injunction granted is obviously much too wide in restraining the tenants from cutting down the trees growing on the land and, with reference to the appropriation of the timber so felled, it will be an ample protection to the landlord if a simple declaration is made that the defendants are not entitled to appropriate any trees felled by them and growing on any portion of the land held by them as tenants of the plaintiff. The present appeal must, therefore, be allowed in these terms with costs in this Court only.

Smither, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 746

FLETCHER AND SMITHER, JJ.

Krishna Promoda Dasi—Plaintiff—Appellant.

v.

Kedar Nath Basu and *others*—Defendants—Respondents.

Appeal No. 3214 of 1914, Decided on 23rd March 1917, from appellate decree of Sub Judge, Khulna, D/- 2nd May 1914.

Executor — Purchase by, in execution — Decree obtained by executor— Family arrangement—Effect of—Beneficial ownership of decree held remained with real owners.

K died leaving four sons and a widow and left a will appointing his widow as his executrix. The latter in execution of a rent-decree purchased the property in arrears. Prior to the decree one of the sons having died unmarried, his share had devolved upon the executrix as his mother and by a family arrangement executed between the members of the family before the auction-purchase of the properly, the executrix released all her interest in the estate of her deceased son in favour of another son. The plaintiff acquired the entire interest of that son, and the other cosharers in the property:

Held: (1) that under the terms of the family arrangement the executrix had no interest in the property that she purchased qua executrix in execution of the decree she obtained as executrix and that the plaintiff was, therefore, entitled to the property. [P 747 C 2]

(2) that though the decree was obtained by the executrix, the beneficial owners of the estate were the real owners of the decree. [P 747 C 1]

Provash Chandra Mitter and *Surendara Madhab Mollik*—for Appellant.

Haripada Chatterjee—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff from a judgment of the learned Subordinate Judge of Khulna, dated 2nd May 1914, modifying the decision of the Munsif of the same place. The plaintiff brought the suit to recover possession of a plot of land. The facts found by the learned Judge of the lower appellate Court are wholly in favour of the plaintiff-appellant, except as regards one particular matter. One Krishna Kishore Ghose died leaving four sons and a widow. He left a will appointing his widow, defendant 4 in this case, as his executrix. Defendants 1 and 2 held the disputed land as tenants under the estate of Krishna Kishore Ghose. Defendant 4 as executrix brought a suit to recover the rent in arrear against the present defendants 1 and 2 and obtained a decree. Prior to the decree, one of the sons of Krishna Kishore Ghose by name Jatindra died and the defendant 4 succeeded to his share. After the decree had been obtained the property was brought to sale

in execution and purchased by the defendant 4, the executrix.

In the meantime, disputes having arisen in the family, a deed of family arrangement had been executed between the members thereof and, under the terms of that deed, the mother, that is, defendant 4, the executrix, released all her interest in the estate of the deceased Jatindra to one of the other sons, namely, Upendra. The plaintiff has got the entire interest of Upendra and the other cosharers in the property: The only point that has been decided in this case against the plaintiff is this. That under the terms of the deed of family arrangement, Upendra did not acquire the interest of Jatindra in the land purchased by the executrix in execution of the rent-decree and that, therefore, the plaintiff has got no interest in it. The view of the learned Judge was that that was an interest that accrued to the executrix after the date of the deed of release and could not be affected by the terms of the deed. I do not agree in the view of the learned Judge. His finding that the decree was obtained by defendant 4 as executrix and that the beneficial owners of the estate were the real owners of the decree seems to be right. The question is, 'who were the beneficial owners"?

It may be noticed that defendant 4 is a party to this suit and she does not set up any claim to this land, a share in which has been awarded to her by the decree of the learned Subordinate Judge. But it is manifest that the deed of release passed any interest that defendant 4 had in the estate of Jatindra. The document is in the form of an English deed. Defendant 4 the widow of Krishna Kishore Ghose and his executrix released and surrendered

"all that undivided one-fourth share which was of the said Jatindra Mohan Ghose of, in and to the estate of the said Krishna Kishore Ghose except as aforesaid,"

the exception being certain chattel or moveable property; and the property was described as consisting of the particulars set out in Sch. A thereunder

"written or howsoever otherwise the said property as is or was situated, tenanted, bounded, called, known, mentioned, described or distinguished."

Then followed the ordinary clause as in an English deed,

"together with all the estate, right, title, interest, claim and demand whatsoever of the said Srimati Sarnamoyi Dasi, defendant 4, into or upon the said previous or any part thereof."

It is impossible to imagine that the document did not pass clearly the interest that Jatindra had in the rent decree and it is found as a fact that this property was purchased in execution of that decree, though the purchase price was satisfied by the money that was due to the decree-holder on the decree. It is quite clear, therefore, that the defendant 4 had no interest in the property that she purchased qua executrix in execution of the decree she obtained as executrix. I think the learned Subordinate Judge came to a wrong conclusion when he held that the defendant 4 had an interest in the property which she did not claim and apparently did not want. In my opinion, we ought to set aside the decree of the learned Subordinate Judge and restore the decree of the Munsif with costs both in this Court and in the lower appellate Courts.

Smither, J.—I agree.

V.B./R.K. *Decree set aside.*

A. I. R. 1918 Calcutta 747

MOOKERJEE AND WALMSLEY, JJ.

Khondkar Mehdi Hossein and *others*—Defendants—Appellants.

v.

Umesh Chandra Mukherjee and *others*—Plaintiffs—Respondents.

Appeals Nos. 2402, 2501 and 2502 of 1912, Decided on 22nd May 1917, from appellate decrees of Sub-Judge, Birbhoom, D/- 6th May 1912.

Bengal Chowkidari Act (1870)—Chowkidari Chakran lands comprised within putni can be recovered by putnidar on payment of additional rent assessed on those lands under Chowkidari Act.

A putnidar is entitled to recover possession of the chowkidari chakran lands situate within the ambit of the lands comprised in his putni lease, which on resumption by Government under the Bengal Chowkidari Act have been settled by the Collector with the zamindar, and to hold them as part and parcel of his putni under the zamindar on payment of the sum assessed as revenue upon those lands under the Chowkidari Act, and in addition a fair share of the profits of the lands, unless it is shown that in assessing the putni rent at the time of the putni lease the profits of all the lands including the chakran lands were fully taken into account. [P 748 C 2]

Ramchandra Mazumdar and *Nagendra Nath Sen*—for Appellants.

Brajendra Nath Chatterjee—for Respondents.

S. A. No. 2402 *of* 1912

Judgment.—This is an appeal by the defendants in a suit for recovery of possession of land with mesne profits. On 27th July 1866, the plaintiffs obtained a putni of two villages from the zamindar defendants. A bonus of Rs. 1,000 was paid for this lease and the annual rent was fixed in perpetuity at Rs. 501. Within the ambit of the lands comprised in the putni lease, there were chowkidari chakran lands, at that time in the occupation of chowkidars. These lands were subsequently resumed by the Government and transferred to the zamindars, in conformity with the provisions of the Village Chowkidars Act, 1870. The zamindar took possession of the lands and settled them with tenants. The plaintiffs, who were putnidars, thereupon instituted this suit on 11th June 1910 for declaration of their title and for recovery of possession with mesne profits. The Courts below have concurrently made a decree in their favour; but the two Courts have disagreed as to the terms under which the plaintiffs are entitled to hold this land as part and parcel of their putni under the zamindars. The Court of first instance held that the plaintiffs were under an obligation to pay to the zamindars, not only the sum assessed under the Village Chowkidars Act, 1870, at the time of resumption, but also a share of the profits of the lands they claim to recover.

On appeal, the Subordinate Judge has held that the plaintiffs are liable to pay to the zamindar nothing beyond the sum asssessed at the time of resumption as payable into the chowkidari fund. Upon the question of mesne profits also, the two Courts have disagreed. The trial Court held that the rent payable by the tenants settled on the lands by the zamindars was the measure of damages recoverable by the plaintiffs. The Subordinate Judge, on the other hand, has held that the plaintiffs are entitled to the value of the actual produce of the lands in suit. The zamindars have appealed to this Court and have raised only those two questions whereon the Courts below have disagreed; they have not disputed the right of the plaintiffs to recover possession of the lands, and it may be added that in view of the decision of the Judicial Committee in the case of *Ramjit Singh* v. *Kali Dasi Debi* (1), the decree for possession cannot possibly be successfully challenged.

As regards the first question, namely, the terms under which the plaintiffs are entitled to recover possession of these lands from the zamindars and the tenants inducted by them into the land, we are of opinion that the view taken by the Subordinate Judge is erroneous. It was pointed out by this Court in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2) that if in assessing the putni rent, the profits of all the lands including the chakran lands were fully taken into account, the putnidar would not be liable to pay additional rent for the chakran lands when they came into his possession; but otherwise the putnidar is bound to pay to the zamindar, in addition to the fresh amount assessed on resumption, fair share of the profits derivable from the land. This view has been subsequently approved in the cases of *Rajendra Nath Mukerjee* v *Hira Lal Mukerjee* (3), *Gopendra Chandra Mitter* v. *Taraprasnna Mukerjee* (4) and *Harak Chand* v. *Charu Chandra Singh* (5). In the first of these cases, Brett, J., pointed out that it was not correct to hold as a general principle of law that the putnidar is not bound to pay to the zamindar more than the assessment made by the Collector; the zamindar would be equitably entitled, not only to payment of the assessment made by the Collector, but also a proportionate share in the profits such as the zamindar would, in the circumstances, be entitled to impose on the putnidar. We are of opinion that this view is unquestionably sound on principle. In the case before us, there is no indication in the contract between the parties that, at the time of inception of the grant, the putni rent was assessed on the basis of the assets of all the lands situated within the ambit of the putni inclusive of the chowkidari chakran lands. It is, on the other hand, plain that the rent hitherto paid by the plaintiffs to the defendants has not represented the profits derivable from the chowkidari chakran lands. Consequently, the terms of the contract between the parties do not entitle the plain-

1. A I R 1917 P C 8=44 Cal 841=40 I C 931 =44 I A 117 (P C).
2. (1907) 34 Cal 109.
3. (1910) 7 I C 554.
4. (1910) 7 I C 790=37 Cal 593.
5. (1910) 8 I C 766.

tiffs to claim possession of the lands in suit from the zamindars, merely on payment of the sum now assessed by the Revenue Authorities under the Village Chowkidars Act, 1870.

Reliance has been placed by the plaintiffs-respondents upon ths provisions of S. 51, Village Chowkidari Act, which however do not really advance their contention. S. 51 provides that the land resumed by the Collector is transferred to the zamindar, subject to the prior contracts made by him. The effect of the application of that principle to the case before us is that the plaintiffs can, under the terms of the putni lease, recover possession of the lands in suit. But the contract does not show that the plaintiffs are entitled to such possession without payment of any rent to the zamindar or without payment of any sum beyond what represents the new assessment. Consequently, on equitable grounds, the putnidar and the zamindar must be placed in the position they would have occupied if the chowkidari chakran lands had been resumed before the putni was created; the assets of those lands would then have been taken into account in settling the amount of putni rent, which would have represented the assessment due to the State as also a fair share of the profits. In these circumstances, we are of opinion that the order of the Court of first instance was just and proper and should not have been varied by the Subordinate Judge.

As regards the second question, namely the basis of calculation of mesne profits, it cannot be disputed that the plaintiffs as putnidars would have been entitled to possession of the lands through tenants; the measure of damages payable to them is consequently represented by the rent payable by the actual cultivators to the plaintiffs as putnidars. This was the view taken by the Court of first instance and should not have been rejected by the lower appellate Court. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. The appellants are entitled to their costs in this Court, but there will be no order for costs before the Subordinate Judge. This judgment will govern the other two cases, viz., Second Appeals Nos. 2501 and 2502 of 1912, in each of which a similar order will be drawn up.

V.B./R.K. *Appeals allowed.*

A. I. R. 1918 Calcutta 749

FLETCHER AND RICHARDSON, JJ.

Subal Chandra Chowdhury — Plaintiff —Appellant.

v.

Mosaraf Ali and *others*—Defendants—Respondents.

Appeal No. 691 of 1915, Decided on 29th January 1917, from appellate decree of Dist. Judge., Chittagong, D/- 15th December 1914.

(a) Civil C. P. (1908), O. 23, R. 1—Permission—In each case permission must be construed in accordance with wording of order.

The permission granted in each particular case to withdraw a suit with liberty to bring a fresh suit must be construed in accordance with the wording of the order granting such permission; *A I R* 1914 *Cal* 207, *Dist.* [P 750 C 1]

(b) Civil P. C. (1908), O. 23, R. 1—Permission—Order containing directions to plaintiff to pay up costs of defendant as condition precedent to institution of fresh suit—Plaintiff cannot bring fresh suit before complying with directions.

Plaintiff was given permission to withdraw his suit by the following order.

"The appeal is accordingly decreed and the plaintiff given the permission to institute a fresh suit and that he should pay the defendant-respondent the costs of this appeal and of the original suit as a condition precedent to his instituting a fresh suit":

Held: that the plaintiff could not bring a fresh suit before complying with the terms of the order and paying defendant's costs and that he could not pay the costs after the institution of the suit. [P 750 C 1]

Chander Sekhar Sen—for Appellant.

Khitish Chunder Sen—for Respondents.

Judgment.—This is an appeal from a decision of the learned District Judge of Chittagong, dated 15th December 1914, affirming the decision of the Officiating Munsif of Hathhazari. The plaintiff brought the present suit for ejectment. He brought a former suit and the leave of the Court had been obtained to withdraw that former suit. This appeal turns solely upon the construction to be to placed upon the order in the previous suit giving leave to withdraw. The words of the order are as follows:

—"The appeal is accordingly decreed and the plaintiff given the permission to institute a fresh suit and that he should pay the defendant-respondent the costs of this appeal and of the original suit with interest at six per cent. as a condition precedent to his instituting a fresh suit."

It is found by both the lower Courts that the plaintiff had not complied with the condition precedent before he instituted the fresh suit. It is said that the plaintiff had a right to pay the money

after the institution of the suit and reliance is placed upon the decision of this Court in the case of *Shital Prosad Mondal* v. *Gaya Prosad Dingal* (*Sadhu Charan Tewari* v. *Baikuntha Nath Madak*) (1). But the permission granted in each particular case must be construed in accordance with the wording of the order giving leave to withdraw from the suit and in that case which is reported as *Shital Prosad Mondal* v. *Gaya Prosad Dingal* (*Sadhu Charan Tewari* v. *Baikuntha Nath Madak*) (1), Sir Lawrence Jenkins, C. J., pointed out that the wording of the leave to withdraw in that case was in unfortunate terms and gave the plaintiff a right to pay the money even after the institution of the suit. In this case, we have got a distinct statement that the payment of costs in the former suit was a condition precedent to entitle the plaintiff to institute a fresh suit. It was found that the plaintiff did not comply with that condition and, therfore, he was not entitled to institute a fresh suit. The appeal, therefore, fails and must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. A I R 1914 Cal 207=23 I C 210.

A. I. R. 1918 Calcutta 750 (1)

FLETCHER AND RICHARDSON, JJ.

Sadak Ali and *another*—Appellant.

v.

Keramat Ali—Respondent.

Appeal No. 868 of 1915, Decided on 21st February 1917, from appellate decree of Sub. Judge, Chittagong, D/- 14th January 1915.

Bengal Land Revenue Sales Act (11 of 1859), S. 37—Annulment of under-tenure by auction purchaser, how can be made stated.

The purchaser of an estate at a revenue sale, under Act 11 of 1859, may elect to annul an under-tenure not only by the institution of a suit or by giving notice to vacate but also by any other means showing a clear intention to avoid. 19 *I, C.* 974, *Foll.* [P 750 C 2]

Khitish Chandra Sen—for Appellants.

Probodh Coomar Das—for Respondent.

Judgment.—This is an appeal preferred by defendants 2 and 3 against a judgment of the learned Subordinate Judge of Chittagong, dated 14th January 1915, affirming the decision of the Munsif of the same place. The point that has been argued in this appeal is with reference to an additional ground of appeal (No. 6), which was added after the admission of the appeal under O. 41, R. 12, Civil P. C., and that ground of appeal is with reference to this, whether the annulment of an encumbrance under Act 11 of 1859 must be made by a judicial process. That is the ground set up in the appeal and the matter has come up for consideration. There are many decisions of this Court that are binding on us to the contrary. Perhaps it will be sufficient if we refer to the decisions in *Darsan Singh* v. *Bhawani Koer* (1), where it was definitely laid down that the purchaser at a revenue sale may elect to annul an under-tenure not only by the institution of a suit or by giving notice to vacate but also by any other means showing a clear intention to avoid. The point that is now raised must be treated as a pure question of law, because the point was not tried in the lower appellate Court and it may be that if the point had been taken in the lower Courts, evidence would have been produced to show that the purchaser at the revenue sale elected to annul either by notice or by one of the other means referred to in the judgment of *Darsan Singh* v. *Bhawani Koer* (1). This is not the only judgment of this Court in this matter; but there are other judgments which also establish that the annulment of an under-tenure, when it has been sold for arrears for revenue under Act 11 of 1859, need not take place by a suit. Except in so far as it is taken in the grounds of appeal which is a question of law, it is not open to the appellants to raise this matter, which was not raised in either of the Courts below. The appeal, therefore, fails and must be dismissed with costs.

V.B./R K. *Appeal dismissed.*

1. (1913) 19 I C 974.

A. I. R. 1918 Calcutta 750 (2)

BEACHCROFT AND WALMSLEY, JJ.

Behari Lal Biswas—Petitioner.

v.

Nasimannessa Bibi—Opposite Party.

Rule Nisi No. 65 of 1917, Decided on 26th February 1917, against order of Dist. Judge, Nadia, in Misc. Appeal No. 52 of 1916.

(a) Patni Regulation (1819), S. 13—Depositor has no lien for rent paid to superior landlord.

The holder of a tenure under a patni, who is in possession under S. 13, Regulation 8, of 1819, has not a lien under that section for the amounts paid by him as rent to the superior landlord for the years during which he has been in possession, so that he is not entitled to add to his demand the amount of rent so paid. [P 751 C 2]

(b) Transfer of Property Act (1882), S. 72 —S. 72 does not apply to deposit under Patni Regulation (1918), S. 13.

Section 72, Transfer of Property Act, has not given a new power to the mortgagee and is not applicable to such a case. [P 751 C 2]

While the holder of a tenure under a patni was in possession of it under S. 13, Regulation 1819, the patni was sold under the Regulation and the purchaser offered to pay to the tenure-holder the amount still due to him out of his original deposit:

Held: that the purchaser of the patni was entitled to recover possession of it on re-payment only of the sum which was still due to the tenure holder out of his original deposit, but it was not necessary for him to re-pay the amount of rent paid by the tenure-holder to the superior landlord for the years during which he was in possession, for the tenure holder had no right to retain possession until he had recouped himself for such payments of rent. [P 752 C 1]

Provas Chandra Mitra and *Tarakeswar Pal Choudhuri*—for Petitioner.

Ram Chandra Majumdar and *Probodh Chandra Chatterjee*—for Opposite Party.

Beachcroft, J.—The petitioner is the holder of a tenure under a patni tenure. In 1309 in consequence of a default by the patnidar the petitioner deposited the patni rent in order to save his tenure and was put in possession of the patni under S. 13 of the Patni Regulation to discharge his lien. The interest of the superior landlord was subsequently transferred and in May last the patni was sold at the instance of the new landlord, inspite, the petitioner says, of his having deposited the amount due as patni rent. The petitioner has brought a suit to have the patni sale set aside and pending suit applied for an injunction to restrain the opposite party, the purchaser of the patni, from taking possession.

The Munsif issued an injunction as prayed, but on appeal the District Judge ordered the injunction to be dissolved on the opposite party depositing, as she offered to do, the amount still due to the petitioner out of his original deposit, which he says has not yet been realised. The petitioner has obtained this Rule calling on the opposite party to show cause why the District Judge's order should not be set aside and why an injunction should not issue.

The grounds urged in support of the application are shortly that the petitioner has been in possession of the patni ever since 1909, that the balance of convenience is in favour of his being retained in possession, because not only has he not succeeded in fully collecting rent from the tenants, but as he has been paying the superior landlord's rent for a number of years he has to recoup himself for such payment's which amount to something like Rs. 10,000, and he is entitled to retain possession of the patni until he has recouped himself, and finally, that if he succeeds in his suits he will be very much embarrassed and there will be a serious complication of accounts if he is dispossessed now.

The last argument may be applied with equal force if the opposite party is successful in the suit. She has already been kept out of possession for nearly a year since her purchase and will shortly again have to pay the patni rent, while up to date she has had no return on her purchase money.

Prima facie the petitioner's rights have been secured by the order which the learned Judge has made. Under S. 13, Patni Regulation, the defaulter can recover his tenure on re-payment of the advance made with interest or on proof that the advance has been realised from the usufruct. But an attempt has been made relying on the provision in Cl. 4, S. 13, to the effect that person making the advance has a lien as if the loan had been made on mortgage, to establish the position that the person making the advance is entitled to add to his demand the rent paid to the superior landlord for the years during which he has been in possession. The argument is based on S. 72, T. P. Act, which declares the right of a mortgagee to take the necessary steps to preserve the mortgaged property. An exactly similar attempt to add payments on account of the patni rent to the debt was made in the case of *Lala Bharub Chandra Karpur* v. *Lalit Mohun Singh* (1), and proved unsuccessful. It is argued for the petitioner that the incidents which gave rise to that suit occurred before the passing of the Transfer of Property Act, and therefore, that decision must be taken to have been modified by S. 72 of the Act. I am not aware that that section has given a new power to the mortgagee in possession, and the same view of S. 13 of the Patni Regulation was taken in *Ramjiban* v. *Tajuddin* (2) and *Jakhomull Mehera* v. *Saroda Prosad Dey* (3).

1. (1886) 12 Cal. 185.
2. (1911) 9 I C 489.
3. (1908) 7 C L J 604.

For the purposes of this Rule it is not necessary to say more. I must, however, guard myself from being understood to hold, because I have dealt with the merits, that the application is maintainable under S. 115, Civil P. C. The opposite party objected that it was not, but in the view which I take of the merits of the application it is unnecessary to express any opinion on that.

I think the Rule should be discharged with costs, five gold mohurs.

Walmsley, J.—I agree.

V.B./R.K. *Rule discharged.*

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*A. I. R. 1918 Calcutta 752

PEACOCK, C. J. AND MACPHERSON, J.

Banks and Fenwick, In the matter of.

Decided on 5th May 1869.

*(a) **Contempt—Advertisement for demonstration against judge is contempt — High Court has power to punish for contempt committed out of Court—Apology has not effect of discharge as matter of right.**

Per *Peacock C. J.*—An advertisemet published in a newspaper for a demonstration against a Judge for acts done in Court may be a contempt of Court as well as defamation, although it cannot be said that in every case a demonstration got up in order to obtain an expression of public opinion concerning the acts of a Judge would be a contempt. [P 762 C 2]

Per *Macpherson J.*—The High Court has power to proceed by way of contempt even when the contempt is not committed in Court or during the pendency of a suit. [P 781 C 2]

Per *Curiam.*—The fact of his making an apology does not entitle the person charged with contempt of Court to his discharge as a matter of right. [P 773 C 2]

*(b) **Contempt—Liability — Press is responsible for publication of false statements without author's name.**

If anonymous letters are sent to the press containing false statements, the press is responsible for them if the name of the author is not given up. [P 780 C 2; P 781 C 1]

(c) **Contempt—To say sentence "Cruel", is contempt.**

To say that a sentence is "cruel" may be a contempt of Court, though it would be no contempt if the remark is merely that the sentence is a severe one. [P 779 C 1]

Kennedy—for Banks.

[THE CHIEF JUSTICE.—The Court is sitting in its original civil jurisdiction. The matter is not on the Crown side of the Court.]

Mr. *Kennedy* stated he would then proceed to put in the affidavit of Mr. Banks.

[THE CHIEF JUSTICE.—I suppose there is no doubt as to the signature of Mr. Banks to the document.]

I believe the affidavit has been sworn before an officer of the Court. I will read the affidavit.

[THE CHIEF JUSTICE.—An office copy of Mr. Banks' declaration has been put in under the seal of the Court, but there is no evidence to show whose signature it is.]

The first paragraph of the affidavit removes all difficulty about that, wherein be states:—

"I am the printer and publisher of the "Englishman."

[THE CHIEF JUSTICE.—Very well; but there is one other matter which I wish to mention before going on to the affidavits. I want to see the subscription list which Mr. Clarke has been subpoenaed to produce. I do not wish to see the names of the persons who have subscribed, but I wish to see for what purpose the subscription was raised. If the gentlemen who subscribed preferred that their names should not be known, I have no wish to make them known, but I want to know whether they subscribed to that fund in order to assist Mr. Tayler, or whether it was with the view of denouncing the judgment of the Court.]

Mr. *Kennedy* stated that the subscription list had no particular heading stating for what purpose the subscription was being raised.

[THE CHIEF JUSTICE.—I want to know whether they came in in pursuance to the advertisement or whether they were accompanied by latters stating the reason for which the money was sent.]

In many cases letters accompanied the subscription.

[THE CHIEF JUSTICE.—If the gentlemen who have subscribed will come forward and acknowledge having done so, they may do so with perfect freedom so far as any proceedings agajnst them are concerned. If they like to avow having subscribed, they may do so; if not, I have no wish to inquire into the matter.]

I have a copy of a list headed, "List of subscribers to the Tayler fund who agree to their names being given up." Application was made to the subscribers of the fund, and every one applied to consent to give up his name. I don't know whether there was any particular heading to the list when it was first started, but there are many gentlemen in Court who are prepared to state the circumstances

under which they sent in their subscription.

[THE CHIEF JUSTICE.—I do not wish to press for the names of those gentlemen, but if they like to give them up themselves they may do so.]

Captain Fenwick (Editor of the *Englishman*) is in this position. He is not justified in refusing to produce the list of subscribers which he has been required to produce by a subpoena of the Court, and it could not be any breach of faith on his part, as it was originally intended to publish the names. After, however, the observations of your Lordships, it was considered that to publish their names would be to place them in a somewhat invidious position, and they were accordingly written to and requested to be allowed to give up their names, and to which all who have replied have consented. As I understand, it was not merely their rupees that these gentlemen were sending in, but an expression of the opinion.

[THE CHIEF JUSTICE.—I propose to put in the "Englishman" newspaper of the 21st instant merely to show a report of what took place with regard to Mr. Tayler's case, and merely for the purpose of the proceedings. I do not propose to treat this as a contempt of Court, but merely as explanatory of other parts of the proceedings. There is another paper of 16th April, which contains an article with reference to an article which has appeared in the "Pioneer." I do not wish to put this as forming part of the contempt, as I have already expressed in my judgment in Mr. Tayler's case my willingness to allow this to pass, and I will not now go back from what I before stated and treat it as a contempt. I merely put this paper in for the purpose of showing, with reference to the subsequent articles, what was the object of those subsequent articles. The words: "We suspect that Sir Barnes, if he attempts to carry out his *dictum* too far, will raise a storm not easy to quell. There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the press concerning the public acts of public men. A Judge's acts are no more exempt from public criticism than those of a Chairman of the Justices" were merely to be read as introductory to and explanatory of the other articles.]

I will read the affidavit of Mr. Banks in the first instance, and probably after reading it, your Lordships may be induced to take another course in the matter.

Mr. *Kennedy* then read Mr. Banks' affidavit as follows:—

"In the High Court of Judicature at Fort William in Bengal.

(*In the matter of Alexander Banks.*)

I, Alexander Banks, of Hare Street, in Calcutta, make oath and say:—

First.—I am the printer and publisher of the "Englishman" newspaper.

Second.—That George Roe Fenwick is the Editor of the said newspaper, and without his orders and directions no articles are inserted therein.

Third.—That the said George Roe Fenwick has signified to me his intention to appear before this Hon'ble Court and admit that the articles and advertisements, referred to in the Rule *nisi* herein, were inserted in the said newspaper by his directions.

Fourth.—That I exercise no control whatever over the contents of the said newspaper.

Fifth.—That, although I read some of the said articles when handed to me for publication as aforesaid, I did not in any way consider their meaning or purport, but inserted the same simply on the direction of the said George Roe Fenwick, as is my habit

Sixth.—That in inserting the said articles, notices and advertisements, I did so *bona fide* not actuated from any improper feeling or motives towards the Hon'ble The Chief Justice or any of the Judges of this Hon'ble Court, nor did I intend by such insertion in any way to excite contempt against the proceedings of this Hon'ble Court.

A. Banks.

Sworn this third day of May 1869 before me.
A. L. Pidding,
Commissioner."

Mr. *Kennedy*.—Captain Fenwick is now present in Court. Of course, if, in the strict principle of law, Mr. Banks has been guilty of contempt in what he has done, I do not put this forward as any ground for his discharge, but Captain Fenwick is in Court, ready to bear the brunt of what was in reality done by him, or by his order, and not leave it to others to bear.

[THE CHIEF JUSTICE.—Captain Fenwick, doing that, has only done that which very honourable gentleman who fills an editor's chair would do, in not allowing a publisher of a paper to take the consequence of articles written and published by his orders, by not coming forward to avow the authorship. Sir Barnes went on to state that he was prepared to withdraw the rule as against the printer, and treat

Captain Fenwick as the person against whom the rule was issued. The argument might go on, however, on the printer's rule.]

Mr. *Kennedy* said that what he thought the Court might do, would be to make a fresh order returnable immediately in order that there might be no delay Captain Fenwick was in Court and the case might be allowed to proceed as against him, but there would be this difficulty: that Captain Fenwick wished to explain some matters and had expected to have the opportunity of doing so as he had been called on a subpoena.

[THE CHIEF JUSTICE—Captain Fenwick might put in an affidavit for any purpose he pleased, the arguments might be proceeded with and the affidavit put in at some future time.]

Mr. *Kennedy* remarked that, as he would probably have to occupy the Court for a long time, the affidavit could be sworn in the meantime. Captain Fenwick authorised him to say that he admitted having published the articles in question.

[THE CHIEF JUSTICE.—Then a new order for a rule can be made out, similar to the one made in the case of Mr. Banks. (To Captain Fenwick) I believe I understand that you admit your responsibility.]

[Captain Fenwick.—Certainly, my Lord.]

Mr. *Kennedy* in proceeding to address the Court against the rule spoke as follows:—This is a case in which I appear with very great pain and anxiety, because it is hardly possible to conduct it properly without appearing to be guilty of a thing—contempt of your Lordship—which would be the last I should wish.

[THE CHIEF JUSTICE.—I shall, of course, understand all you say, Mr. Kennedy, as only said in the discharge of your duty as an advocate.]

Thank you, my Lord; but at the same time I would wish it to be understood that in any remarks that may fall from me, I do not desire that they should appear to be addressed to the same Chief Justice as the Chief Justice of whom I speak.

[THE CHIEF JUSTICE.—I think, Mr. Kennedy, that it is a pity to resort to any fiction in the case (a laugh)].

I shall be obliged, then, to criticise the judgment of the Chief Justice, I hope, without exceeding the limits of discretion. The first question is whether, whatever the former state of the law was with respect to contempts of Court or matters of defamation of Judges or their judgment, it now applies, or can be applicable, to your Lordships. I understand this rule to be issued under the civil jurisdiction of the Court and yet it appears to me that a case of contempt of Court should be tried under the criminal jurisdiction.

[THE CHIEF JUSTICE.—I am quite ready to admit that, if you please: it is quite indifferent and immaterial at which side of the Court the case is tried.]

I submit, my Lord, that you have only the power of committing a prisoner for contempt of Court under the criminal jurisdiction. In the case of *Wellesley* v. *Duke of Beaufort* (1), it is clearly shown that contempts of this class are criminal offences and are so dealt with by the Court. By this, it is quite clear that, by trying contempt under the criminal jurisdiction, your Lordships are only exercising jurisdiction under the Penal Code, Act 45 of 1860. No Court can exercise jurisdiction with respect to contempt, except it is contempt by that Code. Cases, if they amount to infraction of that Code, must be tried and punished by that Code, as is mentioned in the S. 30 of the Letters Patent:

"All persons brought for trial before the said High Court of Judicature at Fort Wiiliam in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision, under the Indian Penal Code, charged with any offence, for which provision is made by Act 45 of 1860, called the Indian Penal Code, or by any Act amending or extending the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts and not otherwise."

I think, my Lord, this must be a misprint as to the word extended, which should be "excluded." Ch. 10 defines the offences which shall be deemed contempts of Court. As a general rule the heading is not part of an Act, but in this case it is different, inasmuch as the body of the chapter acknowledges and incorporates the different headings as in S. 6:

"Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision shall be understood subject to the exceptions, eontained in the chapter entitled "general exceptions," though those exceptions are not repeat-

1. (1831) 2 Russ. & M. 639=39 E. R. 538.

ed in such definition, penal provision or illustration."

I think that this marks intention to include the headings or titles in legislation as part of the Act. Not the same is the case of the marginal notes, which are added afterwards, subsequently to the Act being passed. Then we find in that chapter certain definitions most important here. In S. 21 we find that "public servants" include a Judge, and the whole of Ch. 10 is a code to guide the Court in breaches of duty to public servants, and provides for that class of contempt most generally dealt with by the Courts; that is, for the most part known in Chancery and Common law. There it is stated that contempt consists in disobedience to the laws of the Court, obstruction of its business or intereference with, or prejudice to, its decisions and judgments.

These are the classes of acts, which are punishable as contempts under the provisions of the Code of Criminal Procedure, and none of these come up to, or in any way near, the matter in respect of which Mr. Fenwick is now charged. There is an additional provision in this matter in S. 228, I. P. C., which enacts as follows:

"Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is setting in any stage or a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

And in S, 499, of the Code the following words occur:

"Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the 'reputation of such person, is said, except in the cases hereinafter accepted, to defame that person."

Now, as far as I understand it, the accusation which is made against Captain Fenwick—the contempt of Court which he is now called upon to answer—is a contempt of having defamed a person, but there is an exception with respect to that class of defamations.

[THE CHIEF JUSTICE.—You must not understand that we assent to all you are saying. Mr. Kennedy].

No, my Lord, I don't assume assent from your Lordships' silence. I am grateful for that silence for the case is one of peculiar difficulty, and which might be rendered more so if I were to be interrupted.

[THE CHIEF JUSTICE — Pray don't under stand that because the Court is silent, it agrees with all you are saying].

No, my Lord. I prefectly understand that.

Mr. *Kennedy* then went on to say that the exception to S. 499, I. P. C., was as follows:

"It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions; or respecting his character, so far as his character appears in that conduct, and no farther."

Now, that what I sumbit is this a case having occurred, in which certain matter published amounted to defamation—and defamation of acts done in the capacity of a Judge—that defamation, being a defamation on the acts of a Judge, becomes of itself included in the exception which I have just read. It must be defamation within the terms of the Penal Code, and no defamation which was not punishable under the provisions of the Penal Code as defamation is punishable by this Court in any other way; for it is clearly laid down in S. 2 of the Code, as well as by Cl. 30 of the Charter, that "every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories on or after the said 1st day of May, 1861."

It is clearly stated in the Penal Code what is punishable as defamation, and with regard to the exception to which I have referred, your Lordships are bound to read it as if the word "Judge" is substituted, for "public servant;" and nothing expressed in good faith on the public functions of a Judge could be punishable as defamation. It seems to me that it is impossible, without destroying the utility of the Penal Code—without making it a trap—to hold that the license of Legislature has been given to the Court, empowering it to say that though this charge against Captain Fenwick may not be tried in the ordinary course of law by an indictment for defamation, yet that it may be dealt with in an extraordinary way, and under a course which does not give him the ordinary protection of a Jury—the protection of the ordinary Tribunals—and a scale of ascending Tribunals, with an appeal from each, but leaves him wholly at the mercy of the

person on whom the defamation has been uttered. I do not contend that any defamation which does come within S. 499, as explained and limited by the exception to which I have just referred, can be such an offence as to empower the Courts to deal with it either by its ordinary procedure or in an extraordinary way, by treating is as a contempt of Court. That explanation must be given by your Lordships to the language of the Legislature in its description of what it calls and deems to be contempt of a public servant—among whom are included Judges—and that of itself would limit the operation of the Court dealing with such contempts as would come within that part of the Statute, as offences punishable only as defamation under the ordinary provisions of law.

Therefore, my Lord, if jurisdiction can be exercised, it can only be exercised when the Court comes to the conclusion as to the expression. I mean when that expression is not in good faith. Even so I would submit that the power to punish summarily, in a case under the former law, for contempt has been taken away by the express language of the Legislature. Whether that jurisdiction ever existed or whether it be taken away, I contend that it was never imperative for the Court to exercise it, even in those worst of times when newspapers were considered as vermin, to be hunted down as pests, and marks for scorn; instead of, as they are now considered, members of society, important members to be protected instead of arraigned before a Tribunal, considered as the 4th estate of the realm. Even then it was a discretionary matter with the Court how to deal with libels which were likely to bring into contempt the proceedings or judgments of that Court. Your Lordship has recently delivered a judgment [*William Tayler, In the matter of* (2)] in respect of the same question. No doubt that any authority that could be produced from the proceedings of any English Court would not be unknown to your Lordship, yet no exercise of such a power is in that judgment shown to have occurred. I have also carefully searched the reports and text books, but-am unable to find a single instance of a Court in England having exercised such a jurisdiction, by way of trying or punishing contempts of Court, which were merely defamatory libels on the Court or the Judges, when no proceedings were pending and which, therefore, could in no way prejudice or influence the Court in such proceedings. The observations with which your Lordship finds fault, were published by Captain Fenwick subsequent to the proceedings against Mr. Tayler. These proceedings were concluded on the 23rd April, Saturday, and, as I understand, your Lordship is not now proceeding against Captain Fenwick for those articles published on or before the 16th April. Even in those, I am sure, you do not attribute to Captain Fenwick the folly of supposing you weak or wicked enough to alter your judgment in the pending case for fear of an article in the newspaper.

[THE CHIEF JUSTICE.—Although it is not so material to the present portion of your argument, I want to call attention to the explanation in S. 52. You must, I think, import that explanation of "good faith" into the construction of this exception—where it speaks of opinions in good faith, it must mean, in order to express an opinion in good faith the person who holds it must have taken care and attention in forming it.

I think, my Lord, that if he truly holds the opinion he is justified in expressing it. Care and attention in expressing an opinion are different from the care and attention demanded in forming that opinion, and the words "good faith" are only connected with the expression.

[THE CHIEF JUSTICE.—I understand you to say that a person may express an opinion in good faith, though care and attention have not been taken in forming the opinion.]

That is the only construction which can reasonably be given to the language. The power of proceeding by summary powers for contempt, even if vested in the Court, is a discretionary one. There are other courses, than the one now adopted, open for vindicating the integrity of the Courts and the honour of the Judges, and I submit that the discretion which is vested in your Lordships is not properly exercised by proceeding in a summery way for contempt of Court. The discretion, properly exercised by the Court, would be to fall back on the long list of precedents brought forward in the judgment in *William Tayler's case* (2) and if the dignity of the

2. A I R 1918 Cal 713=44 I C 930.

Court has been in any way brought into contempt, to direct an officer of the Court to file a criminal information. In every case in England which I have been able to discover since the earliest period of any reference respecting contempts of this class, that course has always been adopted. No doubt the Courts in England are vested with a summary power to treat certain cases of contempt, without which, indeed, it would be impossible for the ordinary course of justice to be proceeded with—without which no regularity could be observed—and to shield the officers of the Court in the execution of their duty. The power even went so far that where contemptuous words were used towards the Court, or the writ of the Court, at the time the writ was being served, punishment for contempt was inflicted ; but from the earliest time down to the present, I am not aware of one single case where a person has been punished, as for a contempt of Court, for a libel referring not to a suit then pending, but subsequent to its termination. It is stated by Chief Justice Campbell in a well known book—but I could hardly call it an authority, "Campbell's Lives of the Chief Justices, Vol. 2, p. 298, note," that

"if a prosecution for a libel on Judges be necessary, the preferable course is to proceed by information or indictment so as to avoid placing them in the invidious situation of deciding when they may be supposed to be parties."

He says, this is in reference to a judgment written but not delivered, in which Chief Justice Wilmot had laid down the existence of this power, but it would seem that this only states that there may be cases where it may be necessary to exercise this summary jurisdiction in order for the safety of the Courts.

Mr. *Kennedy* then referred to the case of the *King* v. *Faulkner* (3) and continued:—I do so merely to show that there has been, so far as the memory of the Courts at home reaches, no exercise of its jurisdiction in this manner. Baron Park, whose name stands as high as any who have ever worn the ermine in the Courts of Westminster, in the course of the argument in *King* v. *Faulkner* (3), was unable to refer to any case of it save that of *Reg* v. *Almon* (4), but in that case of *Reg* v. *Almon* (4) referred to there, no judgment was ever given, and in no case can it be shown that, when the Courts proceeded for contempt against a person subsequent to the termination of the proceedings, they did so summarily ; but there are many such cases cited, and they have all been proceeded against by information.

I would submit that there is no analogy between this case and the cases where a person brought himself into contempt by direct communication whether oral or written, with the Court, or an officer, as in the case of *Mr. Lechmere Charlton's case* (5). I submit there is a great difference between writing outside the Court and coming into the presence of the Court and insulting it, or using improper language, or being guilty of improper behaviour there. There is no case in England where contempt has been noticed after the close of the proceedings. As to the propriety of your Lordships exercising a jurisdiction which Courts in England have never exercised for the last 100 years, I may refer to the case of *Birch* v. *Walsh* (6).

Here was clearly a case of contempt, yet the Court exercised a discretionary power. There is an enormous difference between proceedings pending in a Court, such as the Court of Chancery, and a Court where a Jury might be influenced, or witnesses deterred, or the course of justice paralysed by the publication of such libels. The jurisdiction is given for the purpose of protecting the Court, parties, and suitors when the ordinary remedy might be too slow. This difference is, as I say, most material, and in the enormous lapse of time there is not one case, like the present, in which the English Courts have proceeded as for a contempt. There have, however, been cases in which the smaller Courts in the Colonies have adopted severe measures with regard to contempts, and in which this summary jurisdiction has been exercised. In a case which came before the Privy Council in 1866 reported as *McDermott, In re* (7), an appeal by one Lawrence MacDermott, the Court which had punished him, gave him leave to appeal against the sentence of six month's imprisoument and a fine, for an article inserted in a local journal. When *McDermott's case* (7) came before the Privy Council, it was

3. (1835) 2 Montague & Ayrton 311.
4. (1765) Wilm 243=97 E R 94.
5. (9837) 2 My & Cr 316=40 E R 661.
6. (1846) 10 Ir Eq 93.
7. (1866) 1 P C 260=4 Moor P C (n s) 110 (P C).

held that there was no jurisdiction to interfere with the decision of the Colonial Court, but the permission to appeal marked the disapprobation of the Privy Council.

[The CHIEF JUSTICE.—I believe another case is reported as *Rainy* v. *Justices of Sierra Leone* (8), where the Privy Council, although deciding that they could not interfere in such a matter, yet reduced the amount of fine from £ 150 to £ 60, not as an Appeal Court, but as a mere matter of finance. I looked into *McDermott's case* (7) before passing sentence in *William Tayler's case* (2) in order that the fine might be below that which the Court allowed in that case.]

In *McDermott's case* (7) one of the contempts for which he was charged was with reference to matter past and gone. It appears from the report that on the 2nd April an *ex parte* order was obtained against MacDermott for publishing certain scandalous articles reflecting on the administration of justice in the Colony of British Guiana. On the 5th April another article appeared which was also treated as a contempt which might be held to refer to a pending proceeding, but the first article, which appeared to be one of a highly defamatory nature, wholly referred to past proceedings. The ultimate decision of the Privy Council on appeal was that it had no power to interfere. The mere fact that there is no appeal to the Privy Council against an order for contempt, ought to itself make your Lordships feel that it is not exercising a proper discretion on your part in proceeding in the matter of an article defamatory of your Lordship the Chief Justice himself by a summary jurisdiction in a Court from whose decision there is no appeal, and in a Court in which the Chief Justice's opinion, even if differing from the rest of the Court, must prevail. Unless it appeared that there was likely to be the gravest possible consequences to the administration of justice, the proper course to be adopted would be, not to have proceeded by a summary process for contempt, but by proceeding, if the Court came to the conclusion that this case is one which calls for animadversion, against Captain Fenwick in a constitutional way, when Captain Fenwick would be brought before a Jury, and if any questions of law arose, they might be reserved for the consideration of a higher Court. That is a point which I have felt in duty bound to bring before your Lordship's notice, and no doubt it would have due weight. Here, in this Court, Captain Fenwick is brought forward to answer a charge of contempt, the nature of which is that he is likely to bring the administration of justice in this country into contempt—that he is likely to weaken the faith of the people in the due and true administration of justice.

This case is one which must go to the public as a matter of fact. I am unable to see any reasons which lead to the conclusion that a summary proceeding should be used instead of the constitutional one. There may be such reasons, but it will be difficult to induce the mass of the people to believe in them. If the Court were to exercise this jurisdiction, it will go forth to the world that a Court, from whose decision there is no appeal, has held that these articles of Captain Fenwick were not written in good faith. Would that be satisfactory to the public? Will a decision like this strengthen the faith of the public in the administration of justice in the same way as a decision of a jury will. The Courts of law in this country are held in too high estimation by the people for any newspaper article to have any damaging effect on that estimation. Whether a Jury convicted or acquitted Captain Fenwick of defamation, or of not having written those articles in good faith, would have very little effect upon the public mind, but the case of a Judge, from whose decision there is no appeal, deciding a case in which he is a person interested, must have the effect of shaking the confidence of the public in the Tribunals of the country. I much regret that it should have this effect, but I fear that it is an almost necessary consequence. If no other course was open to the Court, if it was imperatively necessary for the Court to proceed in the manner it had done, I would be the first to say, regardless of any outside opinion which might be entertained outside,—"Go on, and exercise your jurisdiction." The jurisdiction is vested in the Court for the benefit of the mass of the subjects and must be exercised. It is, however, not a necessary jurisdiction, but a discretionary one, and one which should be exercised with the greatest care, especially when in the course of upwards of 100 years not a single case can be cited to

8. (1853) 8 Moor P C 47=14 E R 19 (P C).

show that the Court at Westminster had exercised this jurisdiction. That is the most elementary feeling and principle that has been engrained into the minds of all people which prevents Judges from deciding in cases in which they are directly interested. In the case of *Dimes* v. *Grand Junction Canal* (9) Lord Cottenham's judgment was held by the House of Lords not capable of being supported, merely because he had an infinitesimal interest as a shareholder.

[THE CHIEF JUSTICE.—The same thing would apply if the same were said to the Judge in Court.]

No, my Lord, I think not. I do not think so; for when an insult is offered in Court, it calls for summary proceedings and instant animadversion, in order to preserve order and regularity, but even then discretionary power is used. What can the Judge do but use summary administration; but even then the offender is in general only put in prison until he submits, or until the rising of the Court. Cases of contempt of this character pertain more to disturbance than defamation, as in case of mad people in the presence of the Court who use insulting and defamatory language. They are not cases in which the Judge is seeking to vindicate his own character; they are not personal matters, but are analogous to cases of writ serving, where the served occasionally use bad language. Could the Judge have personal motives there in punishing such an offender? I think not. I would ask now what reason can there be in not using criminal information or to what reasons will the adoption of this course be attributed. The Court cannot wish to punish Captain Fenwick if he has not done wrong. Has the Court no confidence in the administration of justice by a Jury who have taken an oath of impartiality? Is it impossible to obtain a Jury from among the community of Calcutta, who are to be relied on when they have taken a solemn oath to convict the offender should they find him guilty? Surely their verdict would be satisfactory to the ends of justice. On the other hand, the fact of the Court trying a case in which the Judges were personally interested, would have a more important effect on the mind of the public than could be possibly produced by any newspaper articles or writing. In the case of great personage in Her Majesty's dominions, which I dare say your Lordships remember, when he tried a person against whom he had brought accusation, the case created a sensation not easily forgotten. I cannot forget the expression of public opinion on that occasion. When your Lordship wishes to preserve the dignity and character of the Court, I conceive that in the wording of the Rule the words "to be dealt with in such other way" mean criminal information and trial by a Jury.

[THE CHIEF JUSTICE.—I did not mean that.]

Mr. *Kennedy* quoted the case of *Dimes* v. *Grand Junnction Canal* (9) as to the undesirability of a Judge trying his own case. In the case of the *Rex* v. *Justices of Tyrone* (10) Fitzgerald J., made some very strong observations as to the impropriety of Judges trying cases in which they had the slightest interest.

This is an undoubted and an unquestioned principle. This is not a case like that of Lord Cottenham and *Grand Junction Company* (9), in which it was supposed that an *animus* existed in the mind of the Judge from the trivial interest he held in the matter as a shareholder in the Company. There are two cases which I have discovered, in which it is laid down that a Judge cannot take part in the trial of any case in which he was an interested party. One of these cases is reported in Coke upon Littleton, p. 377b, in which a Judge named Richel wished to decide a case in his own favour, but was overruled by three other Judges. And so the case was dismissed "*ex assensu omniun justiciariorum proetor querentem Richel.*" Leaving then this Judge, who had tried his own case, to be a warning to others, as Coke puts it, he came to a very interesting case, if authentic, but he got it from a high authority, (8th Henry VI, p. 18). That was an action against one Chase. The Chancellor of Oxford, for trespass, where the defendant pleaded in abatement that he was Chancellor Oxford and Clerk of Oxford, and that by Letters Patent the case could only be tried in his own Court. Upon demurrer the plea of abatement was overruled. In that case the counsel for defence, being much pressed by the Court to produce a pre-

9. (1852) 3 H L C 759.

10. (1860) 12 Ir C L R 91.

cedent for man sitting as Judge in his own case and giving judgment against himself, replied he knew of but one. It was that of a Pope, who had committed a grievous crime, and the Cardinals came and said to him "*Peccasti.*" and he answered '*Judicate me*" and they said. "*Non possumus tu es caput ecclesioe Judira teipsum.*" And the Pope gave judgment "*Judico me ipsum cremari et fuit combustus.*" So having sentenced himself to be burnt, he was burnt and became a saint, and so it clearly appears that a man may be a just judge in his own case. In the present case there certainly is that enormous objection—which I have tried to impress upon the Court—that however it may be it will be impossible for the public to divest its mind of the fact, that where a course like this has been adopted from the wish that the trial might be withdrawn from that mors proper triubual—the consideration of a jury.

There was another point of jurisdiction to which he wished to draw the Court's attention, and that was that the whole law of commitment for contempts had arisen antecedent to what he might call the Magna Charta of the English press. Sometime ago it made little difference whether a person charged with libel was tried by a Judge alone, or by a Judge and Jury, as it was the Judge alone who was to determine whether the article was defamatory or not, and the Jury were obliged to confine themselves to the simple issue as to whether the person charged did or did not publish the defamatory matter. That however was not the law now. One must look to present state of the law with respect to libels, and must consider that the whole jurisdiction has been withdrawn from the Court. To the Jury, and and the Jury alone, is submitted the power, but the Court may interfere if the Jury decides to be libel that which is clearly not libel, or it can mitigate, but not increase, the punishment with which the Jury visits such libel. Newspapers are now-a-days looked upon as the natural and proper correctors of those who are high in power. All hold that in England we have one broad principle on which, in a great measure, rests our superiority. I mean the liberty of the press, which does not exist elsewhere. In England the press acts as the hand and eye to the public and to the executive. I refer now to *Watson* v. *Walter* (11). Lord Cockburn, C. J., there says:

"The law of libel has only gradually developed itself iuto a satisfactcry state; for the liberty of a public writer to comment upon the conduct and motives of public men has only recently been recognized. Comments on Government, on Ministers and Officers of State, on Members of both Houses of Parliament, on Judges and other public functionaries are now made every day, which half a century ago, would have been the object of ex-officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"

This shows what a change has taken place in the state of the law and public opinion. Lately the Governor-General or Lieutenant Governor, whose conduct has been subjected to severe and even hostile criticisms, especially on the subject of the Orissa famine, took no notice of such criticisms. Had they done so, the writers of such criticism would have been equally liable with the present offenders on a criminal information. Is it wise for the High Court to object to criminal information, and to claim for itself a higher prerogative, when it is perfectly clear that other functionaries had not that right? These are all the observations I wish to make on this part of the case, and I will now shortly proceed to call your Lordships' attention to another point, and ask whether there is sufficient authority for saying—especially having regard to the then state of the law with regard to indictments for libels, —that the Court has ever had jurisdiction to treat as contempts of Court matters which have occurred outside the Court after the termination of the case, which brought no one into personal collision with the Court, and which are in no way injurious except in being in some way defamatory. All the cases cited on the point are cases which have been actually decided in England, and in all these cases criminal informations have been issued. I have not been able to discover a case in which an English Judge has exercised this jurisdiction, although there have been cases of Colonial Judges having done so. In the case of *King* v.

11. (1868) 4 Q B 73=8 B & S 671=38 L J Q B 34.

Faulkner (3) alluded to before, and reported in Montague and Ayrton, it is held that, whatever might be the right or the of attachment, the Judge who professed to exercise the paver power had not the pôwer. In examining the law in this matter, it strongly recalls to my mind the observation of Lord Denman in the case of *O' Connell* v. *Reg.* (12):

"That there were three kinds of law; Common law, Law by Statute, and law taken for granted and that the amount of accepted legal opinion which fell under the last head far exceeded the amount comprised under the two first heads."

The law could not be better expressed than it was there, in one of the greatest judgments which have ever been delivered by any member of the House of Lords.

[THE CHIEF JUSTICE.— But it was proved that the law taken for granted was not good law.]

It was proved to be irreconcilable to clear legal principles.

The Court then adjourned for a quarter of an hour for refreshment. Upon its reassembling :

Mr. *Kennedy* proceeded with his argument. I refer the Court to the judgment of the Lord Chancellor in *St. James Evening Post case* (13) and will now ask your Lordships to direct your attention to the case of *Birch* v. *Walsh* (6), in which the Master of the Rolls in Ireland adopted the language of Lord Hardwicke and went through the whole of the classes of contempts punishable by the Court in its high prerogative power.

Mr. *Kennedy* again quoted the class of contempts referred to, and proceeded to speak with regard to the third point— that of an inference of an intention to obstruct the course of justice. This, I submit, could not be called scandalising the Court. The term "scandalising," as I understand it, is a part of the class of contempt in which, when the process of the Court was served, opprobrious language of some description was used. It does seem to me that in cases of this description, where the contempt consists of an attack on the Judges, that the Court invariably ought to proceed on criminal information.

Mr. *Kennedy* then quoted the case of *The King* v. *Watson* (14) and went on to say.—I do not think that any Court at this day would proceed against a man for expressing an opinion even if it were expressed without forethought. There are several cases in which criminal informations have been brought against persons for libels upon persons filling high judicial positions, but if a shorter and more simple remedy had been open to them, that course would certainly have been pursued. In our judgment your Lordship starts with that case—*St. James's Evening Post case* (13)—which lays down three different kinds of contempt. That is exhaustive of contempts which are liable to punishment, and yet the Judge is not in favour of public rights to the exclusion of rights of the Court. It is hardly possible to put any other construction on that judgment. I think the only other case having any bearing on the present is *Van Sandan's case* (15)—which is alluded to in the course of *Mr. William Tayler's case* (2) in which the contempt was actually committed in the presence of the Court, and the summary jurisdiction was resorted to for the purpose of preserving order.

The two cases referred to by Starkie, p. 481,* are stated to be libels on the Court of the Queen's Bench; whereas it would appear, on looking into them, that they had nothing to do with the Court of the Queen's Bench at all, but it was a libel on Dr. Middleton*. How it occurred that the King's Bench could be mixed up with a Doctor of Divinity I am at a loss to comprehend. We find in Fortescue, 201, that the libel was a libel on Doctor of Divinity, and that the libel was contained in the dedication of a book. I have heard that "divinity doth hedge a King" but here the "King's Bench" seems to hedge a Doctor of Divinity (a laugh). Then the only other case was in Starkie, 582. These are the only two cases which state that such jurisdiction has never existed. In more modern times we find a case in the Queen's Bench. Now in this case it appears on the face of the report, *Crawford's case* (16), that Crawford attended the Court as a spectator and auditor and that he commented in the "Mona" newspaper, and then it appears the Court was adjourned and the man was committed.

[THE CHIEF JUSTICE.—That case appears to be a libel out of Court.]

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12. (1844) 11 Cl & Fin 155=1 Cox C C 413.
13. (1742) 2 Atk 469=26 E R 683.
14. (1788) 2 T R 199=100 E R 108.
15. (1846) 1 Ph 605=41 E R 763.
16. (1849) 13 Q B 613=18 L J Q B 225.

* (1606) 5 Coke 125 A.

It does not appear that the suit was not still pending. It appears that the article was contemptuous, and that its publication were calculated to paralyse the proceedings of the Court. I believe your Lordship was personally present, but it appears to me that as it is reported that appears to be the gist of the affair. Next I come to *Wallace's case* (17), which was a letter directed to the Judge for the purpose of influencing him in the discharge of one of the duties of the Court. This letter was most insulting, and accused him of altering minutes of the Court (here Mr. Kennedy quoted the case). This was clearly during a pending suit. I forgot to remind your Lordship that in the Mofussil, except in those Courts established by Royal Charter, they would have no power to exercise such a jurisdiction as I mentioned before, as the administration has carefully withdrawn all such power—Act 21 of 1861, S. 1863.

No Court except those established by Royal Charter has any jurisdiction, and when so established it has only that power to a similar extent of Rs. 200 fine. Yet they would want it more than this Court: in fact one would have thought it would have been necessary in those Courts. Assuming that your Lordships are not convinced on the points on which I have argued, I will go on to prove that your Lordships cannot treat this case as one of contempt, that is to say, as a case punishable summarily, but that you can only try it by Jury as a case of defamation under the Penal Code.

[THE CHIEF JUSTICE —If the contempt is one which does not come under the provisions of the Penal Code, there is nothing to prevent the Court dealing with it as a contempt and if it is contempt punishable under the Penal Code, the Court can try it itself, but upon the understanding that the punishment to be inflicted will in no case exceed that provided in the Penal Code.]

What is the charge against Captain Fenwick in the present case?

[THE CHIEF JUSTICE.—He is charged with having published certain letters and advertisement in the newspaper, and that in doing so he has been guilty of a contempt of Court.]

What I want to know is whether I am to direct myself to the question as to whether the articles in question were calculated to do harm or to injure the reputation of the Judge.

[THE CHIEF JUSTICE.—Not alone that. The advertisement for a demonstration against a Judge for acts done in Court is, in my view, a contempt.]

[MACPHERSON, J.—I think, Mr. Kennedy, you may argue first as to whether the letters, etc. written come within the meaning of the word defamation according to the Penal Code, and then whether they are a contempt of Court.]

[THE CHIEF JUSTICE.—I put it that the advertisement calls for a demonstration of public opinion, and is a defamation as well.]

With respect to the defamation, I want to understand what your Lordships hold.

[THE CHIEF JUSTICE.—If it is a criticism for which, within the meaning of the Penal Code, he could not be indicted, it is not a contempt. Any fair criticism is justifiable and is not a contempt, if expressed in good faith. According to S. 52, I. P. C., a *bona fide* criticism is not a contempt.]

There may be some difference between the words "expression of opinion" and and the word "criticism," although perhaps the simple meaning of the word "criticism" is nothing but an expression of opinion, but if any person were to say, "So and so's judgment was wrong," that could hardly be called a fair criticism.

[THE CHIEF JUSTICE.—I call an expression of opinion in good faith a criticism.]

If writers in the discharge of their public duty wers to be obliged to support every portion of what they wrote with reasons, they would be in a hard case.

[THE CHIEF JUSTICE.—I don't mean with their own reasons, but it would not do for a writer, in the case of a man convicted of murder, to say, without giving the evidence, the Judge and Jury had convicted an innocent man.]

Suppose it was not in a newspaper. but an ordinary person had said so.

THE CHIEF JUSTICE.—If he said so in Court that would be a contempt of Court. I am willing to hear you if you wish to argue that would be an expression in good faith on the conduct of a public servant. Suppose in a case in which there was a conflict of evidence, a newspaper was to say that "the Judge and Jury have convicted an innocent man; the man has

17. (1866) 1 P C 283=36 L J P C 9.

been hanged and it is a cruel injustice," would that be justifiable?

If made in good faith, it would. Suppose the case of a person who had been in Court and paid great attention to the case and came to that conclusion, or suppose that one of a minority of a Jury, as in the moffussil, where a unanimous verdict is not required, differed from the other jurors, and the man tried was condemned to death, could it be said that, although he did not give his reasons, yet that if he said, "in my opinion that man is as innocent as any in Court, and yet he has been sentenced to death," that the statement was not made in good faith?

Mr. *Kennedy* continued.—The offences charged against Captain Fenwick are two: first, in having consented to act as treasurer to the fund, and in having given notice of the formation of a fund, intended to offer an opportunity to people who entertained an adverse opinion to the Court in *William Tayler, In the matter of* (2) of giving an expression of their opinion by paying their rupee. Possibly the law of conspiracy still prevails in the couutry, and after the case of *O'Connell* v. *Reg* (12) it is hard to say what is not conspiracy.

[THE CHIEF JUSTICE. — But those counts were held to be bad.]

I will not state what is and what is not of the nature of a conspiracy, as that is an offence not triable under this particular jurisdiction, and since the introduction of the Penal Code I doubt whether it is triable at all in India. The paragraph which I presume to take as the contempt of Court was this:

"During the whole of Sunday and yesterday great excitement prevailed throughout Calcutta at the severe sentence pronounced by the Chief Justice on Mr. W. Tayler. We understand that a public subscription has been opened to pay the amouut of the fine, subscriptions being limited to one rupee each. We shall be happy to take charge of any subscriptions to such a fund,—the demonstration not being at all intended to express any justification of Mr. Tayler's conduct, but to show rather the sentiment which exists in the breasts of all Englishmen against a too severe use of power. Precedents in law and the forms of justice may be cited in favour of Sir Barnes Peacock's action in the matter, but the universal shout of indignation with which his Lordship's sentence, sitting as he was as Prosecutor, Judge and Jury upon his own wrong, has been received sufficiently justifies an appeal to the public. Five hundred men having the pluck to put down their rupee each, in proof of their protest against the cruel sentence awarded by the Chief Justice, and as an earnest of their determination to support their right of appeal to free press, will be a lesson which Sir Barnes Peacock will not be likely soon to forget."

I confess that I can find nothing there that amounts to a contempt of Court. I find a desire rather to find out what public feeling really was in the matter. In your judgment your Lordship said:

"I am a servant of the public. If public opinion is unmistakeably expressed I will bow to it. But I will not take the voice of a few papers for the voice of the public."

It really seems difficult to ascertain how public opinion could be better expressed than by this rupee subscription. It was your Lordship's and not Captain Fenwick's suggestion as to the expression. The proposal for subscription did not come from Captain Fenwick, as I learn; on the contrary, he has been led into it. This appears on the face of the notice itself.

From this it is clear that the suggestion was made to him, as he had taken great interest in *William Tayler's case* (2), and surely this could not be taken as a contempt of Court, when his action was merely the result of your Lordship's challenge of the public opinion of the community in Calcutta fortified by a threat.

[THE CHIEF JUSTICE.—I used no threat. I said I shall be happy to lay down.]

Yes, my Lord, it is a threat when you speak of depriving the community of your deep learning and the brilliancy and impartiality so long the brightest ornament of the Bench. This subscription may be regarded as an indication that public opinion thought your Lordship was in error. This public opinion may be very wrong, but still the feeling existed, as it would amongst all Englishmen and I believe it also existed here amongst the members of the Bar, that it would have been better had Mr. Tayler been tried by a Jury. In one word, there was a feeling of dissatisfaction at the proceedings against Mr. Tayler and the severity of his punishment Your Lordship thought that the sentence of the Court was a fit award, and this judgment had been to some extent challenged by an expression of public opinion on the subject, and it was difficult, under the circumstances, to see how else that expression of public opinion could have been conveyed. Calling a public meeting for the purpose would have been a much graver offence as well as more insulting, and was a course which I would have been very sorry to have seen adopted.

The way of enabling the people to come forward and give their opinion as expressed by their rupee was about as mild a form of expressing an opinion as could well be adopted. I have known of many such similar cases, but have never known of one in which any particular proceedings were taken as in this case.

[THE CHIEF JUSTICE.—This subscription was not intended for the purpose of paying off Mr. Tayler's fine.]

Cases of paying off a person's fine for charity are never noticed by the Court, and indeed are very seldom done; but in most cases where subscriptions are raised for the purpose of paying off fines, it is in order to mark public disapprobation at the course adopted. It will doubtless be remembered that when the *Nil Durpan* prosecution* was successfully carried out, a wealthy native, named Kali Prosunno Singh, actually threw the amount of the fine on the table of the Court. In *McDermott's case* (7) there was also a fine, and this was also raised by subscription.

[MACPHERSON, J., said that it must be remembered that the article in the paper of 16th April was to be read in connection with the other articles, although there was no charge of contempt in respect of that particular article]

It appears to me that this is a mere expression of opinion if it has been given *bona fide* and with reasonable care, and if there is no reason why the expression of opinion should not be given in this way, and why persons really have been challenged to come forward and give an expression of their opinion should not do so, then it would seem a monstrous thing that it should be made a matter of contempt on the part of Mr. Fenwick to give them an opportunity to do so. Another paragraph states as follows :

"Notwithstanding yesterday having been mail day and a day of considerable business in Calcutta, subscriptions towards the fine imposed upon Mr. Tayler have been pouring in. Our notice yesterday must have been carelessly read by many, as individual subscriptions of 100 rupees and upwards have been offered. The limit proposed was one rupee. As in we have to remark that the demonstration is no way intended as a vindication or approval of Mr. Tayler's conduct, but as an independent expression of opinion regarding an overexercise of power on the part of Sir Barnest Peacock, and as a legitimate protest agaist undue interference with the right of appeal to the Press."

[THE CHIEF JUSTICE.—Mr. Tayler's second apology had been put in the day before the second notification.]

Mr. Tayler, in his second apology, admitted himself to be altogether in the wrong, and the article in the *Englishman* does not vindicate Mr. Tayler's conduct, but merely says :—

"There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the Press concerning the public acts of public men."

I confess my belief that, on investigation, that these proceedings are an encroachment on the liberty of the Press, the opinion would be discovered to prevail extensively among the members of the Bar. This prevails also among Captain Fenwick and many others who are not at all defective in intelligence, who were present and read the proceedings without reference to Mr. Tayler, whom many think to have acted in a very shabby way. Many also entertained an opinion against Mr. Justice Mitter. I will here read the letters that were sent with these subscriptions.

[THE CHIEF JUSTICE.—Are these all the names, or are they only of those who consented to have their names published?]

These are all the names, my Lord, except those of some ladies and those who are in the Moffussil, and have, therefore, been unable to send in their consent as yet.

[THE CHIEF JUSTICE. —I see here "Inigo or Jingo and three friends, H. B. and 10 others, residents of—"]

Those are all ladies, my Lord (laughter).

Here Mr. *Kennedy* read the letters which caused much amusement. One letter being anonymous and of a libellous nature was not read.

Mr. *Kennedy* continued. — Although, after your Lordship issuing the Rule, Captain Fenwick published a statement to the effect that he would receive no more subscriptions, yet many further subscriptions came in. There were also many other subscribers who have not sent letters, but who are men of high education and strong feelings as to the rights of Englishmen, which they feel in the present case have been infringed and attacked. I don't know how it was that the subscription came to take place. It has been shown that Captain Fenwick was not the originator of it, but merely agreed to act as treasurer, and the part he has taken was done by nomeans with

*(1862) Celebrated Trials 36.

the intention of committing a contempt of Court. One of the advantages we enjoy from a free press is that the expression of public opinion which it allows, prevents the breaking out of conspiracies. The greatest means of keeping our country free from outbreaks is that every person is able to bring his opinion before the public, when it can be confirmed or refuted by those who have the power and ability to show what is right and what is wrong. The preventing of the expression of public opinion such as this, by the dread of being punished for contempt of Court, appears to me to be about as wise as placing a weight on a safety valve to keep a boiler from explosion. Captain Fenwick has probably high ideas of the press and the duties of an editor, they may be erroneous ideas, and he may perhaps have gone beyond what he ought to have done in the matter of criticism. The first of the incriminated articles seems to me to be one of 26th April and with regard to the first passage which states:

"The extraordinary severity of the sentence was much commented on in and out of Court." That I take it, my Lord, is a mere matter of fact. I believe Captain Fenwick in his affidavit states it as such and I will be able to procure other viva voce evidence of persons who were present to verify that statement, that there was much comment on the sentence and that the public expected that after what had occurred on Tuesday morning, they understood that Mr. Tayler would be, to use a police Court phrase, warned and discharged upon his making an apology. The letter went on:

"There was not a listener in Court on Tuesday last to Mr. Tayler's offer of apology, who did not consider, from what fell from the Chief Justice, that his Lordship was prepared to accept his apology, provided it obtained the same publicity as had been afforded to the letters complained of."

The words "there was not a listener in Court," etc., might be difficult to prove, but what I am prepared to prove, is that a large number of persons in Court did come to the conclusion that your Lordship did not intend to proceed to punish Mr. Tayler in case be published an apology, and included in it a retraction suggested by your Lordship. The article goes on to say that the Ranee of Ticaree's:

"unprotected position was feelingly dwelt upon, and Mr. Dwarkanath Mitter was extolled in such a manner that he must have blushed, although like Gray's flower, it was unseen."

That may perhaps be a somewhat irreverent joke at Mitter, J., but I cannot think it amounts to anything like a contempt, or calls for any necessity for measures such as have been adopted.

[THE CHIEF JUSTICE.—No proceedings would have been taken for anything like that.]

Then the letter goes on.

[THE CHIEF JUSTICE.—There is a quotation at the commencement of the articles which you have not read, Mr. Kennedy.]

Mr. *Kennedy* read the following:

"Calendaro.—Will he be punished?
Bertuccio. Yes.
Calendaro. With what? a mulct or an arrest
Bertuccio. With both:
Calendaro. Now you rave, or must intend revenge."

Slightly altered from Marion Faliero.

I do not see how that can be considered as applying to the Court. I suppose your Lordship remembers the original quotation, and you will see that the alteration is a very slight one. The joke may not be a very good one, but it is hard to see how it could be applied to the Court. The word in the original quotation is "death." I take it that quotation is only meant as a sort of expression of opinion, that the imposition of both fine and imprisonment for such an offence was a singularly severe one. Now surely that is a matter in which a journalist is capable of forming a bona fide opinion, having seen Mr. Tayler in Court and heard the proceedings. What he says of your Lordship, if it is not in good faith, then it is not justifiable. Your Lordship's judgment was one of singular power and of deep research, most clearly bringing before the public that which to other Judges would not have occurred. Your Lordship in exercising your real powers did bring an enormous amount of evidence to bear against Mr. Tayler, against whose acts you had formed a very strong opinion.

So, surely, there is no dispraise in saying that you had turned every point against Mr. Tayler. The word "bitternsss" cannot be construed into contempt of Court. It merely applies to your Lordship's manner. It may not be fair to criticise your Lordship's manner, not perhaps in good taste, but really your Lordship's manner is sometimes very for-

cible, very forcible indeed. You did say that Mr. Tayler's apology did aggravate his offence, for the apology in the affidavit was but an echo of the other. Yet when it was read in Court you did not intimate that it was improper or objectionable. Your Lordship intimated that it was insufficient, because it contained no retraction. The general opinion then was that your Lordship had no further intention to punish but 'that as the affidavit contained no retraction it was insufficient. Yet, surely, pity for Mr Tayler would not overrule the anxiety in the minds of the public for the honour of the Court.

The case was then adjourned till the following day.

Mr. *Kennedy* resumed his argument on 4th May. He said I shall again draw your Lordship's attention to the exceptions contained in the Penal Code. Your Lord-hip seemed to think that the expression of opinion was equivalent to criticism. I confess I hardly think that is the true construction. Expression of opinion is a much wider phrase than criticism. The framers of the law evidently held that fair criticism was certainly not libel. When they used such a wide term as expression of opinion, they must have meant something very different from the existing state of the law, or they would not have gone to the trouble of defining what good faith was. I think here that there is an invitation in the statute for the expression of opinion in good faith, which is totally exempt from punishment, otherwise the Legislature is merely laying a trap. I cannot think this to be the case. In a recent calamity, public opinion ran very strongly against the highest officials; in fact, it was said that they were indifferent about the death of thousands of people at the time of the Orissa famine which was attributed to their negligence and want of knowledge. The same opinions prevailed at home, although I understand that human means would have been totally unavailing to prevent the calamity, but yet a strong opinion was expressed that this was caused by the culpable neglect of the officials. There was even a suggestion that this province should have a separate Governor from home, as the existing Lieutenant Governor was the cause of the evil. I think that was singularly unjust. Yet there was no explanation, no giving of reasons; still it was not punishable because it was in good faith. The case put yesterday of a Judge and Jury finding a man guilty of murder, and thereupon being accused of having condemned an innocent man, would be an expression of opinion. Might not that be perhaps in good faith, although the reasons did not appear? Perhaps they might be very weak. But yet that would not imply a doubt as to the speaker's good faith. S. 52 does not imply that every one must be completely master of his subject, or that his reasons must be sufficient and good, and that else he is liable to punishment, although such expression was made in good faith.

Again, the publication of defamatory words is extended towards "either spoken or intended to be spoken or said." It is not at all an unfrequent occurrence to hear defeated counsel expressing strong opinions against the judgment which has overthrown them. Yet, surely, that cannot be defamation, though perhaps erroneous and not fulfilling such demands as "care and attention." Surely S. 52 does not say that good faith must be applied in forming opinions, but only in expressing such opinion. Of course, if a man has no opinion, if he knows nothing whatever of the case, what he expresses cannot be in good faith. On the other hand, if he has an opinion, this section gives him the liberty of expressing it. The intention of the Penal Code is to extend this liberty of expression, yet if no opinion may be expressed save after careful study, it only misleads the public and contracts their liberty. I now think it right to read Captain Fenwick's affidavit (Here Mr. Kennedy put in and read the affidavit , which stated that the articles complained of were inserted bona fide, and as a fair expression of public opinion. Then an article from the Friend of India 29th April). Here the writer appears to have been in Court and seen the reports, and he says that the opinion was shared by all in Court, that nothing further than the apology, which Mr. Tayler afterwards published in the newspaper would be required of them,

And now this brings me to a very painful portion of my subject. I must say that your Lordship's language on that occasion would naturally lead to the supposition that if Mr. Tayler made the apology required by your Lordship, your Lordship would be satisfied, and that no further proceedings would be taken against him.

Mr. Tayler did make an affidavit which he read to your Lordship and he also read the case of *Fletcher, Ex parte* (18), a very gross contempt, when the Court intimated that they would be satisfied with an apology. This was read to your Lordship, and yet you expressed no dissent from such an opinion. Of course that was a matter for your Lordship's discretion, but still I submit that many would think that, as you expressed no dissent, you consented to the contents of that affidavit. I presume myself that the apology you referred to was that incorporated in the affidavit. The affidavit was then before your Lordship. Any one might think that you meant the apology contained in this affidavit. You further said: I leave this remark to Mr. Tayler's consideration."

[THE CHIEF JUSTICE—I did mean the affidavit.]

Under those circumstances, my Lord, it does seem that it was not natural to presume that upon a retractation published as the letters were published, it would be accepted as sufficient, for although your Lordship did not pledge yourself [having *Van Sandau's case* (15) in your mind] that if Mr. Tayler published his apology and retractation it would be sufficient, yet the supposition was that nothing further would be wanted. Of course you did not say so; and people may be to blame for thinking so; still that was their opinion. This is what Captain Fenwick says in his affidavit, and if that is not sufficient, I can give the evidence of several most respectable gentlemen whose opinions were identically the same, and who will testify that that was the state of public opinion. I mean that if Mr. Tayler published the apology as he had published the offence, he would be visited with no other punishment. I don't myself like to give evidence, but really there was a great discussion here amongst the members of the Bar, and here that was the general opinion as is also in the outside world. The reflections on your Lordship in "Bystander's" letter are very strong, but then what you have to consider is, whether that was the prevalent opinion caused by what you said or by what you did not say. Of course, if it had been brought to your Lordship's notice you would have spoken more fully upon the matter. But with that we have now nothing to do. What did occur did very naturally give rise to the general belief that the publication of the apology was all your Lordship required. I submit, my Lord, that the thing for you to consider is, whether such opinion might not be held *bona fide*. The question is whether the course taken in Court may not have induced people in Court, who had not the same means as we had of forming an opinion of your Lordship's judgment, to have taken such a view perfectly *bona fide*. I can't help impressing upon your Lordship the opinion, which could most naturally occur to the minds of such persons, was that a gentleman of your Lordship's ability would not allow such an impression to arise without intending that it should arise. I know that your Lordship did not intend such an impression to arise, but the question is whether it did not arise *bona fide* and that this letter was the *bona fide* and legitimate expression of the opinion of the person who wrote it. If so, I submit the subsequent remarks were not beyond the limits of free expression even though the opinion was founded in error. The latter part of the letter is written in a sort of flourishing style and is to me quite unintelligible and I am unable to put any construction upon it. In that part of the letter he says:

"there is a marked difference between the dulcet though powerful tones of the British lion and the *arriere pensee* gamut of the Bengal tiger."

What the meaning of these words is, or what construction is to be put upon them I certainly cannot understand. The other inculpated letter is, I take it one published in the *Englishman* of the 28th April, in which a short extract is given from Sutherland's Weekly Reporter, showing that Dwarkanath Mitter, J. appeared as Counsel for the Ranee in a case against Mr. *Tayler Ranee Usmut Koowar* v. *Tayler* (19), and the last part of the letter stated what was erroneous as well as ungrammatical. The sentence is as follows: "By this you will perceive that Dwarkanath Mitter, J. who held a brief for the Ranee in this case, afterwards sat as a Judge in a cause between the same parties." This is erroneous because Mitter, J., did not sit as a Judge in a cause between the same parties. But of what consequence is it? Is it unprofessional or contrary to precedent that

18. (1841) 2 Mont D & De G 129.

(19) [1865] 2 W R 307.

a gentleman of the Bar holding a brief should afterwards sit as Judgein a different suit between the same parties? It is only a rule of etiquette and nothing more that where an Advocate taking part in a suit, which afterwards comes before the Court when he is on the Bench, takes no part in the case. Certainly, the suggestion that he sat as Judge in a different suit between the same parties was no imputation on Dwarkanath Mitter, J.

[MACPHERSON, J.—The whole point of the letter is that Mitter, J., having been counsel for one of the parties had been guilty of unfair and improper conduct in taking part in the case. That was the innuendo contained in the letter—or why was it published?]

Well, I don't see why it was published.

[MACPHERSON, J.—There is a misstatement in the letter, which any one may see.]

Yes, and it carries its contradiction on the face of it.

[MACPHERSON, J.—But the letter is nonetheless an offence for all that, when the manifest object with which it was written is considered.]

It is hard to see how the letter can amount to defamation. There had been a great deal of excitement about the matter and—

[MACPHERSON, J.—The letter itself is of no value one way or the other, except that it goes to show the object with which it was written, in imputing improper conduct to Dwarkanath Mitter, J.]

There had been a good deal of excitement about this matter, and this letter came to Captain Fenwick's hands, and he published it with a perfectly innocent intention. It is a very foolish letter, but nothing more. It does not implicate Dwarkanath Mitter, J., or any other person and is perfectly immaterial one way or the other. That there was and is a great deal of excitement about these cases, can hardly be doubted. These cases have excited a great deal of interest and your Lordships need hardly have looked around the Court yesterday or today to see that this is the case. In spite of the heat of the weather the Court has been much crowded during the last two days, and this shows the enormous interest and excitement felt about this case as a sequel to the case of Mr. Tayler. The public of Calcutta, not only Europeans but natives, had become impressed with the value of the principles of English Jurisprudence, and an idea had been engendered that some of these principles were endangered by the action taken by the Court in *Mr. Tayler's case* (2). In time long gone by a very summary course was adopted towards the public in matters which affected the dignity of the Courts. In times long gone by, the person of the Crown was protected with equally stringent prerogatives. The same with regard to Ministers of State, and remarks upon persons holding high offices of State were prosecuted and dealt with almost as treason. He would remind the Court of a case in the reign of Edward IV, where a man's deer was killed, and he wished that the horns of the deer were in the belly of the man who advised the King to do this. That was held to be high treason. Those days however have gone by, and the rights of free speech and free discussion have been gradually widened down to the present day.

The greatest change is that in the free discussions on the doings of public men have now learned to view their safety, and men now see that it is good for the commonwealth and for the good of all that there should be free discussion, and that if it overstepped the proper bounds it should be punished by constitutional means. As I have shown, the discretionary power of exercising a summary jurisdiction in the case of libels upon the Court published out of Court, and after the termination of a case, has never for the last 100 years been exercised in England, it was a power to be exercised with the most guarded discretion—a discretion which has been so guarded in England, that in the whole history of English Law, not one case could be found in which English Judges had used this power. The only cases in which this power is shown to have been used are cases from the Colonies and the Isle of Man. Under these circumstances it is not astonishing that it has caused great public excitement, and it is not astonishing that the Court should have been crowded as it was yesterday and to-day. I have now, my Lords, only to close by repeating what I said before, that I can hardly feel the administration of justice and the respect felt for this Court could receive a heavier blow than they have re-

ceived by these proceedings of your Lordships, when it is remembered that these proceedings of your Lordships may give rise to an impression that your Lordships consider a Jury cannot be safely entrusted with the administration of the law.

Mr. *Paul* then rose to address the Court. He said: — May it please your Lordships. The duty of showing cause against the Rule made by your Lordships which devolves upon me, imposes on me a task at once painful, delicate, difficult and embarassing.

Painful, because I shall have to offer remarks upon the conduct of the Chief Justice, who is entitled, by his well known services and immense talents, to a respect which is acknowledged and felt by all who know him.

Delicate, because in my duty to the Court and my client I must be careful not to overstep the bounds of propriety on the one hand and must yet push every argument to the utmost limits on the other.

Difficult, because I have to contend against what may be considered to some extent a foregone conclusion in the minds of your Lordships, based upon mature judgment and reflection.

Embarassing, because it is clear that whatever arguments I may take up, have already been considered and weighed beforehand by your Lordships, besides which no specific grounds are laid down against which I have to combat.

The learned counsel then proceeded to show how greatly indebted the community was and should be to the Chief Justice for having swept aside the cobwebs of confusion, and for having substituted clear grounds of law in laying down the Penal Code, which existed only in this country.

Whatever accusation might be made against Captain Fenwick surely everybody would acquit him of malice, or of deliberately bad intentions. Whatever faults he had committed were errors of judgment. Steady justice was to be considered as much the indication of public liberty as the freedom of the press. From the earliest records of civilisation, authority and liberty had always been in contest. In order that the two may act in conjunction and harmony a line of definement must be drawn, a very difficult problem indeed, if it was to be governed by the precedent of cases which occurred in England 40 or 50 years ago. Some Judges have held very singular opinions on the subject, and therefore in that necessary definement one should rather be guided by the principles than the conclusions of those cases. It would, therefore, be better to confine the argument to the question of the law, as to whether the Court had the right to try a case in which it was itself interested. Nothing published after the termination of proceedings could be held practically as contempt. Mr. Justice Wilmot's opinions are often commented on, but they are not sound, because they will not accommodate themselves to the present times. He, however, was not according to Lord Campbell, a very bright genius, and his opinions must be regarded as speculative opinions.

Whenever cases have come up of libels after the termination of proceedings the Judges have always refrained from exercising their rights of punishing. Sir Samuel Romilly at one time held a strong opinion on the existence of this power but found he had gone too far, and he afterwards retracted. This retraction is a matter worthy of consideration, considering the eminence of his position, his learning, and the benefit he conferred on society (13, Adolphus and Ellis). No case in England had gone to the extent that a contempt after proceedings could be punished summarily: *Crawford's case* (16). In that case it was considered there was no question to go to the Jury, for the publisher had admitted publication, and in those days before Fox's Bill, the question of construction was one for the Judge.

Here was a manner of proceeding in which the whole argument was one of law. Therefore, trial by a Jury was absurd, as the fact of the publication and authorship was admitted, if the construction to be placed on a libel was for the Court to decide. In the judgment of Patterson, J. it was stated that a case might be conceived, which would have the effect of paralysing the proceedings of the Court. I can conceive such a case, but I thought it must be more than mere defamatory matter. If a threat were made that your Lordships would be resisted in going to Court, that would be a proceeding which would be likely to have the effect of paralysing the action of the Court, as it would be actively impeding the administration of Justice. If the

world did believe your Lordship's judgment to be severe, and Caption Fenwick said so, it would have no effect in paralysing the action of the Court, and the equanimity with which your Lordships sat there would not be disturbed in the least. In no case in England had the Judges gone the length contended for. It was said that the Court could not properly punish as contempt anything which would not interfere with the working of the Court, and I can imagine many cases in which the Court might well exercise this power. In the case of the *King* v. *Faulkner* (3) it was held that a Commissioner of Bankruptcy had not the power to punish for contempt. I contend that the letter reflecting upon the sentence of his Lordship as severe was not an obstruction in any way. In the case of *Reg* v. *Almon* (4), Lord Campbell's Lives of the Chief Jusices, Vol. 2, p. 297, the judgment of the Wilmot, C. J. begs the question which it proceeds to prove. It says the Court has power because it has the power, but shows no instance of its exercise.

It is for the Court to say if they are satisfied with this judgment. The Judge does not know where the power comes from. Thought is here lost in language. (Here Mr. Paul read the note of Lord Campbell, to the effect that it was inexpedient for a Judge to exercise this power, and that the proper way to proceed was by criminal information).

The matters here complained of are not scandalising to the Court. To think so would be to give the words too wide an interpretation. That is a question for a Jury. *Van Sandu's* case (15) does not come within that class. Where the Court sees a direct attempt to obstruct the proceedings, then they are justified, but in Captain Fenwick's case, the supposed obstruction is from some reasoning or some argument; and then the Chief Justice says the Courts had better be shut up it is the inference of intention.

Times have changed and the severity of the law is now much mitigated. With regard to this, whole pages of legal literature teemed with cases of great injustice done by Judges under colour of law. I need go no farther than to instance the judgment of Sir John Finch in the case of *Hampden* (20), in which everything was exhausted to show that in that case the right way of proceeding had been adopted and to uphold in the strongest manner the divine rights of Kings. I understand your Lordship to say that if the misrepresentations had been confined to misstatements without anything being based on them, no notice would have been taken of them. I understand that your Lordship considers the letter of "Bystander" to be a contempt as reflecting upon your Lordship's character and also that the advertisement calling for subscriptions was also a contempt of Court, as being intended as a demonstration against the Court. I have already submitted, on the authority of a number of cases, that in cases of libel of this sort on a Judge, after proceedings had ended, the Court had no greater powers than an ordinary individual. There were other ways than the present course of proceedings by which the honour of the Court might be protected, and the mental capacity of a Judge ought to be of such a nature as to prevent him from placing himself in the position of Prosecutor and Judge in the same case. With regard to the animadversions in the letter of "Bystander", no doubt the word "ruse" is one calculated to annoy your Lordship, but I hope to be able to show to the Court, although the word was not one which I can approve of, that it was really intended to express an impression which had gone abroad that your Lordship had given Mr. Tayler to understand that his apology would be accepted, and had thus punished him severely without even mentioning the apology.

With regard to what was said to be the grossest libel—the opening of the subscription as demonstration against the Court—Mr. *Paul* mentioned that in olden times, the Judges had very curious ideas upon the liberty of the subject and the firmness of the British constitution. If almost anything was done, it was given out that the constitution was in danger. Even in later times a great deal of unenlightenment clung to Judges of high-standing. In Lord Eilenborough's speech on Sir Samuel Romilly's Bill, reported in the 233rd page of the 3rd Volume of Campbell's Lives of the Chief Justices, he strongly recommended that the punishment of death for felony to the amount of five shillings should not be abolished and so late as 1830, Lord Tenterden strongly opposed the abolishment of capital punishment for the offence of forgery.

20. (1640) Howell's St Tr 826.

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Mr. *Paul* then proceeded to read Sir A. Cockburns's remarks in the case of *Wason* v. *Walter* (11) already cited by Mr. *Kennedy*.

In modern days Judges do not go on the acts of their predecessors, they do not deliver judgments in such and such a manner, because others have been of a similar character (here Mr. *Paul* cited several cases of overruling). The law as it is written is adamantine and immovable, but the unwritten law is so elastic that it adapts itself to the present time and judgment can, therefore, be guided by proper discretion. If a dissent of opinion be contempt, then it is impossible to know what is not contempt, and one is at a loss to discover what and where the bounds of contempt exist. The Earl of Macclesfield was fined £ 3,000 and because the King dissented from the opinion of the House of Lords, he ordered the fine to be paid from the Privy Purse. Suppose a case of a man who had been fined, and that fine were to be paid off by any one in Court, is this a case of contempt? There is the case of the Corporation of Yarmouth, in Dunsford and East, on which the present case is judged. But surely that is carrying the law too far. When a man expresses his opinion that a verdict is wrong, or declares it to be so, it does not follow that he says it is infamously so or that he even thinks so. In the present case there has been no obstruction of justice, and he was at a loss to conceive how it could be construed into a contempt of Court except by a process of harsh reasoning. There are wrong verdicts every day. In times past perhaps Juries were more subservient to the Judges, and perhaps that was the reason there are so few cases on record of reversal of sentences, but that does not say that they were not unjust. Provided that they are deserved, animadversions on wrong judgments or on any public acts of any public men were of benefit to themselves and useful to the general community. If there were no liberty of the Press, then a Justice could say whatever he liked or pleased.

Even if their Lordships considered that Captain Fenwick ought to be punished, even then they would surely acquit him of any endeavour to sap the administration of justice. But it was submitted that the present case was one for a Jury who were uninterested.

(Court adjourned.) Upon the re-assembling of the Court after a short adjournment for tiffin, Mr. *Paul* resumed his argument. He said that in the judgment of Mr. Justice Buller, that learned Judge seemed disposed to consider that all animadversions on the proceedings of Courts should be prevented. He (Mr. *Paul*) submitted that an opinion pronounced adverse to the judgment of a Judge and Jury is perfectly justifiable if not of a calumnious nature.

[MACPHERSON, J.—Surely that is not disputed.]

Mr. *Paul* said that was the decision of Mr. Justice Buller in the case he had referred to. He (Mr. *Paul*) would only say that he was one of those who, when occasion required, expressed himself strongly in cases where he felt strongly. There had been cases of Judges of the High Court expressing themselves in strong language, Mr. *Paul* submitted that if an article was written and published *bona fide*, the reasons ought not to be tested by the severest logic, for if so, the Government of the world would rest in the hands of two or three persons. If that were so his Lordship the Chief Justice's decisions could be never assailed, if the reasons of anything which was alleged against them were to be put to the severe test of logic. Mr. *Paul* then quoted the case of *Hurro Chunder Roy Chowdry* v. *Shoorodhonee Debia* (21), where the present Chief Justice had made use of strong language in expressing his opinion, and had said that to come to the conclusion come to by the majority of the Judges in that case would bring discredit upon the law and upon the administration of justice. Mr. *Paul* continued and contended that in cases of this kind it was necessary that not only the words but their intent should be calumnious before it could be made an offence. Mr. *Paul* maintained that these articles did not come within the meaning of the word contempt, as the judgment of the Court in the case referred to was gone and final. He would now proceed to interpret the law with regard to the liberties of the press. It was a noble example that Lord Brougham showed when in trying a question relating to the privilege of members of the House of Commons, he did not hesitate to cast aside certain decided cases, when it

21. (1868) 9 W R 408.

behoved him to do so. He (Mr. *Paul*) asked their Lordships to do the same. Mr. *Paul* also read some passage from Mill on Liberty defining the right of criticism of public men.

He then summed up this portion of his argument by submitting that he was right in stating that with the exception of two Colonial cases, one of which was *Crawford's case* (16), in which the details led him to believe that although the Court was not sitting, yet the proceedings were still pending, for in that case Earle J., said that it was quite possible to conceive cases of contempt calculated to paralyse justice and, therefore, the Court would vindicate its administration, and that it was for the Court in each case to decide whether it amounted to that. If the suit had been terminated these observations would not have been applicable.

Sir Samuel Romilly, a great man and one who had done very much for the good of the country, and who was a great authority, gives an account of certain proceedings before Lord Erskine. They are stated in 6 Lord Campbell's Lives of the Chancellors, p. 565. He states the facts and arguments in a case in which he had endeavoured to persuade Lord Erskine to exercise this jurisdiction, but Lord Erskine had declined to commit. Sir Samuel Romilly made some very harsh comments on Lord Erskine's conduct but eventually he had himself retracted his arguments, and said he believed that a contempt of this kind ought to be prosecuted as a libel. And in *McDermott's case* (7), the facts were open when leave of appeal was applied for. Lord Westbury saw the necessity and gave the leave to appeal, thus marking his disapprobation of the committal, and although subsequently that was rescinded, that proved nothing, because it was merely refused as there was no jurisdiction to entertain an appeal in the case.

In the case of *Wallace, In re* (17), gross charges were made against the Chief Justice by letters sent to him, and before the proceedings were terminated, and that of course came within the class of direct contempts, because the letters containing the insults were sent direct to the Chief Justice. Therefore, the case was narrowed down to the case in Wilmot and a case which occurred in the Isle of Man, which shows that the power was doubtful and did not prove satisfactorily that a man could be punished for remarks made after the conclusion of the proceedings. The question seemed to be an open question, which, if properly considered, would show that no such power really did exist. The next subject was the mode of proceeding to be adopted, supposing this to be a case in which the Court still retains of the opinion that they have a right to punish. In order to show cases where that power clearly existed, *Stockdale* v. *Hansard* (22) shows the general opinion that such cases ought to go before on impartial Jury. Then as regards *Birch* v. *Walsh* (6), no grosser case could be conceived than this, and yet the Court thought that the safety of its honour was not impeached, and that the futile attempts would but recoil on the authors. Letters Patent, 1865, S. 30, is already before the Court, and here if the offence does not come under the second exception, then it is plainly defamatory and consequently triable under the Penal Code. In *Long Wellesley's case* (1) Lord Brougham considers that the proceeding for contempt are criminal proceedings.

Here in the present case was no specific charge.

[THE CHIEF JUSTICE.—The charge is for publishing those letters and notices which are in themselves contempts of Court.]

Yes, but there is no specific charge.

[THE CHIEF JUSTICE. — Then how would it be in the case of an indictment which would only say:—"That on a certain day he did publish and set forth certain articles?"]

Then, my Lord, there would be an innuendo.

[THE CHIEF JUSTICE.—If you are ignorant as to what I complain of I will tell you.]

In the case of indictment there would be a Prosecuting Counsel.

[THE CHIEF JUSTICE.—But if there were none?]

Then the defendant should be told.

[THE CHIEF JUSTICE.—The substance of the letters and the advertisement was to get up a demonstration to teach the Chief Justice a lesson, and the article stated that the Chief Justice would raise a storm which he would not find it easy to quell. Those were the letters which

22. (1839) 9 Ad & Ell 1=2 Starkie 204.

formed the contempt. Do you wish an adjournment, Mr. Paul, to consider the charges as now explained?]

No, my Lord, but I submit that my client is prejudiced in not knowing the precise charge brought against him, and which he is expected to meet.

Mr. *Paul* went on to state that the course adopted by the Court had prejudiced his client, and was a course which ought not to be resorted to except where it was imperatively necessary. There was a definite punishment provided for defamation in the Penal Code, and a definite way of trial provided for such cases. It was never intended that offences of this description should be dealt with in a summary manner. Mr. *Paul* then referred to the jurisdiction of the Sudder Court in cases of contempt, the punishment for which could not exceed a fine of Rs. 200, or a month's imprisonment where the fine was not paid. In America, it was stated in Kent's Commentaries, Vol. I, page 321, that the Courts could only summarily punish in those cases where the contempt was committed in the face of the Court, or was such as to obstruct the course of justice. This Court was precluded from punishing except by the Penal Code, and the Penal Code can only punish such offence as come under the sections in that Code. The question was whether what was printed as *bona fide* criticism might be a better kind of opinion but not necessarily more *bona fide* than the mere expression of opinion. The well known case of a Judge in the Colonies who was told to give his opinions but not his reasons for those opinions is a matter of history.

On the 13th April a warrant was issued, and Mr. Tayler appeared in answer and admitted the authorship of those letters. In commenting on *Mr. Tayler's case* (2) his audacity and his carelessness were certainly indefensible. The Chief Justice therefore brought a strong artillery of argument to bear against him. On the other hand Mr. Tayler had some reasons for complaining, although not sufficient to justify him, but still he felt mortified against Mr. Justice Mitter. Yet this did not warrant his careless way and the style in which those letters were written Mr. Justice Mitter might have retracted what he had said as to Mr. Tayler being directly guilty of fraud, a statement which there was not a tittle of evidence to prove so far as it meant personal fraud Therefore, Mr. Tayler had a grievance which might have been some extenuation of his conduct and have mitigated his offence and on those grounds his sentence might have been less severe; yet not one observation, not one remark appeared in the long and carefully considered judgment pronounced upon him to show that there was a single point in his favour. It did not say that he was galled or that he submitted at once—which he did without complaining of his arrest. His submission and his apology might have been sufficient and could have been accepted. In the outside world his wrong was supposed to be true. Yet the Chief Justice went to work with all the zeal and labour for which his judgments are conspicuous to turn every point against Mr. Tayler. It would be no compliment were one to say that the Chief Justice had been careful in preparing his judgment. Yet that judgment shows in no way that Mr. Tayler was suffering under irritation which might have some cause for his conduct. Mr. *Paul* then proceeded to refer to the third occasion when Mr. Tayler was brought up, when he presented a petition and made a further apology.

[MACPHERSON, J.—The fact of his making an apology did not entitle him to his discharge as a matter of right.]

Mr. *Paul* said that it was a matter of expectation that if he did apologize he would not be subjected to any further punishment. In the case *Piffard and Captain Francis, In re.* (23) in which Mr. Piffard and Captain Francis were tried for contempt of Court, the Court was satisfied with an apology expressing sorrow for what had occurred in lieu of all punishment.

[MACPHERSON, J.—All I meant is that a man cannot claim immunity from punishment from the fact of having made an apology for his offences.]

THE CHIEF JUSTICE.—Suppose a man were to knock another person down in the street, and on being arrested, make an apology. Would he be entitled to consider that sufficient amends?]

Mr. *Paul* said that in *Van Sandau's case* (15), which was a very gross one, a simple apology was held to be sufficient, and quoted Sir George Rowe's remarks in

23. (1863) 1 Hyde 79.

that case, wherein he said he would be unwilling to inflict punishment if he could find a single expression of regret. Mr *Paul* said that he considered Mr. Tayler's first apology to have been a sufficient one, and that when he expressed his sorrow, that implied all retractations and he did not think it was necessary for him to retract everything, and say in so many words that what he had said was false. That apology appeared to him (Mr. *Paul*) to have been a sufficient and ample one and this formed one of the grounds for the writing of the letter of "Bystander," which had been referred to. When it was pointed out to Mr. Tayler that his apology contained no retractation, he made the only retractation he could. Under the circumstances nothing had been said to Mr. Tayler but that his letters were a contempt, and his apology was therefore a general one. He was not told of any particular contempt in any of the letters, and when he begged to be allowed to retract everything which the Court considered to be a contempt, he (Mr. *Paul*) considered that to be quite sufficient. Another fact was that his Lordship in his judgment on Mr. Tayler did not mention one word of his published apology, but after passing his sentence he said something about it. It might very naturally have happened that in a long and elaborate judgment like that, his Lordship might have forgotten to mention it, but outside people had criticized the omission: and it had been mentioned that although the published apology was one which emanated from the suggestion of the Chief Justice, yet that his Lordship had not once mentioned it in his judgment, nor taken it into consideration in mitigation of punishment.

[THE CHIEF JUSTICE said that after the delivery of his judgment he told Mr. Tayler that if he made certain additions to his appology which had been already published, his punishment would be mitigated.]

Mr. *Paul* said that the apology which Mr. Tayler had been required to make was a most abject one, and he was surprised that that gentleman did not consider his reputation to be worth more than a month's imprisonment.]

[THE CHIEF JUSTICE.—I do not consider the apology was an abject one.

Mr. *Paul* said that it appeared to him the apology was a most abject one, as Mr. Tayler stated that what he said was unwarranted and wholly without foundation. He (Mr. *Paul*) would have suffered six months' imprisonment, no matter how much in the wrong he might have been, rather than make such an apology as that. However much sympathy Mr. Tayler might have had at first, he had since altogether lost it by such conduct. He did not blame his Lordship for demanding the apology, as it seemed to have been fixed in his mind that such an apology was necessary. Mr. *Paul* mentioned the fact that Mr. Tayler's final apology was not to be received till a week after the judgment had been pronounced, so that itwas seen that his Lordship had fully made up his mind, no matter what apology was given, to sentence Mr. Tayler to a fine of Rs. 500 and a week's imprisonment. He only referred to this in order to show a reason for the misunderstanding which had arisen. As regards the law of the case of *Wellesley* v. *Duke of Beaufort* (1), that was a case in which upon only an apology being made the order was discharged, which shows that an apology is sufficient sometimes. And further, the Chief Justice expressed no opinion that the affidavit, or rather the apology to the affidavit, was an aggravation of the offence until he delivered his judgment, yet that affidavit was before him.

[THE CHIEF JUSTICE.—I was not advising Mr. Tayler.]

No, my Lord, but you gave the impression that if the affidavit was rectified and the apology published, Mr. Tayler would be discharged.

He then continued.—There was nothing in the character of the Chief Justice to induce the editor to caluminate and attack him. In fact he only said that in case he carried his dictum too far he would raise a storm. There is surely no contempt in that. The only dictum was that the printer and publisher would be proceeded against; naturally the editor took offence at this. This did not refer to anything the *Pioneer* had said. The *Pioneer* contained no dictum. It was the *Friend of India* that contained the dictum which the editor thought was going too far. Since the Court has signified its disapprobation, the newspaper has been silent on the subject and in no way endeavoured to prejudice proceedings.

[MACPHERSON, J.—The article of 26th April states or at least imputes that the Chief Justice acted wrongfully and attacked and turned everything against Mr. Tayler that he possibly could, and then protests against the cruelty (not the severity) of the sentence. There is a vast difference between cruelty and severity. The poetry must be taken as a part of the article.]

Mr. *Paul* said that this was merely an expression of what the public opinion was. Surely an editor is not responsible for an opinion that prevails or for expressing it. The *Friend of India* had done the same thing. He himself thought that Mr. Tayler would have been discharged. In fact from what the Chief Justice had said on Tuesday, he (Mr. *Paul*) did not attend on Saturday although he was watching the case for Mr. Tayler—for in fact he thought that nothing further would be done. Many people thought that the public apology was not fairly treated and therefore they thought the sentence a cruel one. Exception should not be taken at that one word "cruel" here. which merely meant harsh, and nothing more. The editor had never had a wish to impute malice to the Chief Justice, or he would not have paid the tribute he did to the Chief Justice's talents, etc., which he did in the lines directly preceding the word "cruel." Surely the Chief Justice was a little too sensitive. There was not one misstatement, not one hostile criticism even, and could that article be called *mala fide*? It was difficult to convince a Judge who himself had to put what construction he pleased on the sentences he found offensive and to judge of their meaning himself. Did the Chief Justice think that a Judge who thought he had done right should not be told he had delivered a cruel judgment (meaning a harsh judgment) if that judgment had been unnecessarily severe? After all the Chief Justice did go unnecessarily into the past life of Mr. Tayler and the hearers upon that thought the judgment cruel.

[THE CHIEF JUSTICE.—The object of that judgment was to justify the Court and not to attack Mr. Tayler.]

Mr. *Paul* here mentioned the very strong remarks which had been made on Shee, J., and the jury who had tried Toomer when almost every newspaper in England denounced both the verdict and the sentence. He continued: Mr. Tayler had a grievance and in consequence of that he did very unwisely insult Mitter, J. The Chief Justice's high and exalted position prevents him from seeing disappointed suitors, and from witnessing what such men feel. Mr. Tayler knew that he was not in the country when the fraud was committed, so that at the most he could only be accounted guilty of a constructive fraud, not of any moral fraud. Had Mitter, J., said that the fraud was perpetrated by Mr. Tayler's agent all would have been well, but he did not do so. Mr. *Paul* then proceeded to comment upon the judgment, showing that Mr. Tayler really had been aggrieved. The Chief Justice in his judgment in the case of Zuhooroonnissa against Mr. Tayler said that it was unnecessary to consider this question whether there had been any fraud or concealment. To this judgment the Hon'ble Mitter, J. said, "I entirely concur," and when the Chief Justice said that it was unnecessary to enter into the question, Mitter, J. held that it was not necessary to decide, for that was part of the Chief Justice's judgment, and then he went on and found that Mr. Tayler had been guilty of both fraud and concealment. There was no evidence before the Court in that case to justify Mitter, J. in saying that Mr. Tayler had committed fraud. All that could by any means have been said upon the evidence was that a fraud had been constructively committed on behalf of Mr. Tayler, but not by him, because all the transactions with Ahmedoollah were conducted by Enayut Hossein, who was acting as agent for both parties.

The Court then adjourned to the following day.

Mr. *Paul* in resuming his argument the next morning said when the Court rose the day before he was still on the subject of the article of 26th April with reference to that part of it which stated that every possible point had been turned against the accused. He (Mr. *Paul*) had also endeavoured to show that Mr. Tayler had good grounds for complaint against and the decision of Dwarkanath Mitter, J., concluded by showing that although the Chief Justice had declared it to be unnecessary to decide whether there had been any fraud or concealment on the part of

Mr. Tayler, Dwarkanath Mitter, J., after declaring his concurrence in the judgment of the Chief Justice, went further, and expressed what he (Mr. *Paul*) could not help thinking was a dissent from the judgment of the Chief Justice, that it was unnecessary to decide that fraud had been committed. Mitter, J's judgment was as follows:

"I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover both upon the ground that she has paid a debt due from Mr. Tayler to Ranee Usmedh Koer when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise."

As to the duty of the Judges, he (Mr. *Paul*) must refer to the Bench as it must know better what its duties were than any of the outside world, but it struck him that it behoved Judges to be particularly careful in the expressions used in their judgments, that the ordinary meaning was to be given to the words used. If a Junior Judge thought that the judgment of his senior required to be made stronger by further remarks, it was his duty to make them and to give his reason for doing so. But in this case no reason was given as to why, when the Chief Justice had declared it was unnecessary to go into the question of whether there had been fraud or not, the Junior Judge should have considered it to be his imperative duty to come to a finding directly opposite, without assigning any reason. He (Mr. *Paul*) would assume, as indeed the judgment showed, that the bargain for the sale of the estate was altogether carried on between Enayut Hossein and Ahmedoollah and that Enayut Hossein acted in the matter as the agent of both parties. Enayut Hossein stated that Ahmedoollah knew of the attachment, and that he had told him of it. Mr. Tayler was at a distance at the time and took no part in the proceedings, and how therefore was he to know that Enayut Hossein, who was acting as agent for both parties, had kept concealed a fact, which was in his knowledge, from his other principal? Dwarkanath Mitter, J., did not say in his judgment that the agent of Mr. Tayler had committed fraud, and that Mr. Tayler was constructively responsible for the acts of his agent, but he said that Mr. Tayler had committed a fraud himself, and he (Mr. *Paul*) contended that that conclusion was arrived at without there being a tittle of evidence to support it. Mr. Tayler never took any part in the contract with Ahmedoollah from beginning to end, but left it all to his agent, and an amount of moral obloquy had been thrown upon him which there was not a tittle of evidence to support. The Chief Justice in his judgment had expressed his disbelief in the evidence of Enayut Hossein and his belief in that of Ahmedoollah, not from the fact that the evidence of one was preferable to the other by reason of character, but from a chain of circumstances. His Lordship had shown in his judgment that if Enayut Hossein was to be believed, there would have been something done which had not been done. He would ask his Lordship to bear in mind these facts. The judgment on the original case was tantamount --perhaps not to a direct charge of perjury against Enayut Hossein, but sufficiently so for Mr. Tayler to hold and express the opinion that the Court had considered he had been guilty of perjury. He would now refer to Mr. Tayler's petition for a review of judgment. In that petition Mr. Tayler said as follows:

"All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false."

This was a statement of fact and was nothing more than what the Court had already decided in its judgment. Mr. Tayler's petition went on

"and was made and given without the approval concurrence or knowledge of your petitioner, and in direct opposition to the instructions given by your petitioner to Enayut Hossein before his departure from India."

Mr. Tayler said that the fabric of the defence set up by Enayut Hossein was directly contrary to the instructions he gave him before leaving for India. Mr. Tayler never disputed nor wished to dispute his liability for the money and when the action was brought aguinst him, the defence set up by his agent was directly contrary to the written instructions which he had left behind him. Mr. Tayler, as far as he was aggrieved, was satisfied by the statement that the Chief Justice had not made any imputation of moral fraud against him, and he accordingly bowed to the judgment. The Court allowed the proceedings for review of judgment to go

on and Mr. Tayler fully believed that some justice would be done him in that way. He had put in a petition which he had verified by affidavit, praying that the words used in the judgment of the Hon'ble Mr. Justice Dwarkanath Mitter might be in some way retracted or modified. This might have been done without detracting from the gravity of the judgment in any way. The course of justice did not require that the words should be repeated and though the Court was right when it said that it could not go on to a review of judgment in a case where the party applying to the Court did not express himself aggrieved at the decree the Court might have done something for the reputation of Mr. Tayler by retracting or modifying the remarks which had been made against him. That might be done by stating that the fraud imputed to Mr. Tayler was fraud committed by Mr. Tayler's agent in his absence. In the judgment of Messrs. Norman and Loch, in the Ticaree case, words which were used in the judgment were afterwards modified, and the same might very well have been done in this case. Mr. Tayler could not be considered to be an active party to the perpetration of the fraud as he was absent in England at the time and when the negotiations were going on with Ahmedoollah, Mr. Tayler was only constructively negotiating with him through his agent Enayut Hossein and not actively. Mr. *Paul* then submitted that in order to correct what was found to be an error in a judgment it was not necessary that there should be a reivew of judgment, and the Court, in the case of an error in a judgment which was admitted in itself to be a correct judgment, had power to rectify the error, by retracting or modifying the expression to which exception had been taken. If a date in judgment was found to be wrong or the names of parties were declared wrongly or a genealogical tree was not properly placed in the judgment, it would not be necessary to apply for a review of judgment in order to correct them. His Lordship the Chief Justice in refusing the application for a review of judgment said:

"It appears to me that there is no ground for reviewing the judgment. I have read very carefully the judgment which I delivered in this case, and see nothing in it which I can retract. I did remark upon the judgment of the Subordinate Judge, but abstained from expressing any opinion as to whether there was any fraudulent concealment on the part of Mr. Tayler."

In the course of Mitter, J's. judgment on the same application, he said:

"I wish to add however that I should not be justified in withdrawing the remarks in question upon an *ex parte* proceeding of this kind. Enayut Hossein is not before the Court, and so far as the plaintiff is concerned she is in no way interested in opposing this application, inasmuch as the petitioner is not seeking for any interference with the decree which had been passed in her favour."

If this were to be the case, it would be impossible for a person to obtain redress for injuries of this kind, if the other person were out of the jurisdiction of the Court or transported beyond the seas. Why was Mitter, J., so careful of the reputation of Enayut Hossein? If these proceedings were *ex parte* there were no grounds to affect Enayut Hossein's character; why should he reject the petition? Why should the Court express no opinion on evidence before it? Nobody asked Mitter, J., to hold Enayut Hossein guilty of the serious offence. How could a prosecution have benefited Tayler when the Chief Justice had already stigmatised Enayut Hossain as guilty of a falsehood, and when Enayut Hossein was at that very time undergoing a sentence of imprisonment for frauds perpetrated against Mr. Tayler? Why should he be put to these great expenses? Surely it would have been sufficient for Mitter, J., to have said that during Mr. Tayler's absence this fraud was committed by his agent. It does not matter whether Mitter, J., believed Kelly or not; it is sufficient that Kelly took the responsibility himself; he admitted that Mr. Tayler had no hand in the fraud; this was evidence *prima facie*. Many European gentlemen had to rely on their agents for native contracts. It was very good advice of Mitter, J's. that Mr. Kelly should have known what was in the statement, but that advice was impracticable. Mr. Tayler was deeply aggrieved. The reasons of Mitter, J., were not satisfactory; if it was intended to charge Mr. Tayler with personal fraud, there was not a tittle of evidence to support the accusation. Had he put his grievance in a short, clear, logical way he might have cleared his character; but he went into the hyperboles censured by the Chief Justice. Mr. Tayler was more sensitive on account of the Chief Justice's observations. The Chief Justice had delivered the judgment from an attacking point of view. He felt

that a colleague had been attacked. Here is a proof of the evil of the prosecutor being the Judge. The Chief Justice considered Mr. Tayler's insolence and the insult offered to Mitter, J., but he forgot Mr. Tayler's grievance. Mr. Tayler, being a man of some historic reputation, perhaps an unfortunate man, but a man of some accomplishments, though from the time he took to being vakil, he acted very unfortunately, felt deeply the attack on his character, having descended from his high position; there was therefore some extenuation for his offence, not perhaps sufficient to stop the Chief Justice's judgment, but sufficient to mitigate the blame and lessen his degradation.

Mr. *Paul* then turned to the subject of the opinion which had been formed as to the severity of his Lordship's sentence, and went on to say that he submitted, with all due respect for Mitter, J., and to the Court, that in his view the reasons which had been given for the view which had been expressed of Mr. Tayler's conduct by Mitter, J., were not correct, and that gentleman had every right and reason to complain of having been adjudged guilty of fraud without any evidence to support that view, and he also had a right to complain that when he presented his petition for a review of judgment, the Judge refused to retract or modify one single word which he had used. All these circumstances might be urged in extenuation of the conduct of Mr. Tayler. Mr. Tayler had committed a very foolish act, doubtless, in appealing to the papers, but the Court must look to the provocation he had received. There was no doubt that Mr. Tayler had a grievance, and if he had proceeded to vindicate his character in a proper way, it was not impossible to say that public sympathy might not have gone with him.

With regard to the second point of the same subject, the allegation that the Chief Justice had turned every point that could be turned against Mr. Tayler with great severity and bitterness, Mr. *Pual* proceeded to justify these remarks. With regard to the judgment itself if the Chief Justice thinks that the two cases of the Ranee of Tekaree and of Zuhooroonissa had such connection as to make it proper to introduce the point into his judgment respecting the maid, there is some reason, for "Curiosity" in his letter deeming them to be connected cases.

As to the observation made by your Lordship on the statement in the 1st letter and the petition of review and Mr. Tayler's oral explanation, I cannot help thinking your Lordship has misapprehended Mr. Tayler's meaning. I believe Mr. Tayler meant to say that if Mitter, J. had based his judgment on the hypothetical case of fraud he would have had nothing to say, and not that if the Chief Justice had agreed with Mitter, J. then he would have had no ground of complaint. The plea as to whether there was a fraud is one thing, that Mr. Tayler was the author of it, is quite another. Mr. Tayler did not attack at all the judgment of Norman and Loch, JJ. I think the attribution of degraded cowardice conveyed by your Lordship was not founded on the facts of the case. Tayler had no ground of complaint against your Lordship, and that was the reason he did not attack you. It was not because your position rendered you unassailable.

[MACPHERSON, J.—Why are you arguing on Mr. Tayler's case? Is it with the view of showing that the article in the *Englishman* of the 26th April is correct in facts.]

Yes, my Lord.

[MACPHERSON, J.—That the judgment of the Chief Justice was a vindictive judgment.]

No, not with that view, but that it was an unnecessarily severe judgment.

[MACPHERSON, J.—The imputation in the article is that the sentence was a vindictive one. The wording of the paragraph is not that the sentence was severe, but that it was cruel.]

[THE CHIEF JUSTICE said that the word "cruel" imputed a wish to cause pain.]

That, I submit, is not the meaning which the word is intended to convey.

[THE CHIEF JUSTICE.—If the remark was merely that the judgment was a severe one, it would be no contempt. That would only be fair criticism.]

Mr. *Paul* said that he was placed in a very peculiar position. There was not the slighest intention to cast an imputation on his Lordship, but the whole case had turned on a misunderstanding which had unfortunately arisen. Where the word "cruel" was used, it only meant to express harshness and severity and nothing more.

[THE CHIEF JUSTICE.—The article says that I knew of Mr. Tayler's bad state of health. That I did not know; all that I did know was that he was suffering from gout, and as I had shortly before that seen him in society and knew that he was able to make a journey to Patna, I did not know he was suffering from anything else than a simple attack of gout. I knew nothing of what was stated in the medical certificate until after the judgment had been delivered.]

Your Lordship comes to the conclusion that this article is intended to charge you with cruelty.

[THE CHIEF JUSTICE.—If the word only means severe I do not complain.]

Mr. *Paul* said that the word "cruel" in the articles must be taken in connection with the words which followed it. In one part of the article the sentence is called a cruel one, in the next paragraph the words "the harshness of the sentence" occur, and a little lower down there are the words "cruel severity." Captain Fenwick never intended that the word "cruel" should be used in the bad sense which had been imputed to the words and he said so now publicly through him (Mr. *Paul*). He hoped the Court would not construe the word "cruel" in that bad sense.

[MACPHERSON, J.—That is the ordinary meaning of the word.]

[THE CHIEF JUSTICE.—The meaning of the word cruel is a pleasure to inflict pain.]

How could it be imputed that your Lordship would take pleasure in inflicting punishment.?

[MACPHERSON, J.—The question is whether that was not imputed.]

I submit it was not. All that it was meant to express was that the sentence was a severe one—a very severe one.

[MACPHERSON, J.—There could be no objection to having it said that the sentence passed was a very severe one.]

[THE CHIEF JUSTICE.—If it is said that the word was not intended to be used in any bad sense, I am willing to accept that statement.]

I now state on behalf of Captain Fenwick that the word was not intended to be so construed.

[THE CHIEF JUSTICE.—I am ready to hear the rest of your argument, and will accept Captain Fenwick's statement. If the charge had been only that my sentence was a severe one, none of these proceedings would have been taken.]

Your Lordship's mind was so imbued with indignation that the other matters did not strike you. If it were not the intention of Captain Fenwick to say that you were guilty of deliberate cruelty, you will be satisfied then ? I think I can prove that the use of the word all through the articles would be inconsistent with such an intention. He does not call you cruel, which might have the sense imputed, but calls the sentence cruel when the word could only mean, at the most, extremely harsh and severe.

To go on with Mr. Tayler's case. No charge was made, merely an inference. I don't think the charge is fair that he attempted to put aside former judgments, because it does not arise out of the case, and that after Messrs. Norman and Loch had acquitted him; but to add a sting you urge that the affidavit was irregularly taken. Surely that did not fairly arise. That was very severe and should not have been adverted to. I hope I do not give offence, but I must express my opinion.

[THE CHIEF JUSTICE.—I do not look upon anything you say as an offence. I give you full liberty and I hope you will not restrict yourself from the fear of offending.]

Mr. *Paul* then resumed and again ran over the arguments as to the Chief Justice's judgment having been very severe. In that judgment Mr. Tayler was identified with all the acts of Enayut Hossein: he was actively guilty of fraud and taunted with having tried a new way to pay old debts, though he was absent from the country at the time and denied all knowledge of the matter. He said that no one had ever yet come into Court without one scrap of any thing, without one scintilla of extenuation in his favour. Yet none appeared in the judgment, and on those grounds it was very severe. The Chief Justice had no right to go back into Mr. Tayler's previous history which was not in this case. That was another reason why it was severe. The Chief Justice knew Mr. Tayler was suffering from gout, which at his advanced age was very virulent, and that again made the judgment most severe or cruel in its least offensive sense. That word must be taken with the subsequent context, which shows what the *animus* was: "We do

not defend what Mr. Tayler wrote, but we do protest," etc. If the editor did not defend Mr Tayler he could not mean that the judgment was cruel in its worst sense.

[THE CHIEF JUSTICE.—If he meant that the object of the Judge was to give pain and not to administer justice, then I understand the word cruel.]

No, my Lord, Captain Fenwick imputed no facts to show there were private feelings.

[THE CHIEF JUSTICE.—What does "Now you rave or must intend revenge" mean ?]

[MACPHERSON, J.—This would appear to be vindictive.]

Inasmuch as the article professes to be *bona fide* the word "cruel" cannot bear that character.

[THE CHIEF JUSTICE.—Then why was the quotation altered in one instance to suit Mr. Tayler's case and not in the word "revenge."]

You see, my Lords, were this case before a Jury then we could see how ordinary minds would construe the word. As to me I do not know what it meant? I would ask how many men would have known what it meant. I will, however, submit that no facts are mentioned from which malice could be imputed. When flattering eulogiums precede, why should such imputations of malice be made? They are wholly inconsistent with such an imputation.

Mr. *Paul* then read the following paragraph from the Chief Justice's judgment:

"I am an unflinching advocate of the liberty of the press. I believe that its freedom is one of the main bulwarks of the rights of the people. I claim no exemption as regards my public acts from the most rigid scrutiny and the most unsparing criticism. All I claim is that there shall be no misrepresentation and no wilful-or unfair concealment of facts; and that those who deny infallibility, to the Judges shall not claim infallibility for themselves. I have had no cause to complain of the public press since I have been in this country. Speaking generally, I believe it to be fair, independent and impartial. There has not, I believe, been a single criminal prosecution against a newspaper since I have had the honour to hold the office of Chief Justice, and there have been only one or two private actions for libel. The press in this country addresses itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves. The press is fair, it is not scurrilous; the public are not captious; and public men do not object to have their public acts freely discussed and fairly criticised. Our Courts therefore are generally free from complaints against the press, either civil or criminal, on the ground of defamation,"

He continued: Captain Fenwick had not sinned in any way against 'that statement. No false facts had been stated in the article in the newspaper, and the only thing to be regretted was the use of an unfortunate word in it, to which a meaning had been given which it was never intended that word should convey and which it did not and could not properly convey. It was a very gratifying circumstance that, throughout all these proceedings, his Lordship's general opinion of the press was favourable and also, as would be seen from this very article, the general opinion of the press with regard to his Lordship was also favourable. When the press, as his Lordship said, "addressed itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves," it could not be said that his Lordship's reputation would suffer one iota from anything it might contain. He would mention that, since Captain Fenwick had assumed charge of the *Englishman*, a manifest change for the better had been observed in the conduct of the paper. And the scurrility with which some people had charged it had altogether disappeared. It was unfortunate that Mr. Tayler's wrongs should have been ventilated through the newspaper. Mr. *Paul* read other portions of the article of the 26th, and contended that there was nothing which could be objected to. He submitted that if Captain Fenwick was punished for contempt, that would not alter the opinion of the public as to the sentence on Mr. Tayler but would only serve to cause Captain Fenwick to be considered a martyr in a cause of public benefit.

[THE CHIEF JUSTICE.—My object is not punishment but to vindicate the action taken by the Court. In showing these articles to be a contempt of Court, I do not mean that there is any moral delinquency on the part of Captain Fenwick, as I thought there was in Mr. Tayler's case.]

Mr. *Kennedy*.—Under these circumstances, I dont think we should be justified in further taking up the time of the Court.

THE CHIEF JUSTICE.—This is not an attack upon the liberty of the press. All I want to show is that, if anonymous letters are sent to the press containing false statements, the press is responsible

for them, if the name of the author is not given up.

Mr. *Kennedy*. — Your Lordship has laid that it is not your intention to punish Captain Fenwick.

[THE CHIEF JUSTICE.—No, not after what Mr. *Paul* has said. All I want is to explain my reasons for the course which has been adopted.]

Mr. *Paul*.—With regard to the word, "ruse" in the letter of 'Bystander"—

[THE CHIEF JUSTICE.— I don't think Captain Fenwick was the autheor of that anonymous letter.]

Mr. *Paul*.—No, my Lord, he was not.

[THE CHIEF JUSTICE—He has however taken the responsibility upon himself, but the letter is written in a style which I do not think would come from Captain Fenwick.]

Captain Fenwick very properly submitted to the Court when the Court first expressed its opinion that receiving subcriptions was a contempt, by declining to receive any more, and he has now very properly explained that the language which was supposed to cast imputations on the motives of the Chief Justice was not so intended. All I mean to contend is that false statements published in newspapers are not fair criticisms. I have no intention of interfering with the right of appeal to the press, but no one has a right of appeal to the press by bringing false accusations founded on wilful misstatements.]

Mr. Kennedy.—As your Lordship had expressed your intention not to punish, I have no right to take up the time of the Court any longer.

[THE CHIEF JUSTICE.—I will hear you on the point as to whether the articles are contempts. If I had waited to proceed by indictment before proceedings were taken, all the mischief, which I wished to prevent, would have been done and in Mr. Tayler's case, he would have gone to England if instant and summary measures had not been taken, and would have left the printer and publisher of the paper to be alone responsible.]

Mr. *Paul* asked whether their Lordships held that in any case it would not be right to open a subscription for the purpose of obtaining a demonstration of public opinion.

[MACPHERSON, J.—That depends very much on the way in which it is done. It is just as easy to write pointedly without being defamatory. If, however, you wish to hear the decision of the Court you had better resume your argument.]

[THE CHIEF JUSTICE.—And let everything which has been said be withdrawn.]

Mr. *Paul*.—As I understand, any further argument on the matter would be of no use. If the Court is satisfied that no imputations were intended, I do not see the good of any further argument.

Mr. *Kennedy*.—I don't understand the Court to say that in every case a demonstration, got up in order to obtain an expression of public opinion, would be a contempt.

[THE CHIEF JUSTICE.—No.]

Mr. *Kennedy*.—Suppose in a case of an encroachment on the liberty of a subject by a Judge, it could not be said that it would be unjustifiable, for those who thought their liberties had been encroached upon, to come forward and give a public expression of their opinion or to support it by subscription.

[THE CHIEF JUSTICE.—No; but I hold this to be a contempt as it contained a threat.]

Mr. *Paul* said there was nothing to be gained by going on any further. He begged to thank the Court, on behalf of Mr. Kennedy and himself for the patient hearing that had been given.

[THE CHIEF JUSTICE. — The Court would have been prepared to decide that these articles are a contempt, but under all the circumstances, and as all imputations of motives have been disclaimed, and Captain Fenwick having submitted to the Court when the Rule was issued, the Rule will not be carried any further, but will be discharged.]

[MACPHERSON, J.—I also, as far as the case has gone, was prepared to decide that the Court has power to proceed in this matter by way of contempt, and also that there have been two contempts of Court. As regards the power of the Court to proceed by way of contempt, even when the contempt is not committed in Court or during the pendency of a suit, that point was fully settled in the case of *Mr. Piffard and Captain Francis* (23) which was tried before a Bench of eleven Judges. In that case Captain Francis, who was a stranger to the Court, was brought up for contempt which consisted in delivering or attempting to deliver at a Judge's house a message relating to what had

ccurred in Court between a Judge and Mr. Piffard. In that case Mr. Bell argued that the Court had no power to deal with the matter which took place out of Court, but out of the eleven Judges sitting, nine held that to proceed by way of contempt was a proper way of dealing with the case. A decision of such a number of Judges quite settles the question as far as a Division Bench of two Judges is concerned. Mr. Piffard's case was quite different, as he was an advocate of the Court.

[THE CHIEF JUSTICE.—I may say that in my opinion, Captain Fenwick has adopted a very honourable and proper course in this matter by avowing himself to be responsible for the articles which have appeared, and thus taking the responsibility off the shoulders of the printer and publisher who had nothing to do with it. It would have given me much pain if I had been obliged to proceed against the printer and publisher. I also think that Captain Fenwick has adopted a very proper course in having, through Mr. Paul, withdrawn all imputations of improper motives on the part of the Chief Justice, and in having explained that the word "cruelty" was not intended in any bad sense, but merely as meaning severity. Captain Fenwick not having any such intention, although the word was susceptible of bearing such a meaning, has done himself honour by expressing that he had no such intention. I repeat that the only object I had in taking summary measures against Mr. Tayler, was that he was about to leave for England, and if he had been allowed to go away, the printer and publisher of the paper would have been left responsible for his letters.

I have already stated that I am an unflinching advocate for the liberty of the Press, and I repeat what I said before, that I do not claim for myself any immunity from unsparing criticism for any of my public acts, but all I claim is that there shall be no wilful misrepresentation or concealment of facts which the person criticising knows to be altogether unfounded. It appears to me that the public Press as well as the Judges of the Court are all instruments for the public good, and, in my opinion, the more public men are submitted to public criticism the better for the public, provided that the criticism contains no misrepresentations of facts or undue concealment. With this explanation, I order the Rule to be discharged.]

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 782

FLETCHER AND RICHARDSON, JJ.

Karimunnessa Chowdhurani—Defendant—Appellant.

v.

Ekiwa—Plaintiff—Respondent.

Appeals Nos. 24 and 63 of 1915, Decided on 5th January 1917 from appellate decrees of Dist. Judge, Noakhali, D - 4th December 1914.

(a) Mahomedan law — Wakf—Validity—Test is whether dominating purpose and intention of grantor is to provide for religious and charitable objects.

The question whether a wakf is valid or not must depend on the circumstances existing at the date of the execution of the deed. The true test is whether, having regard to all the circumstances of the case, the dominating purpose and intention of the grantor was to provide for charitable and religious objects. 19 *I. C.* 896, *Ref.* [P 783 C 2]

(b) Mahomedan law—Wakf—Partial dedication to religious and charitable objects—Main object of settlor to benefit successors—Wakf held not valid—Religious and charitable trust held to be valid charge on property.

Where, under the terms of a wakf, a portion of the property was to go for religious and charitable objects, the main object of the settlor being to benefit his daughter and her successors:

Held: that the wakf was not valid as such, but the religious and charitable trusts constituted by it would be a valid charge on the property: 17 *Cal.* 498, (*P. C.*) & 4 *C. L. J.* 442, *Ref.* [P 784 C 1]

(c) Interest—Right to—Claim for annuity under instrument of wakf.

A person claiming an annuity under the terms of a document in the nature of a wakf is not entitled to interest. [P 784 C 1]

Nuruddin Ahmed—for Appellants.

Fazlul Huq—for Respondents.

Fletcher, J.—These two appeals are preferred against a decision of the learned District Judge of Noakhali. The decision appealed against affirmed two other decisions, one of them being pronounced by the Subordinate Judge of Noakhali and the other being pronounced by the Munsif at Sudharam. The two cases in substance involve only one question and the rights of the parties must be governed according to the view that we take of a particular document called a wakf. The wakf in question is a document executed in the year 1291 by a Mahomedan lady named Srimati Budrunnessa Chowdhurani who was the daughter of Mahomed Afzul Chowdhuri and the wife of Sri Dowlut Gazi Chawdhuri. The deed after

the appropriate recitals proceeds to state that the executant is in possession of the properties mentioned in the document. Then it states that she owes a particular debt of Rs. 310 but otherwise she is not indebted to any body. Then the document runs in these terms:

"I have thought it proper that, in my lifetime, I should according to my Mahomedan religion, settle the property mentioned in the schedule hereinafter given according to the scheme herein laid down with the object of my future good as well as with the object of providing and not disappointing my successor or successors or other person or persons. To attain this object, I could not do any other act but make the wakf. Accordingly I have endowed and made for ever a wakf of the property mentioned in the schedule given below, names and details with sudder jama of which are also set forth. (2) The income of the properties mentioned in Sch. 1 is reserved for the repairs to my dwelling house, repairs to the mosque in front of the dwelling house of my husband in Perganah Melorkul as also for repairs to the tank, as well as it is reserved for meeting the expenses of lighting, paying the wages of khatib, the expenses of Durga Bati of Sha Neamah, the expenses of travellers and guests, for khateni and maulood shariff and for charitable purposes. (3) The income from the property mentioned in Sch. 2 is to be applied to providing breakfast during Ramzan and meeting the expenses of the two eads in the sum of Rs. 25 per annum making repairs to my dwelling house and the four enclosures in the sum of Rs. 100 per annum, paying to my daughter Srimati Karimunnessa Rs. 25 per month, to Ghani Mian, a member of my family, that is to say, the son born to my aforesaid husband from the womb of his khadema Rs. 8 per month, to Ahmed Mian Rs. 8 per month and to Yakina Banoo, the daughter born to my husband of the womb of his another khadema Rs. 10 and Srimati Hasina Banoo Rs. 4 per month."

It is not necessary to go through the rest of the provisions of the deed in detail. The muttawaliship was kept in the family. Cl. (5) of the document contains a very significant provision, namely, that the husband of the executant with the consent of their daughter might make a will, though it is not clear that the will which he might make was to override all trusts or the other conditions of the muttawaliship. But the other clauses in the document show quite clearly that the intention was that the family house and the tank should be kept in repairs and that those should be enjoyed by the daughter and her successors and also that the income of the property and any portions that might be added thereto should go to the only child of the founder Karimunnessa and her successors. It seems to me quite clear on these terms that what the settlor had in view was that, although a certain portion of the property was to go for objects religious and charitable, the main object was the benefit of the daughter and her successors. The lady died and one of these suits was brought by Srimati Ekina Banoo who was the illegitimate daughter of her husband to recover the arrears of the annuity or stipend as it was called, which was given to her by the deed. The first question is whether, having regard to the Privy Council decisions prior to the recent Act, this deed was a valid deed of endowment as a wakf. The Privy Council decisions laid down generally that the test as to whether a deed was a valid deed of waqf was whether the property in substance had been dedicated to religious and charitable purposes.

The case in *Bazlul Ghani Mia* v. *Adak Patari* (1) is an illustration where that rule was applied but each case must depend on the circumstances existing at the date of the execution of the deed. The true test is whether, having regard to all the circumstances of the case the dominating purpose and intention of the grantor was to provide for the charities. Applying that test to the present case, I am of opinion that was not the purpose and intention of the grantor.

The decisions of this Court however show that, even if the document may not be wholly good but there are religious and charitable trusts constituted by the document, these trusts may be declared to form a valid charge on the property. That is, I think, the view that we can take with regard to the religious and charitable trusts as set out in this particular document. This view relating to the charge was recognized not only in the case of *Md. Ahsanulla Chowdhry* v. *Amarchand Kundu* (2) but also in the case of *Alamgir Khan* v. *Kamrunnessa Khanum* (3). Now, what are the trusts in this case? The trust for keeping the mosque in repairs is, of course, a valid religious and charitable trust. No Muhammadan would argue otherwise. The question in dispute in this case is with reference to the annuity to Ekina Banoo who is an illegitimate daughter of the husband of the founder. The learned Judge has found that she was destitute

1. (1913) 19 I C 896.
2. (1890) 17 Cal 498=17 I A 28 (P C).
3. (1906) 4 C L J 442.

and unprovided for by her father and that without the small annuity of Rs. 10 per month, she would have nothing to live on. In that view, I think the annuity in her favour and the other illegitimate children can be supported as a charitable gift. I think that we ought to affirm the decision appealed from as regards the arrears of the annuity due to Ekina Banoo. It is said that some observations have been made by the learned Judge with reference to these annuities having been satisfied by some other transactions the nature of which apparently the learned Judge of the lower appellate Court was not aware of, nor are we. How therefore we can say that Ekina Banoo's annuity has been satisfied by some unknown other consideration, I do not know. That disposes of the suit brought by Ekina Banoo excepting that there is a cross-objection preferred by her claiming interest.

The question of interest is a matter in the discretion of the Court and the Judges in the Courts below obviously were entitled to allow or refuse interest. What was the view of the learned Judges in refusing interest we do not know. It seems that they came to the conclusion that something had been given in lieu of interest. I do not think that in a case that arises out of a document of the character of a wakf, we ought to award interest in favour of the person claiming under the terms of the document. The other appeal arises out of a suit brought by one Budral Haidar Chowdhuri and others to recover possession of the lands mentioned in the deed of wakfnama. The Judge of the lower appellate Court has dismissed that suit holding that the wakf was good. In the view, we have taken, the wakf as regards the interest other than that validly dedicated was not a valid dedication by the founder. In that view, the plaintiffs are entitled to recover possession of those lands, although, of course, they are bound to satisfy and keep down the charges mentioned in the wakfnama which we have held to be valid in so far as they affect the lands which the plaintiffs are entitled to recover in this suit. Only one other question remains to be dealt with and that is the question of costs. Both parties having succeeded in one portion, it will be convenient if we make no order as to costs in either appeal.

Richardson, J.—I agree in the orders proposed.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 784

MOOKERJEE AND BEACHCROFT, JJ.

Birendra Kishore Manikya Bahadur—Plaintiff—Appellant.

v.

Fuljan Bibi and *others*—Defendants—Respondents.

Appeal No. 585 of 1912, Decided on 12th February 1917, from appellate decree of Dist. Judge, Tipperah, D/- 13th December 1911.

(a) Ben. Ten. Act (1885), S 105—Variation of tenancy cannot be obtained by simple persistency by party for long time that one of the terms is otherwise than what it really is.

While a contract of tenancy is in force, neither party can obtain a variation thereof by simply persisting long enough in his assertion that one of the terms is otherwise than what it really is: 27 *Cal* 156 (*P C*) and 25 *Mad* 507, *Rel. on*; 30 *I C* 896 and 31 *IC* 391, *Dist.* [P 785 C 1]

(b) Adverse Possession—Suit for assessment—Defendant denying liability for rent on ground of assertion of right to hold land rent free to knowledge of plaintiff for more than 12 years before suit—Defendants plea is unsustainable.

In a suit for the assessment of rent of a holding the defendant denied his liability to pay rent, on the ground that more than 12 years before the institution of the suit he had to the knowledge of the plaintiff asserted his right to hold the land without payment of rent, and that the suit was, therefore, barred by time:

Held: that the defendant's plea could not be sustained. [P 785 C 1]

Dwarka Nath Chakravarty and *Ramesh Chandra Sen*—for Appellant.

Dhirendra Lal Kastagir—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for assessment of rent. The case for the plaintiff is that the lands in dispute are included in a tenancy created on 25th August 1849, and that rent has not hitherto been assessed for these lands, and that the defendant is not entitled to hold the lands without payment of rent. The defence in substance is that under the terms of the contract between the parties, the defendant is entitled to hold these lands without payment of rent, and that the lands were exempted from payment of rent in consideration, that the tenant would bring under cultivation the other lands included in the lease.

In 1895, proceedings were taken under Ch. 10, Ben. Ten. Act, for preparation of a Record of Rights and the tenant then

claimed to be entitled to hold these lands without payment of rent. His contention however was overruled, and an entry was made in the Record of Rights to the effect that the lands were included in the lease, and were not, under the contract, specially exempted from payment of rent. The present suit was instituted by the landlord on 4th October 1909 for assessment of rent. The District Judge has held, in concurrence with the Court of first instance, that the allegation of the defendant that he was entitled to hold these lands without payment of rent for the consideration that he would bring under cultivation the other lands included in the lease had not been established. But, while the primary Court overruled the plea of limitation on the authority of the decisions in *Beni Pershad Koeri* v. *Dudhnath Roy* (1) and *Seshamma Shettati* v. *Chickaya Hegade* (2) the lower appellate Court has dismissed the suit as barred by limitation, inasmuch as more than 12 years before its institution, the tenant had, to the knowledge of his landlord, denied his liability to pay rent in respect of these lands. We are of opinion that this view cannot possibly be supported. The defendant, no doubt, asserted before the Settlement Authorities, that under the terms of the contract between the parties, he was entitled to hold these lands without payment of rent; that case however failed. He now seeks to succeed on the ground that as he has denied his liability to pay rent for more than 12 years, he has thereby secured a variation of the terms of the contract between him and his landlord. Neither authority nor principle has been invoked in support of this position. It is, indeed, a novel proposition that while a contract of tenancy is in force, either party can practically obtain a variation thereof, if he persists long enough in his assertion that one of the terms is otherwise than what it really is. The decisions in *Birendra Kisore* v. *Laksmi* (3) and *Kali Mohan Tripura* v. *Birendra Kisore* (4) lend no support to the contention of the respondent which is clearly negatived by the cases relied upon by the Court of first instance.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and before the lower appellate Court.

V.B./R.K. *Appeal allowed.*

1. (1900) 27 Cal 156=26 I A 216 (P C).
2. (1902) 25 Mad 507.
3. (1915) 30 I C 896.
4. (1915) 31 I C 391.

*A. I. R. 1918 Calcutta 785

TEUNON AND CHAUDHURI. JJ.

F. H. Jolly—Complainant—Petitioner.

v.

St. John William Jolly—Defendant—Opposite Party.

Criminal Revn. No. 158 of 1917, Decided on 28th February 1917.

*** Criminal P C. (1898), S. 488 (9)—Complaint against husband temporarily living in Calcutta—Calcutta Courts have jurisdiction.**

Respondent who lived in Darjeeling came to Calcutta and resided there from 16th to 23rd January. While he was residing in Calcutta an application under S. 488, was made by his wife to the Presidency Magistrate's Court in Calcutta:

Held: that the residence of the husband in Calcutta from 16th to 23rd January, when the application under S. 488 was made, was sufficient to give the Presidency Magistrate's Court in Calcutta jurisdiction, having regard to sub-S. (9), S. 488. [P 786 C 1]

S. Sandell—for Petitioner.

Santosh Kumar Bose — for Opposite Party.

Judgment.—In this case the petitioner before us applied to the Chief Presidency Magistrate under the provisions of S. 488, Criminal P. C. The application was against one St. John William Jolly who, it appears, is her husband. They have not been living together and the lady applies for maintenance. At the hearing of the case a preliminary objection was taken on the ground of jurisdiction. It is stated that the husband has lived in Darjeeling from the year 1913, and that he is still a resident of Darjeeling. But in his own affidavit the opposite party, the husband, admits that he was in fact in Calcutta on business from 29th November till 9th January. The petitioner's first application bears date 9th January. The husband says that he left Calcutta for Darjeeling on that day, and though it is clear that the petition was written on the 9th it is not clear that it was actually presented to the Magistrate before 10th January. But the husband further admits that he had returned to Calcutta on 16th January and has been in Calcutta since or at least throughout the continuance of the proceedings. Now, on 23rd January when the husband was admittedly in Calcutta, the petitioner put in a fresh application to the Presidency Magistrate re-

questing that that petition and her original petition of the 9th should be treated as parts of one and the same petition and that action should be taken on her application as on and from 23rd January. Obviously the evidence of the husband in Calcutta from 16th to 23rd January, when that application was made, is sufficient to give the Court jurisdiction having regard to sub-S. (9), S. 488, Criminal P. C. We, therefore, make the Rule absolute, set aside the order complained of and direct that the case be remitted to the Presidency Magistrate before whom it was to be heard and decided by him on the merits. We desire to add that we trust that after the delay that has already been allowed to occur, the learned Presidency Magistrate on the return of the case to him will proceed to dispose of it with all expedition.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 786

SANDERSON, C. J. AND MOOKERJEE, J.

Nawab Jan and *others*—Plaintiffs—Appellants.

v.

Safiur Rahman and *others* — Defendants—Respondents.

Civil appeal No. 5 of 1916, Decided on 18th January 1917, against decree of Greaves, J., D/- 25th March 1915.

(a) **Mahomedan Law—Gift—Mushaa—Doctrine as to invalidity of gift of Mushaa—Scope of.**

Per *Curiam*—The doctrine relating to the invalidity of gifts of mushaa ought to be confined within the strictest rules. [P 787 C 2]

(b) **Mahomedan Law—Gift—Mushaa—Gift of undivided property capable of partition by father to adult and minor sons, making adult son guardian of minor son, is valid.**

No objection of confusion (mushaa) can arise in the case of a gift of undivided property, which is capable of partition, made by a father in favour of an adult and a minor son by a formal document duly executed and registered in which the donor, intending that his adult son should act in respect of the subject of gift for his minor son, states that the adult son is the guardian of the minor son. [P 787 C 2]

(c) **Mahomedan Law — Guardianship — Father can delegate guardianship of minor children to fit and proper person.**

Under the Mahomedan law it is competent for the father who is the natural guardian of his minor children, to divest himself of the guardianship by delegating it to a fit and proper person. [P 788 C 1]

(d) **Mahomedan Law—Gift — Transfer of possession is necessary.**

Per *Sanderson, C. J.*—Under the Mahomedan law it is necessary for the donee to take possession of the subject of gift in order to make the gift valid, even when the gift is made by a deed duly registered. [P 786 C 2]

(e) **Mahomedan Law—Gift—Mushaa—Gift of undivided property to adult and minor son is valid—Proper form must be used.**

There is nothing to prevent a gift of an undivided property by a father to an adult and a minor son, provided the proper form or device is used for the gift. [P 787 C 1, 2]

(f) **Mahomedan Law—Gift—Heba-bil-ewaz—Burden of proof—Donee has to prove that consideration described in instrument has been paid.**

Per *Mookerjee, J.*—The burden of proof lies on the person in whose favour a heba-bil-ewaz is executed to establish that the consideration was paid as described in the instrument, and the rule that it is for the executant of a document, who denies receipt of the consideration as recited therein, to prove that the recital is incorrect in fact, has no application to a heba-bil-ewaz. [P 788 C 2; P 789 C 1]

(g) **Mahomedan Law—Gift—Gift by father to son—No change of possession is necessary.**

Where a gift is made by a father to his infant son under the Mahomedan law, no change of possession is necessary; the declaration of gift is deemed to change the possession by the father on his own account into possession as guardian on his son's account. [P 790 C 1]

U. N. Sen Gupta and *S. N. Ghose*—for Appellants.

S. C. Mukerjee and *H. D. Basu*—for Respondents.

Sanderson, C. J.—This is an appeal against the judgment of Greaves, J., and on the hearing of the appeal the arguments have been mainly addressed to the question whether the learned Judge's conclusion as to the validity and effect of the two deeds, dated 20th January 1906 and 27th January 1906, are correct. (The latter deed is referred to in the judgment of the learned Judge as being dated 28th January 1906). These documents were executed in the form of heba-bil-ewaz or "gift in exchange" and each deed contained a recital that Abdul Sutter had received two pieces of gold coin by way of consideration from the donees; the learned Judge, however, has found that there was no evidence of any consideration passing at the time of the execution of the deeds, but on the contrary defendant 1 himself had in fact stated in his evidence that nothing was paid at the time of the execution of the deeds by his father. Consequently these deeds must in my judgment, be treated as having been made without consideration and merely as hebas. The deeds being treated as hebas it would be necessary for the donees to take possession of the subjects of the gifts in order to make the gifts valid. The

learned Judge has found that there was, after the deeds were executed, delivery of possession of the properties, to which they refer, to defendant 1 so far as relates to the properties given to him, and also so far as relates to the properties given to Amatunnessa, delivery of possession to her, and he further says that this was proved by the evidence of defendant 1. The evidence on this point is contained at pp. 149 and 150 of the paper-book as follows:

"*Q.* After the deeds were executed and registered, what happened to the properties?

A. The persons to whom they were given came into possession of them.

Q. With regard to the properties given to you, did you do anything after possession was given to you?

A. Yes.

Q. What?

A. I had my name substituted in respect of them in the Municipality as also in the Collectorate, and I also used to get the tenants to sign the counterfoils of receipts for moneys paid by them.

Q. In consequence of your application your name was registered?

A. Yes, I also filed the deed of gift along with my application in the Collectorate.

Q. With regard to the properties given to them do you know what happened to these properties?

A. Those given to Amatunnessa were taken possession of by her."

I think that there is enough to justify the learned Judge's finding, especially in view of the fact that the above-mentioned statements in the evidence of defendant 1 do not seem to have been challenged by cross-examination. It was, however, argued on behalf of the appellants that even if there was possession of the property included in the heba of 20th January 1906, the deed was not valid by reason of the gift being one of undivided property, which was capable of partition, to adult and minor sons. This argument was founded on the objection of "confusion" which was said to apply to such a case, viz., that in the case of the deed of 20th January 1906, the donor being the father, and, therefore, the guardian of his minor son, would take seisin of the minor's share at the time of the gift and thus confusion would be created. This objection, according to the later authorities could be avoided by the adoption of a device which is referred to in the books, viz., that the entire property should be consigned to the adult, and then a gift of it made to both. So that apparently, according to Mahomedan law, there is nothing to prevent a gift of undivided property by a father to an adult and minor son, provided that the proper form or device is used for the gift. Further, it has been laid down by the Judicial Committee of the Privy Council in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1) that the doctrine relating to the invalidity of gifts of musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules.

The principle of the objection already referred to seems to be that when a person makes a gift to an adult and an infant who is in the donor's guardianship, the donor is assumed to take seisin of the minor's share, whereas the gift in favour of the adult requires acceptance, and thus confusion is occasioned. In this case the gift was contained in a formal document, duly executed and registered, in which it was stated that the adult son, Safiur Rahman, was the guardian of Abdul Rahman, the minor son; and I think the intention of the donor was that the adult son should act in respect of these properties for his minor son. Under such circumstances, I do not think that the confusion hereinbefore referred to would be created, inasmuch as the adult son and not the father would take seisin of the minor's share at the time of the gift: in any event, in view of the opinion expressed by the Judicial Committee of the Privy Council I do not propose to extend the doctrine by applying it to the facts of this case. Then it was argued (1) that the father did not in fact appoint the elder son as guardian to take possession, and (2) that he could not divest himself of his guardianship and appoint the elder son as guardian even if he intended so to do. As regards first of these two points, it is true that there is no express provision in the deed authorizing the elder son to take possession as guardian for the minor son. This is not surprising, when one remembers that the deed was intended to be a "heba bil-ewaz," and not a mere "heba," and consequently the donor purported by the deed, in exchange for the consideration there mentioned, to put the two sons in possession. On the other hand, I think it is clear that the father, being advanced in age and not expecting to live much longer, intended to divest himself of all interest in the property and to appoint the elder son guardian of the minor,

1. (1889) 11 All. 460=16 I A 205 (P C).

and to do whatever was necessary in respect of these properties on behalf of the minor son, and, if taking, possession was necessary, that would be included within the authority conferred upon the elder son as guardian.

As regards the second of the above mentioned points, it was urged that the father could not divest himself of the right and duty of guardianship over his minor son, and consequently the appointment of his elder son as guardian being invalid and ineffective, the gift contained in the deed was also invalid. No authority was produced, in answer to our request, for the proposition that by Mahomedan law, a father cannot divest himself of his guardianship of a minor son in a proper case and by appointing a proper person. The father is no doubt the natural guardian of the minor son, but, under the circumstances which existed in the present case, viz, that the father was advanced in years, and did not expect to live long, and desiring to prevent ill-feeling and disputes amongst his children and wives, he wished to make a disposition of his property, I do not think there is any good reason why he should not delegate his guardianship by appointing his elder son the guardian of his minor son, and, in the absence of any authority to the contrary, in my judgment it was competent for him so to do. The considerations above mentioned apply, mutatis mutandis, to the second deed dated 27th January 1906 whereby Abdul Suttar appointed his wife Amatoonnessa Bibi guardian of his infant daughter Khodajunnessa: in the case of this deed also, for the reasons above mentioned, I think it was competent to Abdul Suttar to delegate his guardianship by appointing his wife guardian of his infant daughter and to make a valid gift of the properties therein mentioned in favour of Amatoonnessa and his infant daughter. For these reasons, in my judgment, this appeal should be dismissed with costs.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for declaration of title to property alleged to have been left by one Abdul Suttar, a Sunni Mahomedan who died on 15th July 1907. Abdul Suttar had three wives, Basimunnessa, Amatoonnessa and Dulinjan, by each of whom he had children. The first wife predeceased him and the third wife who survived him died before the institution of this suit. The plaintiffs are the legal representatives of the third wife, and his children by her. They are admittedly entitled to a half-share of whatever forms part of the estate left by Abdul Suttar. The defendants are his children by the first and second wives. The relationship of the parties will appear from the following genealogical table:

ABDUL SUTTAR
died, 15th July 1907.

Bassimmunnessa, first wife,	Amatoonnessa, second wife,	Dulinjan Bibi, third wife,
Safiur Rahman, defendant 1		
	Abdul Rahman, defendant 2.	Khodajunnessa, defendant 3.
		Azizur Rahman, plaintiff 3.
		Lutfur Rahman, plaintiff 4.
		Sakina Bibi, plaintiff 5
		Nawab Jan, plaintiff 1 } Father and mother of Dulinjan Bibi.
		Bhoja Bibi, plaintiff 2 }

The controversy between the parties centres round two documents executed by Abdul Suttar on 20th January 1906 and 27th January 1906 respectively and registered on 6th February 1906. By these instruments Abdul Suttar transferred a considerable portion of his estate, the earlier in favour of the two sons by the first two wives; the latter in favour of the second wife and her daughter. The documents on the face of them purport to be hibas-bil-ewaz, that is, gifts for consideration, namely, two gold mohurs in each case. Greaves, J. has found that, as transpires from the evidence of defendant 1, the son of the first wife, no consideration in reality passed at the time of the execution of the documents or at any subsequent period. Consequently the deeds must be treated as hibas and not heba-bil-ewaz. It is well-settled that the burden of proof lies on the person in whose favour a heba-bil-ewaz is executed to establish that the consideration was paid as described in the instrument, and there is no room for the application of the doctrine recognized by the Judicial Committee and by this Court in the cases of *Chowdry Deby Persad* v. *Chowdry*

Dowlut Singh (2), *Rajah Sahib Perhlad Sein* v. *Baboo Budhoo Singh* (3), *Ali Khan Bahadur* v. *Indar Parshad* (4) and *Fulli Bibi* v. *Bassirudi Midha* (5), that where the executant of a document denies receipt of the consideration recited in a bond, the burden lies upon him to establish that the recital is incorrect in fact [*Khajooroonissa* v. *Rowshan Jehan* (6), *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (7), *Rahimjan Bibi* v. *Imanjan Bibi* (8)]. The true position thus is that to establish the validity of the gifts covered by these two instruments, it is incumbent on the defendants to prove strict compliance with the requisites deemed essential for the validity of a gift under the Mahomadan law. This brings us to the crucial point in the case. The earlier gift, as already stated, was in favour of the two sons by the first two wives of whom one was an infant. The later gift was in favour of the second wife and her infant daughter. Greaves J. has found that possession was as a matter of fact delivered to the adult donee in each instance, and the evidence supports this conclusion; indeed there is no evidence to rebut the testimony of defendant 1 on this point. Now as concisely stated in the Hedaya gifts are rendered valid by tender, acceptance and seisin. The plaintiffs contend with reference to this exposition of the law that the gifts were invalid on two grounds, first that as there was in each instance a gift in favour of an adult and an infant there was mushaa or confusion and secondly, that there was no valid acceptance of the gift on behalf of the infants concerned by persons legally competent to act in that behalf.

As regards the first objection which is sought to be supported by reference to the decision of *Nizamuddin* v. *Zabeda Bibi* (9), adversely commented on by Ameer Ali in his Mahomadan Law, Vol. 1, p. 101, it is sufficient to observe that as pointed out by the Judicial Committee in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1), the doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules. In a later case *Ibrahim Goolam Ariff* v. *Sailoo* (10), the Judicial Committee refused to extend the doctrine to forms of property unknown in archaic times. The principle itself rests on two reasons, namely, first seisin in case of gifts is expressly ordained a complete seisin is impracticable with respect to an indefinite part of divisible things, as it is impossible to make seisin of the thing given with something that is not given, and secondly, if the gift of part of a divisible thing without separation were lawful, it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for, namely, a division which may possibly be injurious to him. These reasons obviously cease to be applicable when possession as a matter of fact has been delivered, and for this reason the Judicial Committee has held that whether a gift of undivided property is valid or not under Mahomadan law, possession given and taken under such gift effectually transfers the property. This view is in harmony with the well-established rule explained by this Court in *Mariam Bibi* v. *S. M. Ibrahim* (11), that the objection on the ground of mushaa when a gift is made to an adult and an infant may be evaded by a simple device described in the Fatawa-i-Alamgiri, namely, that,

> "he (the father) should deliver possession of the house to the adult son and then make a gift of it to both of them: Fatawa i-Alamgiri, Vol. 4, p. 549, see also the Bazazia quoted by Ameer Ali in his Mahomadan law, Vol 1, p. 105, Edn. 4."

The gift in the present case cannot consequently be deemed invalid on the ground of mushaa. As regards the second objection the contention of the appellant is that the father was the guardian of the infant sons, that he was incompetent to divest himself of his obligations as guardian, that he could not appoint his major son in the one instance and his wife in the other to act as guardian for the purpose of acceptance of the gift on behalf of the respective infants, and that consequently there has been no valid acceptance of the gift in law. No authority has been brought to our notice in support of this ingenious argument and I cannot discover any prin-

2. (1841-46) 3 M I A 347=6 W R 55 (P C).
3. (1869) 2 B L R 111=12 M I A 275 (P C).
4. (1896) 23 Cal 950=23 I A 92 (P C).
5. (1870) 4 B L R 54 (F B).
6. (1876-77) 2 Cal 184=3 I A 291 (P C).
7. (1906) 28 All 439=4 Cal 39=9 O C 196=33 I A 68 (P C).
8. (1912) 15 I C 698.
9. (1874) 6 N W P H C R 338.
10. (1908) 35 Cal 1=34 I A 167 (P C).
11. Original Side Appeal No. 55 of 1915.

ciple in Mahomadan jurisprudence wherefrom it derives the semblance of support. It is indisputable that where a gift is made by a father to his infant son, no change of possession is necessary; the principle is that the declaration of gift is deemed to change the possession by the father on his own account into possession as guardian on his son's account, and the law is the same in every other case where the donee is a minor in lawful custody of the donor: *Ammeeroonnissa Khatoon* v. *Abadooniisa Khatoon* (12), *Fatima Bibee* v. *Ahmad Baksh* (13). If in such circumcumstances, the donor, with a view to avoid the difficulty created by the doctrine of mushaa. nominates an adult relation as guardian of the infant for the purpose of acceptance of the gift, it is difficult to appreciate why his action should be deemed as beyond his authority. On the other hand, there are texts which point to this conclusion that such a course is not contrary to any established principle of Mahomedan law. Thus Baillie in his Digest of Mahomedan law, Vol. 1, Book 8, Ch. 5, 1875, p. 539, observes:

"The donee, when competent to take possession has the right to take it. When he is a minor, or insane, the right to take possession for him belongs to his guardian, who is first his father, then his father's executor, then his grandfather, then his executor, and next the Judge, and person appointed by him. It is alike whether the minor be in the family of any of these persons or not. If the father or his executor, or paternal grandfather or his executor, be absent at a precluding distance, possession may be taken for a minor by any person under whose power he may happen to be. And with regard to others besides the father and grandfather, such as the brother, paternal uncle, mother, and other relatives, they have all, on a favourable construction, the power to take possession of a gift for a minor when he is in their family."

The view I take receives support from the following texts mentioned by Dr. Abdullah al-Mamun Suhrawardy in his learned lectures on Moslem Legal Institutions:

1. When the father makes a gift of something in favour of his infant son, the infant becomes its owner by virtue of the contract. (*Quduri*, Vol.2, p. 10, Ed. Delhi.)

2. The gift of a father in favour of his infant child is completed by the contract. (*Fatawa-i-Alamgiri*, Vol. 4, p. 546, Ed. Cal.)

3. It is stated by Al-Hakim: where a father makes a gift of a house in favour of two of his sons, one of whom is an adult and the other a minor, and the adult son takes possession of it, the gift is void and this is the correct view. For, the gift in favour of the infant becomes completed by the very act of making the gift, as the possession by the father stands in the stead of his (infant's) possession, and the gift in favour of the adult son stands in need of acceptance. Thus, the gift in favour of the infant precedes and musha a is occasioned. The device is that he should deliver the house to the adult son and then make a gift of it to both of them. (*Fatwa-i-Alamgiri*, Vol. 4, p. 549, Ed. Cal.)

4. If the infant is in the custody of the grandfather or the brother or the mother or the paternal uncle and a gift is made in favour of the infant and taken possession of by the person in charge of the infant while the father is present, there is difference of opinion among the jurist with respect to it: some jurists are of opinion that it is not valid, and the correct view is that it is valid. (*Fatawa-i-Qazikhan*, Vol. 4, p. 289, Eds Lucknow.)

5. Contrary to the case of the mother and of those other than her (mother) maintaining her (minor girl) because the right of taking delivery of possession does not belong to them except after the death of the father or his absence at a precluding distance according to the correct view. (*Hedayah*, Vol 7, p. 495, Ed. Cairo.)

6. *Al-Kifayah* (Vol. 7, p. 496, Ed. Cairo,) the famous commentary on the *Hedayah* re-produces Text 4.

7. The Shaykh-al-Islam Khwahir Zadah states in his Mabsut; there are some amongst our jurists who hold that the husband, the stranger, the father, the grandfather and the brother are all equal and they are of opinion that their taking delivery of possession is valid when the infant is in their charge even though the father ie present. *Nataij-al-Afkar*, supplement to the *Fath-al-Quadir*, the celebrated commentary on *Hedayah*, Vol. 7, p. 496, Ed. Cairo.)

8. The auther does not mean to restrict the rule to the mother and the stranger, but means that every relation excepting the father, the grandfather and their executors is like the mother. The gift becomes complete by their taking possession if the infant is in their charge, otherwise not. (*Bahr-al-Raiq*, Vol. 7, p. 314, Ed. Cairo).

9. It is also stated with respect to the grandfather, that he cannot have the right to take possession on behalf of the minor, If the father is alive and no distinction has been indicated between the case where the minor is in his (grandfather's) charge and where he (the minor) is not. The obvious meaning of what he (author) has laid down without any restriction, leads to the necessary conclusion that it (the grandfather's taking possession on behalf of the minor) is not valid. (*Fatawa-i-Alamgiri*, Vol. 4, p. 548, Ed. Cal.)

10. The *Fatawa-i-Alamgiri* reproduces here the extract from the *Fatawa-i-Qazikhan* quoted above (Text 4) and proceeds as follows: Thus it is laid down in the *Fatawa-i-Qazikhan*. "And the *fatwa* is giving according to this opinion;" Thus it is laid down in the *Fatawa Sughra*. (*Fatawa-i-Alamgiri*, Vol. 4, p. 548, Ed. Cal.)

11. The gift in favour of a child by one who has its guardianship generally is completed by the contract. (*Tanwir-al-Absar*, Vol. 4, p. 512, Ed. Cairo.)

12. (1899) 2 I A 87 (P C).
13. (1904) 31 Cal 319.

12. "One. . .guardianship generally:" i. e., every one who maintains it, has charge of it. Thus the brother and the paternal uncle in the absence of the father are included provided that the child is in their charge. (*Durr-al-Mukhtar*, Vol. 4, p. 512, Ed. Cairo,)

13. It is laid down in the *Barjindi* ;—There is difference of opinion, where possession has been taken by one, who has it (the child) in his charge when the father is present. It is said, it is not valid: and the correct opinion is that it is valid. (*Radd-al-Muhtar*, Vol. 4, p. 513, Ed. Cairo.)

14. The author of the *Hindiya* (the *Fatwa-i-Alamgiri*) cites the *Khaniyah* (*Fatawa-i-Qazi-khan*) to the effect that "it is valid" and the *Fatawa Sughra* to the effect that "the *fatwa* is given according to this opinion." (See Text 10 above). (*Al-Tahtawi*, Vol. 3, p. 398, Ed. Cairo.)

I hold accordingly that in each of the two instances before us, there was a valid tender, a valid acceptance and a valid transference of seisin and that the legality of the transaction cannot be successfully impeached. On these grounds I agree that the decree of Greaves, J., must be affirmed and this appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 791

TEUNON AND CHAUDHURI, JJ.

Raj Kumar Deoty—Petitioner.

v.

Satish Chandra Ghosh — Opposite Party.

Civil Revn. case No. 25 of 1916, Decided on 5th January 1917.

(a) Criminal P. C (1898), S. 195—Sanction to prosecute witness during pendency of suit is improper.

Sanction for the prosecution of a witness for deposing falsely in a suit which is stiil pending is improper, particularly when the witness is a near relatve and am-mukhtear of the plaintiff, a lady who depends upon him for the proper prosecution of her suit. Generally speaking, it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to despose is still pending. [P 791 C 2]

(b) Criminal P. C. (1898), S. 195 (7) — District Judge can revoke sanction to prosecute granted by Subordinate Judge.

On a petition to the High Court for the revocation of a sanction for prosecution granted by a Subordinate Judge, the High Court having formed a firm opinion as to the impropriety of the sanction, set it aside, though it felt that the proper course for the petitioner shonld hnve bsen to apply to the District Judge under S 195 (7). [P 791 C 2; P 792 C 1]

Satyaendra Prosanna Sinha, *Dwaraka Nath Mitter* and *Manindra Nath Banerjee*—for Petitioner.

Norton, *Haradhan Chatterjee* and *Manmotha Nath Ganguli* — for Opposite Party.

Judgment.— This is an application for the revocation of a sanction granted by the Subordinate Judge of Howrah. The sanction was granted in a suit brought by a lady of the name of Kali Dasi and her case was that a certain business was the exclusive property of her husband, while the case of the defendant, who is the brother of her deceased husband, was that it was the joint property of the two brothers. In the course of certain proceedings for the appointment of a receiver it appears that the person whose prosecution has been directed, being the brother of the plaintiff, swore an affidavit to the effect that there are entries in books of the business showing that the defendant was in fact a servant. Some, if not all, the books of business were apparently brought into Court but it is stated that no clear proof with regard to them was given, and it does not seem to be certain that all the books of the business were produced. It is in respect of this statement in the affidavit that the prosecution has been sanctioned. Now it appears that the petitioner, who is the brother of the plaintiff, is also her am-mukhtear and is the person on whom she depends for the proper prosecution of her suit. Generally speaking it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to depose is still pending, and in this particular case, having regard to the position of the petitioner towards the plaintiff, we think the impropriety of such a step is all the greater.

We, therefore, set aside the sanction which has been granted by the Subordinate Judge. We may then observe that it has been objected in law that this application should have been made to the District Judge of Hooghly. This argument is based upon the language of S. 195 (7) and sub-Cl. (a) of that subsection and also on the fact that the number of suits exceeding Rs. 5,000 in value, in which appeals lie from the decision of the Subordinate Judge to this Court, are much fewer in number than the suits of Rupees 5,000 and under in which appeals lie to the District Judge. That in such a case the application for revocation of sanction should be made to the District Judge is the view taken in the cases reported as *Imperatrix* v. *Lokshman Sakharam* (1) and *Anant Ramchandra Lottikar*

1. (1877-78) 2 Bom 481.

In re (2), and those cases appear to have been followed in this Court in *Madhuray Pillay* v. *Elderton* (3). Having, however, formed a firm opinion as to the impropriety of the sanction that has been granted we do not think it necessary, whatever may be the correct reading of S. 195 (7), to send the petitioner before us back to the District Court in order to his obtaining relief which we are prepared and are competent to give him.

V.B./R.K. *Sanction set aside.*

2. (1887) 11 Bom 438.
3. (1895) 22 Cal 487.

A. I. R. 1918 Calcutta 792

TEUNON AND BEACHCROFT, JJ.

Nalini Kanta Laha and *others*—Accused—Petitioners.

v.

Anukul Chandra Laha—Complainant—Opposite Party.

Criminal Revn. No. 1078 of 1916 and Misc. No. 123 of 1916, Decided on 11th January 1917.

Criminal P. C. (1898), S. 195 (1) (c) — "Produced" illustratad — Alleged forged document used in proceeding under S. 145 —Document is produced and sanction is necessary for antecedent forgery and user.

On the application of the accused, who were parties to a proceeding under S. 145, Criminal P. C., an alleged forged document, which had been registered before a Sub-Registrar, was called for by the Magistrate in the said proceedings from the record of a case instituted against a stamp-vendor and was made use of by their pleader in the course of his argument and referred to by the Magistrate in his judgment:

Held: (1) that the document was "produced" within the meaning of S. 195 (1) (c), in the S. 145 proceedings and the accused could not, therefore, be prosecuted in respect of its antecedent forgery and antecedent user before the Sub-Registrar without the sanction of the Magistrate; 29 *Cal* 887; 22 *Cal* 1004; 37 *Cal* 714; 9 *Bom. L. R.* 725; 5 *I C* 879; 38 *All* 169 and 39 *Mad* 677, *Relon* and 4 *Bom. L. R.* 268, *not App.*

(2) that although such sanction was not necessary for the prosecution of the accessories to the crime who were not parties to the proceeding under S. 145, it was not desirable that proceeding should be taken piecemeal against them while there was still a bar to the prosecution of the principal offenders. [P 793 C 1,2]

Dasarathi Sanyal, Manmatho Nath Mukherji and *Jyotish Chandra Hazra*—for Petitioners.

Atulya Charan Bose, Bir Bhushan Dutt and *Jagat Chandra Bose*—for Opposite Party.

Monier—for the Crown.

Judgment.—In this case it appears that proceedings under Ss. 465, 467 and 471, I. P. C. have been taken in the Court of the Senior Deputy Magistrate of Howrah, against the petitioners. These proceedings are in respect of a deed of sale executed by one Niroda Moyee Dasi in favour of petitioner No. 1, Nalini Kanta Laha, though ostensibly in favour of petitioner No. 3, Fakir Chandra Chakraverty. The document bears date 11th September 1915, and was registered on 26th October 1915, before the Sub-Registrar of Amta. The complainant in the proceedings is one Anukul Chandra Laha, who holds a conveyance of the same plot of land purporting to have been executed by Niroda Moyee on 10th October 1915. This document was presented for registration to the Sub-Registrar of Howrah on 25th October and was ultimately registered under the order of the District Registrar on 2nd December 1915. The complainant's case is that the document in favour of Nalini Kanta and Fakir Chandra has been fraudulently antedated and his complaint was made before the District Magistrate of Howrah as against petitioners 1, 3, 4 and 5 on 12th July 1916, and as against petitioner 2 on 2nd August 1916. Both complaints were transferred by the District Magistrate to the Deputy Magistrate for disposal. The complaints, it may be observed, were made after preliminary proceedings which continued before the Sub-Registrar of Amta, the District Registrar and an enquiring officer from 28th October 1915 to 29th Juneel916. The offences charged are the alleged fabrication of the document on or about 20th October 1915, and the fraudulent use thereof before the Sub-Registrar of Amta on that date.

Meanwhile on 29th January 1916, proceedings under S. 145, Criminal P. C. had been taken in the Court of the Sub-Divisional Magistrate of Uluberia against complainant Anukul as the 1st party and against the present petitioners, Nalini and Fakir, as the 2nd party. These proceedings were disposed of by an Honorary Magistrate to whom they had been transferred on 29th March 1916. It may be next observed that on 7th July 1916, i.e., four days before the 1st complaint in the criminal Court and about a month before the 2nd, the petitioner Nalini brought a suit on the document in the Court of the 2nd Munsif at Amta. In this suit the complainant Anukul is the defendant and the essential question in

that suit will be, whether the document which is the subject of the present criminal proceedings is or is not a genuine document. On behalf of the petitioner it is then contended before us, firstly, that in the proceedings before the Honorary Magistrate under S. 145, Criminal P. C., to which the petitioners Nalini and Fakir were parties, the document now in question was "produced or given in evidence" and that, therefore, under the provisions of S. 195 (1) (c) the absence of the said Magistrate's sanction is a bar to the criminal proceedings in respect of the antecedent forgery and the antecedent user before the Sub-Registrar of Amta. It is, secondly, contended that the institution of the civil suit in the Court of the 2nd Munsif at Howrah having proceeded the complaint on which the criminal proceedings have been taken, these proceedings should await the determination of that suit. We have then first to ascertain whether the document was in fact "produced or given in evidence" in the course of the S. 145, proceedings. When these proceedings were pending the document, it appears, was on the record of a case instituted against the stamp vendor Dayal Sau and on 8th March the present petitioner Nalini Kanta Laha presented a petition to the Honorary Magistrate in which he prayed that the document should be called for and used in the S. 145 proceedings. Thereupon on 11th March the Honorary Magistrate called for this document and other documents on the ground that reference to them was essentially necessary and the document was accordingly transmitted to him by the Sub-Divisional Officer, Uluberia, on 15sh March.

We next find that in the course of the argument the pleader for the 2nd party Nalini and Fakir made use of the document and that in his judgment the Honorary Magistarte refers to it, though he refrains from expressing any opinion on its authenticity. On these facts we think that we ought to hold that in the proceedings in the Court of the Honorary Magistrate of Amta the document was produced within the meaning of S. 195 (1) (c). In support of this view we may refer to the cases reported as *Guru Charan Shaha* v. *Girija Sundari Dasi* (1), *Akhil Chandra Sen* v. *Queen Empress* (2), *Ramdin Bania* v. *Sew Baksh Singh* (3) and *Gopal Sidheshvar, In re* (4). The question then is whether this production makes a sanction necessary before the petitioners Nalini and Fakir, who were parties to the proceedings, under S. 145, Criminal P. C, can be prosecuted in respect of the antecedent forgery and the antecedent user before the Sub Registrar. The Crown contends that such sanction is necessary only when the offences charged have been committed by the persons accused and when parties to the proceedings in which the production took place. The language of S. 195 (1) (c) is by no means clear and would seem to admit of either construction, but though the contention on behalf of the Crown is supported by the case reported as *Noor Mahomad Cassum* v. *Kaikhosru Maneckjee* (5), we are of opinion that this is unduly to limit the scope of the sub-clause under consideration. The view urged on behalf of the petitioner has been taken in *Teni Shah* v. *Bolahi Shah* (6), and in *Bhawani Das* v. *Emperor* (7) and is also supported by the course of reasoning followed in *Parameswara Nambudri, In re* (8). With these decisions we agree and in this view the prosecution of the principal petitioners. Nalini and Fakir Chandra, cannot proceed without sanction. The other three petitioners who are charged as accessories were not parties to the case under S. 145, Criminal P. C., but it is not desirable that proceedings should be taken piecemeal or against the abettors, while there is still a bar to the prosecution of the principals. In this view it is unnecessary to discuss the second contention advanced on behalf of the petitioners. For the reasons given, we quash the proceedings now taken against the petitioners Nalini and Fakir and stay the proceedings against the remaining three petitioners until the bar to a prosecution of the principals has been removed.

V.B./R.K. *Proceedings quashed.*

1. (1902) 29 Cal 887.
2. (1895) 22 Cal 1004.
3. (1910) 37 Cal 714=6 I C 473.
4. (1907) 9 Bom L R 735.
5. (1902) 4 Bom L R 268.
6. (1910) 5 I C 879.
7. (1916) 38 All 169=35 I C 161.
8. (1916) 39 Mad 677=31 I C 161.

A. I. R. 1918 Calcutta 794 (1)

FLETCHER AND NEWBOULD, JJ.

Sahebjan Khansama and *others* — Plaintiffs—Appellants.

v.

Abdul Jalil and *others*—Defendants—Respondents.

Reference No. 3 of 1917, Decided on 2nd July 1917.

Succession Certificate Act (1889), S. 4, —Rent—Suit to recover arrears of—Succession Certificate is necessary.

Succession certificate is necessary for the recovery of arrears of rent in respect of homestead land by the heirs or the legal representatives of a deceased landlord to whom the rent was due. [P 794 C 2]

The words "land used for agricultural purposes" in S. 4 govern the words "rent, revenue or profits" that precede them. [P 794 C 1]

Fletcher, J.—This is a reference made by the learned Munsif of the Second Court at Sealdah, exercising the powers of a Small Cause Court Judge, under the provisions of O. 46, R. 1, Civil P. C. 1908 and the question referred by the learned Munsif is this. Is succession certificate necessary for the recovery of the arrears of rent in respect of homestead land by the heirs or the legal representatives of a deceased landlord to whom the rent in arrears was due? The question turns solely upon the definition of the word "debt" contained in S. 4, Succession Certificate Act (7 of 1889). The word 'debt" as used in that section is defined as including any debt except rent, revenue or profits payable in respect of land used for agricultural purposes. The only question is do the words "land used for agricultural purposes" govern the words rent, revenue or profits or whether rent apart from the question whether or not it is derived from agricultural land is excluded from the definition of debt as given in that section. It seems to me quite clear on the ordinary grammatical construction of the section that the words "land used for agricultural purposes" govern the words rent, revenue or profits. It is only in respect of rent revenue or profits payable in respect of land used for agricultural purposes that succession certificate is not necessary. The two cases referred to in the reference one as *Nagendra Nath Basu* v. *Satadal Basini Basu* (1) and the other as *Mokhoda Dassee* v. *Nundo Lal Haldar* (2), do not seem to be opposed to this view. So far as one can gather from the reports of those cases the land in these cases was land used for agricultural purposes and therefore, clearly the rent in respect of that land was excepted from the definition of "debt" in S. 4, Succession Certificate Act. Accordingly we answer the reference as mentioned above, namely, that succession certificate is necessary for the recovery of arrears of rent in respect of homestead land by the heirs or the legal representatives of a deceased landlord to whom the rent was due.

Newbould, J.—I agree.

V.B./R.K. *Answer accordingly.*

1. (1899) 26 Cal 536.
2. (1900) 27 Cal 556.

A. I. R. 1918 Calcutta 794 (2)

FLETCHER AND RICHARDSON, JJ.

Radhika Nath Roy—Plaintiff — Petitioner.

v.

Samir Fakir—Defendant — Opposite Party.

Rule Nisi No. 659 of 1916, Decided on 9th January 1917, against order of Munsif, 2nd Court, Rungpore.

Bengal Tenancy Act (1885), S. 23—Raiyat at fixed rate has right to cut and appropriate timber.

A raiyat holding at a fixed rate of rent has the right to cut and appropriate the timber, not only in cases where he planted the trees himself, but also in cases where the trees were growing on the holding at the time of his lease : 5 *C. L. J.* 413, *not Foll.*; 10 *W. R.* 419 and 21 *W. R.* 344, *Foll.* [P 795 C 1]

Sarat Chandra Roy Chowdhuri, *Brojolal Chuckerbertty* and *Harish Chandra Roy*—for Petitioner.

Surendra Chandra Sen and *Hemendra Chandra Sen*—for Opposite Party.

Fletcher, J.—This is a rule obtained by the plaintiff calling upon the defendant to show cause why the judgment and decree of the Small Cause Court at Rungpore, dated 30th May 1916 complained of in the petition should not be set aside. The plaintiff brought the suit to recover from the defendant the value of certain mango trees which had been felled by the defendant, and appropriated to his own use. The plaintiff was the landlord and the defendant was the tenant. The learned Judge of the Small Cause Court has found that the defendant is a raiyat holding at a fixed rate of rent; that is, that the tenant has a raiyati interest under a perpetual grant at a rent which is not liable to be increased. This rule was obtained on the ground that a raiyat of that class is not entitled to fell

and appropriate the timbers when so felled. The case has been argued before us not only on that footing but an attempt has also been made to get us to differ from the finding arrived at by the learned Judge of the Small Cause Court that the interest of the defendant is that of a raiyat holding at a fixed rate of rent. As regards the second part of the argument, namely, that the evidence does not establish the fact that the defendant is a raiyat holding at a fixed rate of rent. I am not disposed to differ from the conclusion arrived at by the learned Small Cause Court Judge. The question, therefore, resolves itself to this: Has a raiyat holding at a fixed rate of rent the right to appropriate the timber when the tree is cut? The matter is not res integra. It is covered, in my opinion, by two decisions of this Court. The first is the case of *Sharoda Sundari Debia* v. *Gonee Sheik* (1). That case cannot, in my opinion, be distinguished from the present case. It is admitted that the interest granted to the tenant in that case was a raiyati interest at a fixed rate of rent.

The other case is the case of *Goluck Rana* v. *Nubo Soonduree Dossee* (2). No doubt, in that case, the decision turned on the question whether a raiyat holding at a fixed rate of rent had the right to appropriate the trees which had been planted by him. The grounds of the decision seem to me to support the view that a raiyat holding at a fixed rate of rent has the right to cut and appropriate the timber, not only in cases where he planted the trees himself but also in cases where the trees were growing on the holding at the time of his lease. The decision that has been relied upon by the petitioner, the plaintiff is a decision of this Court in *Nilmani Maitra* v. *Mathura Nath Joardar* (3). The report unfortunately in this last case is merely a reprint of the judgment delivered at the hearing of the rule. The report is extremely obscure and difficult to follow. But so far as I can gather, the Court did not decide in that case that a raiyat holding at a fixed rate of rent had not the right to appropriate the timber when felled. The two decisions that I have cited reported in Vols. 10 and 21 of the Weekly Reporter were not cited in that case or dealt with in the course of the argument. That case, in my opinion, cannot be set up as an authority against the express decisions in the case of *Sharoda Soondari Debia* v. *Ganee Sheik* (1) and *Goluk Rana* v. *Nubo Soonduri Dossee* (2). In my opinion, we ought to follow the decisions that I have referred to reported in the Weekly Reporter. In that view, the present rule must be discharged with costs, one gold mohur.

Richardson, J. — On the whole, I agree in the view which my learned brother has expressed. Authority for that view is to be found in the case of *Sharoda Soondari Debia* v. *Gonee Sheik* (1). I add that the conclusion is at any rate not inconsistent with anything in the Bengal Tenancy Act ralating to the status of a raiyat holding at a fixed rent and that the law appears to be the same in the Upper Provinces [*Harbans Lal* v. *Maharaja of Benares* (4).]

V.B./R.K. *Rule discharged.*

1. (1868) 10 W R 419.
2. (1874) 21 W R 344.
3. (1907) 5 C L J 413.
4. (1901) 23 All 126.

A. I. R. 1918 Calcutta 795

MOOKERJEE AND BEACHCROFT, JJ.

Gopal Chandra Mukhopadhya and *others*—Plaintiffs—Appellants.

v.

Probhat Chandra Biswas and *others*—Defendants—Respondents.

Letters Patent Appeal No. 70 of 1915, Decided on 13th March 1917, against decree of Walmsley, J., D/- 12th April 1915, in appeal No. 602 of 1914.

Partition Act (4 of 1893), S. 4—Applicability.

A restricted scope is not to be attributed to S. 4. The section applies even where the person who claims partition of a family dwelling-house has also obtained a transfer of a share of other family property. 7 *I. C.* 436, *Foll.* [P 795 C 2]

Gunada Charan Sen—for Appellant.

Judgment.—We are not disposed to accept the argument whereby a restricted scope is attributed by the appellant to S. 4, Partition Act 1893. The interpretation he seeks to put upon the section is that it has no application when the person, who claims partition of a dwelling-house, has also obtained a transfer of a share of other property. This limited construction was negatived in the case of *Khirode Chandra* v. *Saroda Prosad* (1). In our opinion the effect of S. 4 is to exclude the dwelling-house from the parti-

1 (1910) 7 I C 436.

tion suit if one or other member of the family is willing to pay price thereof and purchase it as provided in that section. This was the contingency which happened in this case. It was faintly argued, as a last resort, that the application of S. 4 was excluded by reason of the rent sale. Walmsley, J. has conclusively shown that the rent sale did not, for any practical purpose, affect the mutual rights and obligations of the parties. Consequently S. 4 is applicable and in that view there is no doubt that the decree of Walmsley J, is correct. The result is that this appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 796 (1)

CHATTERJEA AND RICHARDSON, JJ

Abdul Aziz—Defendant—Appellant.

v.

Khirod Chandra Das—Plaintiff—Respondent.

Appeals Nos. 470 of 1915 and 7 of 1916, Decided on 2nd July 1917, from original orders of District Judge, Chittagong, D/- 24th September 1915.

Provincial Insolvency Act (1907), S. 36—Document impeached as fraudulent transfer cannot be found to be invalid without giving opportunity to produce evidence.

When a kobala produced before an Insolvency Court is impeached on the ground that it is a fraudulent transfer under S. 36, the Court ought not to come to the conclusion that the document is invalid on a mere perusal of the same and hearing arguments without giving the parties an opporunity to adduce evidence in the matter.

[P 796 C 1, 2]

U. N. Sen Gupta and *Nitish Chandra Lahiri*—for Appellant.

Khitish Chandrn Sen—for Respondent.

Judgment.—The appeals are against an order made by the District Judge under the Provincial Insolvency Act, by which he held that the wakfnama in respect of some of the properties was invalid to the extent of 2/3rds, and that the kobala executed by the insolvent in favour of his wife who is the appellant in Appeal No. 7 of 1916 was invalid. It is contended that no evidence was taken and that the learned Judge came to the conclusion that the kobala was invalid on a perusal of the document and hearing arguments. When the documents were impeached on the ground that they were fraudulent, we think that the appellant ought to have been given an opportunity of adducing evidence in the matter. The learned pleader for the respondent has pointed out that the receiver has not been made a party in Appeal No. 7 of 1916 although he has been made a respondent in Misc. Appeal No. 470 of 1915, and that the creditors have not been made respondents in Appeal No. 470 of 1915 though they have been made respondents in Appeal No. 7 of 1916. They ought to have been made parties in each appeal. The appeals, however, are against the same order and in order to avoid further delay in the hearing of the matter, the learned pleader for the respondent very properly waives the objections as all the parties are before the Court. We set aside the order of the Court below and send the cases back to that Court in order that it may allow the parties an opportunity of adducing evidence, and decide the matter on such evidence. The appellant must pay the costs of the respondents in these appeals. We assess the hearing fee at three gold mohurs to be divided equally between the two cases, i. e., Rs. 24 in each case.

V.B./R.K. *Case sent back.*

A. I. R. 1918 Calcutta 796 (2)

WOODROFFE AND CUMING, JJ.

Kali Das Mullick—Plaintiff — Petitioner.

v.

East Indian Ry. Co.—Defendants—Opposite Parties.

Rule Nisi No. 957 of 1916, Decided on 3rd April 1917, against the order of Sub-Judge, Third Court, Hooghly.

(a) Contract Act (9 of 1872), S. 23—Form of risk-note exonerating Company from liability except for loss of complete package is not contrary to public policy—Railways Act S. 72.

The form of risk-note under which a Railway Company is exonerated from liability to compensate a consignor, except for the loss of a complete package, is not contrary to public policy.

[P 797 C 1]

(d) Words and Phrases—"Package"—Meaning of.

The word "package" in risk-note means both that which is packed, and that in which it is packed, i. e., its covering or receptacle.

[P 797 C 1]

Jadnuath Kanjilal and *Jogendra Komar Dey*—for Petitioner.

Mohendra Nath Roy and *Ambika Pada Chowdhury*—for Opposite Parties.

Judgment.— The Judge finds that there was theft of some ghee by the servants of the Railway Company, but that case is covered by the risk-note as there

was no loss of any complete package. It does prima facie seem to be hard that the Railway Company can avoid responsibility in such case by producing the empty tins. But this has been so held already by this Court, and the word "package" seems to mean both that which is packed and that in which it is packed, its covering or receptacle. Then it is said that if that be so the risk-note in this respect is contrary to public policy. The previous cases, however, decided this point to the contrary and nonetheless so because the risk-note which was discussed in those cases is not now in force, for, the risk-note now in use is not so wide as the risk-note before 9th March 1907. If the former risk-note was held not to be against public policy, a fortiori, the present risk-note is not. Moreover, in the case of *William Dring* v. *Shiv Prosad Bhagat* (1) in which the risk-note was exactly in the same form as that now before us, the learned Judgess say this:

"It was suggested by the learned pleader that the contract embodied in the risk-note was contrary to public policy. This question has also been considered in more than one case and dicided in favour of the Railway Company. It may be pointed out that the risk-note in its present form is not so wide as it previously was."

The contention as regards notice also fails. We think that the rule fails. The rule is, therefore, discharged. We make no order as to costs.

V.B /R.K. *Rule discharged.*

1. (1913) 18 I C 216.

A. I. R. 1918 Calcutta 797 (1)

FLETCHER AND NEWBOULD, JJ.

Agore Nath Shaha—Plaintiff—Appellant.

v.

Natabar Bairagi and *others*—Defendants—Respondents.

Appeal No. 2314 of 1915, Decided on 15th June 1917,

Transfer of Property Act (1882), S. 67—Mortgage — Usfructuary mortgagee dispossessed—Remedy is confined to money decree.

An usufructuary mortgagee who has been dispossessed of the mortgaged property has no remedy either by foreclosure or sale, but his remedy is confined to a money-decree against the mortgagor, as provided for in the mortgage-bond.

[P 797 C 2]

Karunamoy Bose and *Atul Krishna Roy*—for Appellant.

Amarendra Nath Bose and *Sashi Sekhar Bose*—for Respondents.

Fletcher, J.—This appeal must be dismissed. The finding of the learned Judge of the lower appellate Court is that the plaintiff's mortgage is an usufructuary mortgage. That is also what the plaintiff himself says in his plaint and from his statement of the mortgage in his plaint it is quite clear that it is an usufructuary mortgage. If it is an usufructuary mortgage, there is no remedy either by foreclosure or by sale, and the plaintiff having brought this suit, he has been given a simple money decree for the amount due on his mortgage. That seems to be the only relief that he can get in this suit.

The other point is that the plaintiff ought to be permitted to withdraw from the present suit with liberty to bring a fresh suit for possession of the mortgaged property. One cannot say generally what ought to be the rule in such a case. All that one can say is whether or not the case under consideration is a proper case in which to exercise that discretion. In this case, we ought not to grant the prayer because the plaintiff deliberately selected the gentleman who conducted this litigation in the Courts below. He instituted the suit in this way. The two defendants met him on the case put forward. He cannot now, when he has deliberately taken this course, be permitted to get out of the whole thing and start the litigation afresh. I think the plaintiff ought, under the circumstances, to get a decree for money against his mortgagor. He can then enforce his decree as he thinks best. The present appeal fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 797 (2)

FLETCHER AND NEWBOULD, JJ.

Basiruddin Baiddy—Defendant—Appellant.

v.

Hari Mohan Ghose—Plaintiff—Respondent.

Appeal No. 3836 of 1914, Decided on 19th April 1917.

Landlord and Tenant—Rent—Rent partly in kind and partly in cash—Price of grain stated—Tenant is not bound by rate stated—Rent payable wholly either in cash or kind—Tenant has option to choice.

A tenant by a kabuliyat agreed to pay a cash rent of Rs. 45-8 annas and to deliver eleven aras of paddy, the price of which was stated to Rs. 22,

the total rent being fixed at Rs. 67-8 annas. The contract provided further that in every year, the tenant should pay the rent fixed and the paddy in the months of Bhadra and Pous:

Held: that notwithstanding the statement as to the value of the paddy, the tenant was not entitled to pay the named sum in lieu of the paddy, and that on his failure to deliver the paddy he was liable to pay damages to the landlord at the rate of the value of the paddy as on the date when the breach occurred: 7 *I. C.* 875 and 37 *Cal.* 626. *Foll.* [P 798 C 2]

Where however a tenant undertakes to deliver so much paddy or to pay a particular sum of money as his rent, the tenant has the option to perform the contract either by delivering the paddy or paying the sum of money. [P 798 C 2]

Probodh Coomar Das—for Appellant.

Amarendra Nath Bose—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned Subordinate Judge of the 24 Pergannahs, dated 7th Sepetmber 1914, affirming the decision of the Munsif at Barasat. The suit was brought for rent. Both the lower Courts have decreed the suit for the amount claimed by the plaintiff The first point argued before us was whether a certain kabuliyat, which the plaintiff had lodged into Court along with his plaint but which had not been proved or given in evidence, ought not to have been referred to by the learned Judge of the Court of appeal below in assessing the rent payable by the defendant. This kabuliyat, it was stated by the learned vakil appearing on behalf of the defendant-appellant before us, had been admitted by his client in his written statement. I am not prepared to agree with the view of the learned vakil that the statement in his client's written statement amounts to an admission of the kabuliyat. But the learned Judge of the lower appellate Court refused to go into this matter, on the ground that it ought to have been raised and the document ought to have been given in evidence in the primary Court. In the view I take, it makes little or no difference as to whether the document is admitted in evidence in this case or not, because, if the document is available for the defendant to argue as the basis on which the rent is payable, I am clearly of opinion that the view put forward by the defendant on the construction of the document is untenable. The rent payable by the document was a rent payable partly in cash and partly in kind. The cash rent was Rs. 45-8-0 and the rent payable in kind was 11 aras of paddy whose price was Rs. 22, the total rent being fixed at Rs. 67-8-0. The contract provided further that in every year the tenant should pay the rent fixed and the paddy in the months of Bhadra and Pous. Apparently, the word "fixed" clearly governs only the word rent and not paddy and so apparently the price of the paddy was not fixed. But that makes little or no difference. The question is:

"Has the tenant under that document the right at any time to pay in lieu of the 11 aras of paddy the sum of Rs. 22."

This case is not distinguishable from the case of *Baneswar Mukherji* v. *Umesh Chandra Chakrabarti* (1) There the rent was cash rent and 40 maunds of paddy, of which the value was stated to be Rs. 37, the total rent being Rs. 49-14-0, and the learned Chief Justice in that case held that, notwithstanding the statement as to the value of the paddy, the tenant was not entitled to pay the named sum in lieu of the paddy and, on his failure to deliver the paddy, in the view of the contract, the tenant was liable to pay compensation to the landlord for the value of the paddy, as at the date of the institution of the suit. There is another class of cases in which an option is given to the tenant with regard to the rent payable in kind and that is where the tenant undertakes to deliver so much paddy or to pay a particular sum of money. It is quite clear that, in a case of that nature, under the terms of the contract itself, the tenant has the right to perform the contract either by delivering the paddy or paying the sum of money. But in a case of this nature where 11 aras of paddy is simply stated whose price is Rs. 22 and where the covenant following is to deliver the paddy itself, the tenant, in my opinion, has no right to perform the contract otherwise than by delivering the 11 aras of paddy and. on failure to do so, he must pay damages to the landlord at the rate of the value of the paddy as at the date when the breach occurred. In my opinion, even assuming that this pattah was entitled to be referred to in the lower appellate Court by the defendant-appellant, the result would have been the same and the paddy rent having been assessed with reference to the market value thereof at the time when the defendant ought to have delivered the same to the plaintiff, the suit has been

1. (1910) 37 Cal 626=7 I C 875.

rightly decreed. In my opinion, the result arrived at by the lower appellate Court is correct. The present appeal therefore fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 799

FLETCHER AND RICHARDSON, JJ.

Upendralal Gupta and *others*--Defendants—Appellants.

v.

Jogesh Chandra Roy—Plaintiff — Respondent.

Appeals No. 15 of 1915, and No. 3206 of 1914, Decided on 7th January 1917, from appellate decree of Sub. Judge, Second Court, Chittagong, D/- 26th August 1914, and 27th June 1914 respectively.

(a) Landlord and Tenant — Rent — Land held under permanent lease—Rent is liable to enhancement.

Where land is held under a permanent lease the rent is liable to enhancement, unless the landlord has precluded himself by a contract or is by law precluded from claiming an enhancement 5: *W R Act* 10 *Rulings* 80: 12 *C W N* 175 and 29 *I C* 46 *Ref* [P 800 C1]

(b) Landlord and Tenant — Kabuliyat—Construction of—Use of word "taluka patta" prima facie show that interest granted is permanent one.

Where the material terms of a contract by which a tenure of taraf and Noabad lands was created were as follows: "You (that is the lessee) having applied of your own accord for a taluka patta.....I having taken a taluka kabuliyat of the said total lands, grant you this patta and thereby appoint you talukdar. The total rent of the said mouzahs is a consolidated sum of Company's Rs. 420, etc,, etc.....If the Huzur imposes any new assessment, that you shall give without any objection and if you do not pay according to the kists given below, the arrear rents would be realised in accordance with the Regns. 5, 7 and 8 and other laws that may come into force.....".

Held: (1) that the use of the words "taluka patta" would prima facie show that the intreset granted to the lessee was intended to be a parmanent one, but that did not mean that the rent was also fixed in perpetuity: (2) that the covenant, drawn, in general words regarding the payment of new assessment, was not to be read as restricted to a particular tax in respect of particular land (the Noabad land) but was to be read with reference to the whole land and with reference to any imposition that might be made by the Government in respect of any portion of the land: (3) that the agreement between the parties that resort might be had under the Putni Regulation to recover the rent in arrears did not prove that the rent had been permanently fixed; (4) that the covenant by the lessee to pay any new assessment that the Government should impose on the land did not show that the landlord intended to preclude himself from having the ordinary right that a landlord would have of applying to have the rent enhanced in a proper case. [P 800 C 1, 2]

S. P. Sinha, Mohendra Nath Roy and *Khitish Chakraburty* — for Appellants.

Rash Behari Ghosh, Dhirendra Lal Kastagir and *Chandra Sekhar Sen*— for Respondent.

No. 15 *of* 1915.

Fletcher, J.—This is an appeal preferred by the defendants 1, 3 and 7 against the decision of the learned Subordinate Judge of Chittagong, dated 26th August 1914, affirming the decision of the Munsif of the same place. The suit was brought by the plaintiff for enhancement of rent and for recovery of rent at the enhanced rate. The learned Munsif enhanced the rent from Rs. 411-8 0 per annum to Rs. 792. On appeal to the lower appellate Court, the learned Subordinate Judge affirmed the decision of the Munsif. Against that decision, the present appellants have preferred this appeal to this Court.

The tenure in respect of which the plaintiff sought to enhance the rent is governed by a document in writing or rather two documents in writing, namely, the patta executed by the landlord in favour of the tenure-holder and the kabuliyat executed by the tenure-holder in favour of the landlord. The first point that is raised in this appeal is that these documents did not in themselves create the tenure but that the tenure was an old tenure which was merely confirmed or evidenced by these documents and that consequently the presumption contained in S. 50, sub-S. (2), Ben. Ten. Act, would apply to this case and the rent having been paid since 1848 when the lease was granted at an uniform rate, unless it is shown that the tenure had been created since the date of the permanent settlement, the rent would not be liable to enhancement. It is admitted that on the face of the documents, there is nothing to show that these documents are merely confirmatory of a pre existing tenure that was held by the person in whose favour the patta was granted. The learned Judge in the Court below, considering the evidence that had been adduced to show whether the tenure was an old pre-existing tenure, came to the conclusion that the evidence did not establish that fact. We are bound by that finding in this appeal. The question

therefore resolves itself to this : " Does the lease in this case show that the rent is not liable to enhancement ? " The learned Judge also came to the conclusion that the lease did not confer a permanent interest on the tenure-holder. With that view, as at present advised, I am not disposed to agree, because the use of the words " taluka patta " would prima facie show that the interest granted to the lessee was intended to be a permanent one. But in this country, the grant of a permanent lease does not mean that the rent is also fixed in perpetuity. The decisions in this Court which have come down from the old Sudder Diwani Court show that the rule has always been in this country that generally when the lease is a permanent one, the rent is liable to enhancement, unless the landlord has precluded himself by a contract or is by law precluded from claiming an enhancement.

That proposition is well illustrated in the decision of the case cited by Sir Rash Bihari Ghose in the course of his argument, namely, the case of *Taruk Chunder Nundee* v. *Modhoo Soodan Nundee* (1). Many other decisions have been cited where a similar view has been taken. The decisions in the cases of *Gayratulla Sardar* v. *Girish Chandra Bhaumik* (2) and *Meher Ali* v. *Kalai Khalashi* (3) are to the same effect. It may therefore be taken—and it has not been denied in the argument of Mr. Mohendra Nath Roy in reply to Sir Rash Behari Ghose's address—that this case must be determined on the terms of the contract that was entered into between the parties and that unless the landlord is precluded by the terms of that contract from claiming an enhancement, the rent is liable to be enhanced. Now, the terms of the contract, so far as material, are as follows : " You, " that is, the lessee,

" having applied of your own accord for a taluka patta, according to your own application, I having taken a taluka kabuliyat of the said total lands grant you this patta and there by appoint you talukdar. The total rent of the said mouzahs is a consolidated sum of Company's Rs. 420. "

The lease then proceeds as follows after some words that are not material to state : " If the Huzur (the Government) imposes any new assessment " (the words " any new assessment " occurring in the translation which we have got which Sir Rash Behary Ghose says mean any new imposition, the other side stating that those words mean any new sum) " that you shall give without any objection ; " and the patta ends with these words :

" If you do not pay according to the kists given below, the arrear rents would be realized in accordance with the Regns. 5, 7 and 8 and other laws that may come into force, you shall not take any objection to the realization of the rent. "

The main stress of the argument in this case has been on the words contained in the covenant, namely, that if the Huzur (Government) should impose any new sum the lessee should pay that without any objection. The land let out by these documents consists of two portions ; first, which is called the taraf, that is, the land of which the Government revenue is permanently assessed, and, secondly, the Noabad land, that is, the land which is outside the permanent settlement in Bengal. It is argued that the covenant in this lease has reference to the small portion of Noabad land and that, it being expressly agreed that the rent of the Noabad land should be increased only in the case of the Government revenue being increased therefore the contract in this case shows clearly that it was the intention of the parties that the landlord should be precluded from raising the rent in any other case. But that argument does not seem to me to be sound. The covenant cannot be read with reference only to the revenue payable to the Government in respect of the Noabad land. From its very terms, it would include any new cess, tax or imposition which the Government should impose upon the land, whether it is imposed on the taraf or the Noabad land. I see no reason why the covenant should be read in the restricted manner that the appellants have asked us to read it, as having reference only to the revenue payable to the Government in respect of the Noabad land. I think we should not be justified in reading a covenant drawn in general words with reference to a particular tax in respect of particular land. In my opinion, we should read the covenant with reference to the whole land and

1. (1866) 5 W R Act Rulings 80.
2. (1908) 12 C W N 175.
3. (1915) 29 I C 461.

with reference to any imposition that may be made by the Government in respect of any portion of the land. I do not think that we can read the covenant so as to alter the right of the landlord to have the rent enhanced in a suit properly brought for the purpose.

The other portion of the document that was relied upon as showing that the landlord had precluded himself from the right of applying to have the rent increased was the portion which I have already read in which the landlord was given the right, if the rent was in arrears, to apply to have the rent recovered under the terms of what is known as the Putni Regulation. But it is admitted that the Putni Regulation applies in cases where the rent is not permanently fixed. Where, as in this case, it has been agreed between the parties that resort might be had under the Putni Regulation to recover the rent in arrears, the rent cannot be said to have been permanently fixed. It seems to me that that clause in the lease does not assist the appellants in any way. The case is really thrown back on this :

"Does the covenant by the lessee to pay any new assessment that the Government should impose on the land, show that the landlord intended to preclude himself from having the ordinary right that a landlord would have of applying to have the rent enhanced in a proper case?"

I am clearly of opinion that it does not. The covenant, as I have already said, cannot be read in the restricted way that the appellants wish it to be read and that being so, there are no words in this lease which would show that the landlord had given up the ordinary right he had, namely, of applying to the Court to have the rent enhanced in a proper case. In the result, I agree with the decision of the Court of appeal below. The present appeal therefore fails and must be dismissed with costs. Let the record be sent down at once.

Richardson, J.—I agree.

No. 3206 *of* 1914. This appeal not being pressed is dismissed with costs.

V.B./R.K, *Appeal dismissed.*

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A. I. R. 1918 Calcutta 801

BEACHCROFT AND WALMSLEY, JJ.

Kalandar Mandal—Plaintiff—Appellant.

v.

Ajimudee Mandal—Defendant—Respondant.

Appeal No. 3013 of 1914, Decided on 8th January 1917, from the Appellate decree of Sub-Judge, Murshidabad, D/- 15th June 1914.

(a) Specific Relief Act (1877), S. 54—Easement—Owner of lower land cannot restrain owner of higher land from catching fish in trap on his own land.

The plaintiffs, who had some paddy fields on the lower levels of a tract of paddy land, had for over 20 years openly, peaceably and uninterruptedly caught fish in a trap set on his own land. The defendant set a similar trap by the side of a tank belonging to him, and caught some of the fish which would otherwise have come to the plaintiff's trap, whereupon the latter brought a suit to establish his right of easement and for damages, and for an injunction restraining the former from catching fish in his trap:

Held: that the plaintiff could not acquire an easement by catching fish on his own land and was not entitled to restrain the defendant from catching fish on his own land. [P 802 C 1, 2]

(b) Specific Relief Act (1877), S. 54—Easement—Right to catch fish on one's own land—Injunction cannot be granted against persons in vicinity.

A man, who has exercised the natural right of catching fish in his own property for upwards of 20 years, does not thereby acquire the right to prevent everybody else holding land in the vicinity from exercising a similar right. [P 802 C 2]

Every person has a natural right tocatch fish, which are res nullius, while on his land. [P 802 C 1]

Jogesh Chandra Bose—for Appellant.

Taradas Chatterjee—for Respondent

Beachcroft, J.—In the suit out of which this appeal arises the plaintiff claimed a right of easement for catching fish in the surface water of some paddy land. The plaintiff has some paddy fields on the lower levels of a tract of paddy land and it has been found as a fact that for over 20 years he has openly, peaceably and uninterruptedly caught fish in an arah or trap which he has been setting on his own land. The defendant, it is alleged, set a similar trap by the side of a tank belonging to him and as he caught some of the fish, which would otherwise have come to plaintiff's trap, the latter brought the suit to establish his right of easement and for damages. The munsif gave him a decree declaring his right to catch fish to be established, giving him Rs. 4 as damages and ordering issue of a perma-

nent injunction restraining the defendant from catching fish in his trap. The Subordinate Judge on appeal, while finding that plaintiff had been catching fish in his trap for over 20 years, held that plaintiff had no exclusive right to catch all the fish in the tract of paddy land and that the defendant in catching fish on his own land acted within his natural right. He accordingly allowed the appeal and dismissed the suit. It is now argued on appeal by the plaintiff that on his finding as to user, the Subordinate Judge ought to have affirmed the munsif's decree.

If we examine the facts alleged and the prayers in the plaint, it is quite clear that no question of easement arises at all and that no declaratory decree should have been made. The first prayer runs: "that the Court be pleased to establish the plaintiff's right to catch fish which grow spontaneously in the paddy land within the plot specified in Schedule (Kha) and pass with the flowing water, by putting up angti in the place specified in the Schedule (Ga)."

Now the land in Schedule (Kha) is the plaintiff's land and the place (Ga) is a spot within the plaintiff's land. As it stands, the prayer refers only to fish growing in the plaintiff's own land and passing from it with the flowing water. The case, however, appears to have been dealt with on the footing that the plaintiff claimed the exclusive right to catch fish coming from above, which would in the ordinary course of things come down to his land with the flow of water and it has been argued on that footing before us. The plaintiff would obviously have a right to catch these fish, which are res nullius, while on his land. That right has never been denied by any one and no one is interested to deny it. There was no place then for any declaratory decree. It is also obvious that he could not acquire an easement by catching fish on his own land. The learned Vakil who appeared for the plaintiff admitted at first that the plaintiff's right in the fish commenced only when they reached the plaintiff's land, but seeing where this admission led to, he subsequently modified it by asserting a right in the fish as soon as the water began to overflow from the land on the higher levels. For this assertion he could show neither principle nor authority, and apart from some supposed virtue in the word "easement," I failed to understand on what principle he argued for a position which leads to this that a man, who has exercised the natural right of catching fish in his own property for upwards of 20 years, thereby acquires the right to prevent everybody else holding land in the vicinity from exercising a similar right. The case of *Ram Dass Surmah* v. *Sonatun Goohoo* (1), which concerned a fishery in a khal, has no the application to case of man catching fish in the surface water of his own paddy fields. I would dismiss the appeal with costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1864) W R 275.

A. I. R. 1918 Calcutta 802

FLETCHER AND RICHARDSON, JJ.

Krishna Kumar De—Plaintiff—Appellant.

v.

Kalinath Guha Ray and *others*—Defendants—Respondents.

Second Appeal No. 2583 of 1915, Decided on 21st February 1917, against decree of Dist. Judge, Noakhali, D/- 18th June 1915.

(a) Practice—Pleadings defective — Claim found to be substantially true—Suit should not be dismissed.

In a suit to recover the price of goods sold and delivered to the defendants, the plaintiff set up an adjustment of account in his plaint. The lower Courts found the claim to be true, but dismissed the suit on the ground that the plaintiff had failed to prove the adjustment of account on which his suit was based :

Held : that the dismissal was wrong as notwithstanding the adjustment set up in the plaint what the plaintiff sued for, was the price of the goods that were supplied to the defendants.

[P 803 C 1]

(b) Contract Act (1872), Ss. 61, 43 and 44 —Goods supplied to number of persons—Payments made by some without specific appropriation — Creditor can appropriate payments in order of time even towards time barred debts.

Six defendants who were members of a joint family were supplied with goods by the plaintiff. After the separation of defendant 6, the plaintiff continued to supply the other five, who remained united and these latter made payments for the goods supplied from time to time without any specific appropriation:

Held : that the plaintiff was entitled to appropriate the payments in discharge of the debts in order of time whether they were or were not barred by the law in force for the time being as to the limitation of suits and whether the payments were made by all the defendants or by some of them without the concurrence of others.

[P 803 C 1, 2]

Brojendra Nath Chatterji—for Appellant.

Bipin Chandra Bose—for Respdts.

Fletcher, J.—This is an appeal by the plaintiff from a decision of the learned District Judge of Noakhali, dated 18th June 1915, affirming the decision of the Munsif at Lakhipore. The plaintiff brought his suit to recover the price of goods sold and delivered to the defendants. The plaintiff is a dealer in oil, salt and other commodities and he supplied the defendants, who were members of a joint Hindu family, with these commodities for the use of their household. The plaintiff set up an adjustment of account in the plaint, but notwithstanding that adjustment, it is quite clear from the plaint that the suit was brought to recover the price of goods sold and delivered. The Munsif found that the case was a true one but, as the suit was based upon an adjusted account, it must fail because the plaintiff had failed to prove the adjustment of the account. That view, in substance, was confirmed by the learned Judge of the lower appellate Court. In that view I am unable to agree. It is quite clear that what the plaintiff sued for was the price of the goods that were supplied to the defendants.

The other point that is relied upon in the judgment of the lower appellate Court is this. There was a separation in 1315 or 1316 B. S. between defendant 6 and the other defendants. After that date goods were also supplied to the defendants and payments were made to the plaintiff by the defendants other than defendant 6; but no specific appropriation of the money so paid was made by the defendants when they paid to the plaintiff. The learned District Judge considers that, as the payments were made by the defendants other than defendant 6, the plaintiff had no right to appropriate the payments within the meaning of S. 60 or S. 61, Contract Act. There is nothing to support that suggestion. On the contract, each of the defendants, including defendant 6, was liable to pay the whole of the price of the goods ordered prior to the separation of defendant 6 and the payment by the defendants other than defendant 6 was a payment by the debtor within the meaning of S. 61, Contract Act. Therefore, under the terms of the section, the plaintiff had the right to appropriate the payments so made as against the statute-barred debts owing to him in respect of the goods sold and delivered prior to the separation of defendant 6. Under the terms of S. 61, Contract Act, the payment has got to be appropriated in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits; and applying those payments so made in discharge of the debts in order of time, the plaintiff is entitled to recover the balance remaining due, which it seems to be common ground would not be barred by limitation.

The decree of the lower appellate Court is accordingly set aside and the case must go back to the Court of first instance for the learned Munsif to find out, after appropriating the payments made under the terms of S. 61, Contract Act, what sums remain due to the plaintiff in respect of the price of the goods sold and delivered to the defendants and which sums are not statute-barred after appropriating the sums already paid under the terms of S. 61, Contract Act. Costs will abide the result of the re-hearing by the first Court. The cross-objection is not pressed and is accordingly dismissed. We make no order as to the costs of the cross-objection.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 803

WOODROFFE AND BEACHCROFT, JJ.

Iswar Chandra Dey and *others*—Appellants.

v.

Murari Lal Dutt and *others*—Respondents.

Appeal No. 542 of 1915, Decided on 1st February 1917, from the Appellate Decree of Sub-Judge, Birbhum, D/- 15th December 1914.

Bengal Tenancy Act (1885), S. 182—Widow of raiyat holding homestead for residence—Transfer is not permissible without consent of landlord.

A raiyat died while in possession of an agricultural jote. His widow paid rent to the zamindar for a period of two years, and built herself a homestead which she used as her own dwelling:

Held: that the widow must be taken to have been a raiyat as regards the homestead, so that S. 182, applied to it, with the result that except with the landlord's consent she had no right to transfer it in the absence of any custom entitling her to do so. [P 804 C 1]

Jitendra Lal Banerjee—for Appellants.

Ram Chandra Majumdar and *Baranashibasi Mukerjee*—for Respondents.

Woodroffe, J.—This is a dispute over a small piece of land which is said to be about 45 feet square and is valued at Rs. 3. The suit is an action in ejectment and both the Courts have found in favour of the plaintiffs. A large number of defences of varying character have been taken which have all been decided against the present appellants.

Before us the main point which has been argued is this: It has been found as a fact that the husband of the appellants' vendor died in the year 1897 or 1898: that he was in possession of an agricultural jote. It is found that his widow inherited this property and actually paid rent to the landlord for this jote for a period of two years. Then, in 1898 1899 she appears to have built herself a homestead, and according to the finding of the first Court, which has been confirmed in appeal by the lower appellate Court, she used this homestead as her own dwelling and lived there. This homestead, therefore, was acquired at a time when according to the finding of the Courts she was a raiyat. It has been contended, therefore, that in the absence of any special custom or usage which has not been proved, S. 182, Ben. Ten. Act, appliesand that she must be taken to be a raiyat as regards this homestead. The lower appellate Court finds her to be a non-occupancy raiyat and that as such she had no right to transfer the land to the appellants, no custom having been proved which would entitle her to do so. Therefore, no title passed to the appellant.

The main argument has been that, even accepting these facts, they are not sufficient to bring the case within the provisions of Ben. Ten. Act, because it has not been shown that she was holding and inhabiting this homestead for agricultural purposes, or, in other words, that the homestead land was held ancillary to an agricultural purpose, in which case only it is contended that S. 182, Ben. Ten. Act, would apply. I do not find in the numerous arguments addressed to the lower Court any reference to this particular point but it would seem to me to be concluded by the findings of fact which we do find in the judgment, and to follow as a natural inference from these facts; and these facts are, as I have said, that the appellants vendor's husband did possess this agricultural jote and she herself paid the rent for these two years and the allegation of abandonment has been held to be not proved. It is true that there is a finding in the judgment of the first Court that the appellants' vendor worked for sometime as a maid-servant. That, however, would not in itself stand in the way of the fact that the homestead might also be held in connection with the agricultural land. Through a servant she might be cultivating lands: nor is the fact of payment of rent by the nephews sufficient. The lower appellate Court in its judgment says this:

"It is not in evidence under what arrangement they, that is, the vendor's nephews, have been paying rent. Certainly the landlord did not enter upon the holding or let it out to another tenant. It might be that the Baishnabi made some arrangement under which they (the nephews) have been paying rent."

Under these circumstances, I think, that the concurrent findings in the judgments of the Courts below must be affirmed. This appeal is therefore dismissed with costs.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 804

WALMSLEY AND GREAVES, JJ.

Badal Mirza and *others*—Plaintiffs—Appellants.

v.

Tinkori Koley and *others*—Defendants—Respondents.

Appeal No. 431 of 1913, Decided on 29th June 1917, from appellate decree of Sub-Judge, 3rd Court Hooghly, D/- 21st December 1912.

Mahomedan Law—Wakf—Muttawali cannot grant permanent lease unless for necessity—Lessee is entitled to refund of consideration spent in improving endowment from endowment and Muttawali is not personally liable.

A muttawali granted a mukarrari maurasi lease of wakf property and out of the selami paid for the lease spent Rs. 400 in building a pucca house for the endowment:

Held: that the lease was void as there was no urgent necessity for granting it, but that the lessee was entitled to a refund of Rs. 400 spent by the muttawali in building the pucca house and that for this amount the lessee would have a charge upon the wakf property, but no personal claim against the muttawali. [P 805 C 1, 2]

Satish Chander Ghose and *Bhupendra Coomar Ghose*—for Appellants.

Dwarkanath Mitter, *Jatindranath Bose* and *Biraj Mohan Mojumdar*—for Respondents.

Walmsley, J.—The plaintiffs as muttawalis of certain wakf property brought

this suit to recover possession of land belonging to the wakf and for a declaration that a mukarari maurusi leaso, dated 30th Aswin 1313, executed by a previous muttawali, their father Jamiruddin, in favour of defendants 1, 2 and 3 was void. The first Court decreed the suit on the ground that the maurasi lease was void. On appeal it was held that the lease was not void if it could be shown that there was urgent necessity for granting it and the case was remanded to the first Court for a finding on that question. This remand was based on the authority of the case of *Nemai Chand Adhya* v. *Mir Golam Hossein* (1). On remand, the first Court found that there was no urgent necessity for the lease and, in consequence, it decreed the plaintiff's suit.

The lower appellate Court however has reversed this finding and dismissed the suit and, in consequence, the plaintiffs have preferred this appeal. As already observed, when the case first went before the lower appellate Court it was remanded on the authority of the case of *Nemai Chand Adhya* v. *Mir Golam Hossein* (1) and the learned vakil on behalf of the respondents has urged in this Court, first, that that case is an authority which we should follow in this appeal and secondly, that there is a finding of fact by the learned Subordinate Judge to the effect that there was urgent necessity for the granting of this lease. I think however that the circumstances of this case are so very different from those of *Nemai Chand Adhya's* case (1) that the principles there enunciated have no application whatever here, and with regard to the suggestion that there is a finding of fact by the appellate Court to the effect stated, I cannot agree because it appears to me that the words of the Subordinate Judge simply came to this that he regarded the substitution of a pucca durga for the thatched hut as desirable and prudent. That is not a finding that there was any urgent necessity.

Now, if the rule already mentioned is not applicable in the present case then it appears to me clear on the authorities that this lease is void. It is not necessary to do more than to refer to the cases of *Jewan Doss Sahoo* v. *Shah Kubeeroodeen* (2) and *Shoojat Ali* v. *Zumeerooddeen* (3). On the authority of these two cases, I am satisfied that this maurusi lease is void. It is contended however on behalf of the respondents that the finding of the lower appellate Court operates as a retrospective sanction, as effective as a previous sanction by the District Judge, and in support of that suggestion the learned vakil refers to a passage in the case of *Nemai Chand Adhya* v. *Mir Golam Hossein* (1). Again the circumstances are so entirely different that I do not think the remarks there made have any application in the present case.

The third point which is raised is this that as the then muttawali Jamiruddin actually received Rs. 400 by way of selami the present muttawalis cannot have the lease set aside without refunding that sum. I take it that the learned Judge of the lower appellate Court found that, as a matter of fact, the sum of Rs. 400 out of the selami was spent by the then muttawali in building a pucca house and I think the present plaintiffs ought to refund that sum. The plaintiffs as muttawalis of the wakf property should refund that sum minus such sum as may be due by the lessees for rent in respect of the leased property and also minus the sum due to the plaintiffs by defendants 1, 2 and 3 by way of the costs of this litigation in all Courts. An account of this sum will be taken by the Munsif and the muttawalis will be entitled to raise such sum by mortgage of the wakf property and pay the amount so raised to defendants 1, 2 and 3, or they can mortgage the property to defendants 1, 2 and 3 to secure the sum found due; the Munsif will fix the rate of interest under the mortgage.

This order does not imposeany personal liability on the plaintiffs or on the muttawalis of the wakf property in respect of the sum found due. The Munsif after taking the account and determining the sum payable by the plaintiffs will fix a date within which the sum so found due is to be paid or a mortgage to secure the same executed by the muttawalis in favour of defendants 1, 2 and 3.

If the sum so found due is not paid within the time fixed or secured by mortgage, defendants 1.2 and 3 will have

1. (1910) 37 Cal 179=3 I C 353.
2. (1837-41) 2 M I A 390=6 W R 3 (P C).
3. (1866) 5 W R 159.

a charge for that amount on the wakf property.

Greaves, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 806

FLETCHER, AND RICHARDSON JJ.

Ram Kumar Chowdhury—Defendant—Appellant.

v.

Rameshwar Saha and *others*—Plaintiffs—Respondents.

Appeal Nos. 14 and 54 of 1915, Decided on 8th February 1917, from appellate decrees of Dist. Judge, Tipperah, D/- 14th September 1914.

(a) Mortgage—Redemption—Non-transferable occupancy holding subject to mortgage—Purchaser acquiring interest in portion in execution of money-decree — Interest remains subject to mortgage — Purchaser can redeem mortgage to extent of his interest.

The interest acquired by the purchaser in execution of a money-decree of a portion of a non-transferable occupancy holding, which was subject to a mortgage, remains subject to the mortgage, notwithstanding that the purchase is consented to and the purchaser recognized by the landlord. [P 806 C 2]

Such purchaser has, however, the right to redeem the mortgage to the extent of the interest acquired by him: *A I R* 1915 *Cal* 242 and 39 *Cal* 513, *Ref.* [P 806 C 2]

(b) Bengal Tenancy Act (1885), S. 86 (6)—Object of.

Per *Richardson, J.*—S. 86, Cl. (6), Ben. Ten. Act, was introduced for the purpose of invalidating surrenders made so as to defeat the claims of encumbrancers. [P 807 C 1]

Sarat Chandra Basak and *Bepin Chandra Bose*—for Appellant.

Dwarka Nath Chakravarty and *Sasadhar Roy*—for Respondents.

Fletcher, J.—These are two appeals, one by defendant 14 and the other by the plaintiffs. The point that arises is as follows: Three brothers and one Seni Bibi mortgaged to the plaintiffs the land in the schedule to the plaint for Rs. 400. The mortgagees subsequently obtained a decree on their mortgage and brought the property to sale in execution and purchased themselves. Prior to this defendant 14 purchased in execution of a money-decree against the three brothers a portion of the property and obtained the landlord's consent to the transfer to him, as the property consists of a non-transferable occupancy holding. It is said that the plaintiffs cannot recover against defendant 14, as the interest he holds is not derived from the three brothers but is a new interest created by the landlord. This clearly is not so. At the time that the landlord gave his consent, it was wholly unnecessary and that consent unnecessarily taken cannot deprive the plaintiffs of a portion of the property comprised in the mortgage.

The appeal of defendant 14 is, therefore, dismissed. The appeal by the plaintiffs is also equally ill-founded. As regards the partial redemption allowed by the learned Judges, this is clearly correct having regard to the terms of S. 60, T. P. Act. The other point is that the learned Judges in the lower Courts were wrong in their methods of apportionment and redemption should not have been allowed to defendant 14 on payment of the amount fixed by the Courts below. I see no reason to suppose that the apportionment has been made on a wrong principle as suggested. Both the appeals accordingly fail and must be dismissed with costs.

Richardson, J.—As to the appeal of defendant 14, the question raised appears to me to turn on the true nature of the transaction to which he was a party. The holding is a non-transferable occupancy holding. Defendant 14 purchased a portion of it in execution of a decree for money against the original tenants. On the part of the latter this transfer was an involuntary transfer, but as they took no steps to have the sale set aside the transfer was binding as against them: *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (1). Nevertheless as they remained in possession of the remainder of the holding, there was no abandonment on their part and as between them and the landlord, the original tenancy subsisted. The landlord, therefore, was not in a position without their concurrence to create in favour of defendant 14 a new holding consisting of the part of the original holding which he had purchased. Their consent to such an arrangement would be tantamount to a surrender of the holding to the landlord, in order that it might be re-granted in part to themselves and in part to defendant 14. But at the date of the latter's purchase, the entire holding was mortgaged to the plaintiffs and the encumbrance was secured by a registered instrument. That being so, the surrender of the holding or any part of it to the landlord without

1. A I R 1915 Cal 242=42 Cal 172=27 I C 61.

the consent of the plaintiffs was invalid under Cl. (6) of S. 86. That clause was clearly introduced for the purpose of invalidating surrenders made so as to defeat the claims of encumbrancers. It follows that the interest in the holding acquired by defendant 14 is subject to the plaintiffs' mortgage and his appeal fails. If the reasoning is not quite the same, in so far as it depends on the application of Cl. (6), S. 86, the result at any rate is in accordance with that arrived at by the majority of the Judges in the case of *Radha Kant Chakravarti* v. *Ramananda Shaha* (2). As to the appeal of the plaintiffs, I agree that it fails.

V.B./R.K. *Appeals dismissed.*

2. (1912) 39 Cal 513=13 I C 698.

A. I. R. 1918 Calcutta 807

MOOKERJEE AND WALMSLEY, JJ.

Bagha Mowar and *others*—Defendants—Appellants.

v.

Ram Lakhan Misser and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 16 of 1916, Decided on 7th June 1917, against judgment of Roe, J., D/- 16th December 1915, in Appeal No. 3429 of 1912.

(a) Registration Act (1908), Ss. 17 (d) and 49—Compromise petition—Unregistered petition of compromise in rent suit is not admissible to prove amount of rent payable.

In a suit for the recovery of arrears of rent, a petition of compromise between the parties which was filed in a previous suit for rent was put in evidence for proving the amount of rent payable:

Held: that the petition of compromise not having been registered was not admissible in evidence. 39 *Cal* 284 and 35 *Cal* 1010 *Rel on* [P 807 C 2]

(b) Registration Act (1908), Ss. 49, 17 (d)—Lease — Document embodying contract for variation of rent is in essence lease—It is not admissible in evidence nor constitutes valid contract if unregistered.

A document which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease and is compulsorily registrable. If it is not registered in accordance with law, it is not only, not admissible in evidence, it does not even constitute a valid and operating contract between the parties. [P 807 C 2]

(c) Record of Rights—Entry in—Mode of proof of incorrectness—Party is not limited to particular mode of proof—He can prove aliundi that entry is incorrect.

A party against whom an entry in the Record of Rights has been put in evidence, is not limited to a particular mode of proof, for the purpose of establishing its incorrectness, but he can prove aliundi that the entry is in fact incorrect, e. g., as having been based upon materials, not admissible in evidence. [P 808 C 1]

Dwarka Nath Mitter and *Nabin Chandra Pal*—for Appallants.

Prolodh Kumar Das for N. C. Bordaloi—for Respondents.

Judgment.—This is an appeal under Cl. 15 of the Letters patent from a judgment of Roe, J., in a suit for recovery of arrears of rent. One of the questions in controversy between the parties related to the amount of rent payable in cash. The Court of first instance decreed the claim in full. The Subordinate Judge on appeal modified that decree and allowed the plaintiff a decree at the rate admitted by the defendants. Before the Subordinate Judge, as before the Trial Court, reliance was placed upon a petition of compromise filed in a previous suit for arrears of rent. This document embodied an agreement to pay Rs. 139-2 0, as rent for an area of 35 bighas. A question was thereupon raised, whether the document was admissible in evidence. The Trial Court came to the conclusion that it was admissible in evidence. The Subordinate Judge took the contrary view. There can be no doubt that the opinion of the Subordinate Judge is supported by the decision of a Full Bench in *Lalit Mohan Ghose* v. *Gopali Chauk Coal Co. Ltd.* (1) and the earlier decision of this Court in *Biraj Mohini Dassee* v. *Kedar Nath Karmokar* (2).

These cases show that a document which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease and is compulsorily registrable. If it is not registered in accordance with law, it is not only not admissible in evidence, it does not even constitute a valid and operative contract between the parties. The Subordinate Judge accordingly left the petition of compromise out of considaration and modified the decree of the Court of first instance. On appeal to this Court, Roe, J., has held that the plaintiff is entitled to succeed on the strength of an entry in the Record of Rights. This entry, it may be conceded, is, under sub-S. 3, S. 103 B, Ben. Ten. Act, evidence of the matter referred to therein and must be presumed to be correct until disproved by evidence to be incorrect. The Subordinate Judge held that the entry had been proved by evidence to be incorrect, when it was shown that the entry was based solely on the petition of compromise

1. (1912) 39 Cal 284=12 I C 723.
2. (1908) 35 Cal 1010.

which, as we have already explained, did not constitute in law, a valid and operative contract between the parties, in modification of the pre-existing agreement between them. Roe, J. has held that the entry cannot be rebutted in this manner, but that other evidence must be adduced to prove that the entry is incorrect.

In our opinion sub-S. (3) of S. 103 B, need not be interpreted in the manner suggested, in fact if it is, as it has actually been, established that the only evidence wherein the entry was made by the Settlement Officer does not support his conclusion, that is the strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof, he can prove aliundi that the entry is in fact incorrect but there is no reason why he should not achieve the same result by proof that the material whereon the Settlement Officer based his decision does not in law justify his conclusion as to the relative rights and obligations of the parties. We are of opinion that the view taken by the Subordinate Judge is correct and that his decree should not have been modified. The result is that this appeal is allowed, the decree made by Roe, J., set aside and that of the Subordinate Judge restored with costs of two hearings in this Court.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 808

FLETCHER AND RICHARDSON, JJ.

Baroda Charan Dhar—Plaintiff—Appellant.

v.

Ershad Khan and *others*—Defendants—Respondents.

Appeals Nos. 1189, 1862, 1863 and 1864 of 1914, Decided on 26th January 1917, from appellate decrees of Offg. Sub-Judge, Chittagong, D/- 3rd January 1914.

Mortgage — Suit on — Mortgaged patni sold in execution of rent decree—No steps taken to annul mortgage—Mortgagee purchasing property in execution of mortgage decree—Purchaser at sale in execution of rent decree is bound by mortgage decree—Bengal Patni Taluk Regulation (8 of 1819).

A mortgaged patni was sold in execution of a rent-decree against the patnidar and purchased by his son who, however, did not take any steps to annul the mortgage. The mortgagee then instituted a suit on the mortgage to which the mortgagor's son was also made a party, and in execution of the motgage-decree the decree-holder himself purchased the patni:

Held: (1) that the interest acquired by the purchaser at the sale in execution of the rent-decree was bound by the mortgage-decree and was overridden by the interest that was acquired by the mortgagee by his purchase in execution of the mortgage-decree: (2) that the title of the mortgagee-purchaser was not affected by the fact that his purchase was not registered at the zamindar's sherista unless and until the zamindar chose to exercise the powers given to him by Regn. 8 of 1819. [P 809 C 1]

Mohendra Nath Roy and *Khitish Chandra sen*—for Appellant.

Probodh Chandra Das—for Respondents.

Fletcher, J.—This is an appeal from a decision of the learned Officiating Subordinate Judge of Chittagong dated 3rd January 1914, affirming the decision of the Munsif of Fatikcheri. The suit was brought for rent. The question in debate in the present appeal is whether the plaintiff is entitled to rent as a patnidar. The patni was mortgaged to the plaintiff by one who, in the course of these proceedings, has been called K. Subsequent to this mortgage the zamindar obtained a decree for rent against K., under the Bengal Tenancy Act. In the sale that followed, the patni was purchased by defendant 25 in the present suit, who is the son of K., on 12th November 1904. Defendant 25 took no steps for annulling the mortgage under the provisions of the Bengal Tenancy Act. Subsequently, a suit was brought by the plaintiff on his mortgage to which suit both K., and the present defendant 25 were parties. A decree was passed in that suit, the property was sold in execution and purchased by the plaintiff himself on 7th June 1906. The judgment in the mortgage suit as well as the decree both have been read to us. The only defendant who appeared in the suit brought by the plaintiff on his mortgage was a mortgagee whose martgege was subsequent to the mortgage of the plaintiff and the suit was decreed as against the defendants.

There is no doubt about that from the terms of the judgment. The present defendant 25 did not appear at the hearing of that suit, though he was made a party in order to bind any interest that he had. The decree directed the original mortgagor to pay the money into Court and in default the property was directed to be brought to sale. That decree for sale, in the view of the lower appellate Court, did not bind the interest of defendant 25. In that view, I am unable to agree. It is quite clear that in default of the original mort-

gagor paying the money into Court, the property itself was directed to be sold which would bind the present defendant 25 as well as any other defendant to the suit. The plaintiff by his purchase in execution overrode the interest that had been acquired by defendant 25 by his purchase at the sale in execution of the decree for rent. The view taken by the learned Judge of the Court below that the mortgage decree did not bind defendant 25 is, in my opinion, manifestly wrong.

The next point that has been raised is one under the terms of the Patni Regulation. The plaintiff's purchase was not registered at the landlord's sherista and therefore it is said that he has no title to the property. That is unsupported either by the terms of the Regulation or by any judicial authority. The remedy that is given to the landlord by the terms of the Regulation in the event of the purchaser failing to register and pay the landlord's fee is stated in S. 7 of the Regulation, that is, that the landlord may send an officer of his own to take possession of the property and collect the rent and until the purchaser conforms to the prescribed form, the Regulation constitutes the zamindar a trustee for the purchaser. No steps were taken by the zamindar in the present case in this respect and the plaintiff at the sale in execution of his mortgage-decree bought an interest that is declared by the terms of the Regulation to be transferable. The fact that he was not registered unless and until the zamindar chose to exercise the powers given to him by the Regulation does not, in any way, affect his title. In my opinion, the decisions of both the Courts below are wrong and they ought to be set aside and a judgment entered in favour of the plaintiff for the amount sued for, together with costs both in this Court as well as in the Courts below. The decreetal amount will bear interest at the rate of six per cent. per annum from 5th December 1912 until realization.

Richardson, J.—I agree.

Nos. 1862, 1863 *and* 1864.

The judgment delivered in Appeal No. 1189 will apply to these appeals also. They are accordingly decreed on the same terms.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 809

MOOKERJEE AND WALMSLEY, JJ.

Asitulla—Defendant—Appellant.

v.

Sadatulla and *another*—Plaintiffs—Respondents.

Letters Patent Appeal No. 35 of 1915, Decided on 8th June 1917.

Fraud—Co-vendee's name omitted from conveyance—Suit for rectification barred by limitation — Suit for possession of share against co-vendees lies—Specific Relief Act (1877), S. 31.

A plaintiff who was a co-vendee of land along with the defendants but whose name was omitted from the conveyance by the fraud of the defendants, who were entrusted with the preparation and execution of the document, can by a suit recover possession of his share, even though the limitation period for rectification of the conveyance by insertion of his name, by a suit properly framed for the purpose, has elapsed.

[P 810 C 1]

Sasodhar Roy for *Berendro Chandra Das*—for Appellant.

Hemendra Kumar Das—for Respondents.

Judgment.—This is an appeal under Cl. 15 of the Letters Patent from a judgment of Mullick, J., in a suit for recovery of possession of land on declaration of title. The case for the plaintiffs is that on 21st March 1897 they, along with defendants 1 and 8, purchased the disputed property from the proprietor, but that, by the fraud of defendant 1 who was entrusted with the preparation and execution of the conveyance, the names of the plaintiffs were omitted from the document. The plaintiffs seek for a declaration of their title and for recovery of the lands from the defendants who have wrongfully kept them out of possession. The Courts below have concurrently found that the allegations of the plaintiffs are well founded and have decreed the claim. The decree has been affirmed by Mullick, J. In the present appeal, this decision has been assailed as erroneous in law. It has been argued that the plaintiffs cannot establish their title till the conveyance is rectified by the insertion of their names, that the time to obtain rectification of the conveyance by a suit properly framed for the purpose has elapsed, and that they cannot by a suit for possession on declaration of title indirectly obtain relief to which their claim has been lost by lapse of time. In our opinion there is no foundation for this contention.

Section 31, Specific Relief Act, which has been pressed upon our notice, no doubt entitled the plaintiffs to obtain rectification of the conveyance. But the question remains, whether it is not open to them to establish their title by proof that although the conveyance was drawn up in favour of defendants 1 and 8, they were beneficial owners under the transaction. In our opinion, it was open to them to establish this case by oral evidance. This view is supported by the decision in *Mahendra Nath Mukherjee* v. *Jogendra Nath Roy Chaudhury* (1). Sir Francis Maclean, C. J., observed in that case that title may be established without rectification of an instrument, even though the time to secure a rectification of the instrument has elapsed, and that it is open to a party to give evidence to prove that his name has been omitted from the document by fraud or mistake. Banerjee, J., pointed out in the same case that S. 92, proviso (1), Evidence Act, is not limited in its application to suits for rectification of instruments, but that in suits for possession, evidence of the same character would be admissible as in suits for rectification. He further expressed the opinion that no advantage would be gained if the parties were driven to a separate suit for rectification to be followed by a suit for possession on the strength of the rectified instrument [*cf.* *Fife* v. *Clayton* (2), *Steel* v. *Haddock* (3)]. The identical principle had been previously laid down by this Court in *Md. Bhoy Puddumsee* v. *Chutterput Singh* (4) on the strength of the decision in *Mitchell* v. *Lapage* (5) and has subsequently been applied in *Madhavji* v. *Ramnath* (6), *Mahadeva Iyer* v. *Gopala Iyer* (7), *Rangasawmy Aiyangar* v. *Sowri Aiyangar* (8), *Kota Chinna Mellayya* v. *Kannekanti Veeriah* (9), *Karuppa Goundan Periathambi Goundan* (10), *Dagdu* v. *Bhana* (11). We are of opinion that the view taken by Mullick, J., is correct and that his decree must be affirmed.

1. (1898) 2 C W N 260.
2. (1807) 13 Ves (Jun) 546=33 E R 398=9 R. R 220.
3. (1855) 10 Ex 643=24 L J Ex 78.
4. (1893) 20 Cal 854.
5. (1816) Holt N P 253.
6. (1906) 30 Bom 457.
7. (1911) 34 Mad 51=8 I C 390.
8. (1916) 39 Mad 792=29 I C 588.
9. (1915) 31 I C 671.
10. (1907) 30 Mad 397.
11. (1904) 28 Bom 420.

The result is that this appeal is dismissed with costs

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 810

MOOKERJEE AND WALMSLEY, JJ.

Norendra Nath Kumar and *another*—Plaintiffs—Petitioners.

v.

Atul Chandra Bandopadhya and *others*—Defendants—Opposite Parties.

Rule Nisi No. 889 of 1916, Decided on 25th April 1917, against order of Sub-Judge, First Court, Hooghly, in Rent Appeal No. 52 of 1915.

(a) **Bengal Tenancy Act (1885), S. 148—Suit by co-shebait—Co-shebaits are not co-sharers but co-worshippers—Family arrangement between them does not entitle them to treat debutter property as personal—Co-shebait cannot under any such arrangement sue for his share of rent due to idol—Hindu Law, Religious Endowment.**

Co-shebaits are not cosharers, but co-worshippers and a family arrangement arrived at between them cannot entitle them to treat the debutter property as their personal property and to sue personally for their share of the rent payable to the idol. Therefore, a co-shebait cannot maintain a suit under S. 148-A, Ben. Ten. Act, for the recovery of a share of the rent of the debutter property on the ground that by an amicable arrangement arrived at between him and his co-shebaits, he is interested in the debutter property to the extent of that share, and the other shebaits who have been joined as pro forma defendants in the suit, in the remainder. [P 811 C 1]

(b) **Hindu Law—Religious Endowment.**

Joint shebaits are for many purposes joint trustees. [P 811 C 1]

(c) **Civil P. C., (1908), O. 31, R. 2—Joint Trustees—All trustees should be co-plaintiffs or should be made defendants.**

Ordinarily all the trustees should be co-plaintiffs and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being joined as plaintiffs. [P 811 C 1]

(d) **Trust—Administration — All trustees form one collective trustee and must exercise powers in joint capacity.**

Where the administration of a trust is vested in several trustees, they all form as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity, and not separately. [P 811 C 1]

Mohesh Chandra Banerjee for *Jyotish Chandra Hazra*—for Petitioners.

Sasadhar Roy—for Opposite Parties.

Judgment.—This Rule raises the question, whether the trial Court refused to exercise a jurisdiction vested in it by law, when it dismissed the claim on the ground that the suit was not properly constituted and could not be entertained. The plaintiffs and the pro forma defendants are

joint shebaits of the property dedicated to an idol Damodar Jeo Thakur. The principal defendants are the tenants in occupation of the land. The plaintiffs instituted this suit under S. 148-A, Ben. Ten. Act, for recovery of one-fourth share of the rent payable by the tenant defendants, on the allegation that they were interested to the extent of one fourth in the dedicated property while the pro forma defendants were interested to the extent of three-fourths. The Court of first instance held that the suit as framed was not maintainable, and that view has been affirmed on appeal by the Subordinate Judge. The Subordinate Judge observes that the shebaits are not cosharers but coworshippers, and any family arrangement at which they may have arrived amongst themselves cannot entitle them to treat the debutter property as personal property and to sue personally for their share of the rent payable to the idol. He further holds that S. 148-A, Ben. Ten. Act, contemplates the case of a cosharer landlord who is entitled to sue for his share of the rent separately, and consequently cannot be applied to co-shebaits who have no personal interest in the debutter property and merely represent the idol for secular purposes. We are of opinion that the view taken by the Subordinate Judge in concurrence with the Court of first instance is well-founded on principle.

The true position of a co-shebait was explained by this Court in the case of *Kokilasari Dasi* v. *Mohunt Rudranand Goswami* (1). Where property belonging to an endowment is sought to be recovered from a third party who asserts that he is the owner thereof, all the trustees of the endowment should be made parties to the suit. Ordinarily all the trustees should be co-plaintiffs and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs. Where the administration of the trust is vested in several trustees, they all form as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity. Their interest and authority being equal and undivided they cannot act separately, but all must join. This principle in no way contravenes the decision of the Judicial Committee in *Jagadindra Nath Ray* v. *Hemanta Kumari Debi* (2) and was applied to a suit for enhancement of rent in *Abdul Gafur Mandal* v. *Uma Kanta Pandit* (3), where it was pointed out that joint shebaits are for many purposes joint trustees. The same principle was recognized in *Kumban* v. *Moorthi* (4). In the case before us, it is impossible for the plaintiffs to maintain the position that they have an interest in the land to the extent of one-fourth share and that on that basis they are entitled to collect one-fourth share of the rent from the tenant defendants. If the pro forma defendants declined to join with the plaintiffs in the institution of this suit the proper course for the plaintiffs was to institute a suit for recovery of the entire arrears due: *Luke* v. *South Kensington Hotel Co.* (5). That a suit of this description is maintainable is clear from the decision of a Full Bench of this Court in *Pyari Mohun Bose* v. *Kedarnath Roy* (6). The plaintiffs are clearly not entitled to maintain a suit for one-fourth share of the rent and the Court below has correctly held that the suit as framed is not maintainable. The result is that this Rule is discharged with costs. We assess the hearing fee at one gold mohur.

V B./R.K. *Rule discharged.*

1. (1907) 5 C L J 527.
2. (1905) 32 Cal 129=31 I A 203 (P C).
3. A I R 1915 Cal 33=24 I C 266.
4. (1911) 34 Mad 406=7 I C 422.
5. (1879) 11 Ch D 121=48 L J Ch 361.
6. (1899) 26 Cal 409.

A. I. R. 1918 Calcutta 811

TEUNON AND RICHARDSON, JJ.

Debendra Nath Das Gupta — Petitioner.

v.

Registrar, Joint Stock Companies, Bengal—Opposite Party.

Criminal Revn. No. 503 of 1917, Decided on 7th June 1917.

(a) Companies Act (1913), S. 134 (4)—Default in filing balance sheet—Director cannot plead that no general meeting was called and no balance sheet was laid before it.

In answer to a charge under S. 134 (4), Companies Act, in respect of default made in filing with the Registrar the balance-sheet for a certain year, it is not open to a Director of a Joint Stock Company to plead that as no general meeting was called in that year and no balance sheet was laid before the Company at any such general meeting, it was impossible for him or his Company to comply with the requirements of S. 134. [P 812 C 1]

(b) Companies Act (1913), S. 134—Presidency Magistrates in Calcutta can try

charges under S. 134 although Company is situated outside Calcutta.

The Presidency Magistrates in Calcutta possess jurisdiction to try charges under S. 134, Companies Act, even where the Company is situate outside Calcutta, as the office of the Registrar with whom the balance-sheet should be filed is in Calcutta. [P 812 C 2]

I. B. Gupta and *Probodh Kumar Das* —for Petitioner.

Camell—for the Crown.

Judgment.—In this case it appears that the petitioner was one of the Directors of a Joint Stock Company, known as the Darjeeling Press Co. Ltd. He has been convicted under S. 134 (4), Companies Act, 7 of 1913, in respect of a default made in filing with the Registrar the balance-sheet for the year 1914-15. It is not disputed that as a matter of fact in respect of the filing of the balance-sheet with the Registrar of Companies a default was made, and the defence of the petitioner as placed before us is that in fact in that year there was no general meeting and that being so, no balance-sheet was laid before the Company at any such general meeting. His contention then is that these preliminaries not having been fulfilled it was impossible for him or his Company to comply with the requirements of S. 134 and that he should have been convicted, if at all, not under S. 134 but under S. 76 or 131. But it is not disputed, and in fact it is admitted, that as one of the Directors the petitioner himself was responsible for ensuring that all the necessary preliminaries to be observed prior to the filing of the balance-sheet with the Registrar had been duly observed and that being so, on the principles laid down in the case of *Park* v. *Lawton* (1), we are of opinion that we ought to hold that it is not open to the petitioner to plead, in answer to a charge under S. 134, his prior default in respect of the calling of the prescribed general meeting and of placing before the Company at such meeting a duly prepared and audited balance sheet.

The second contention on behalf of the petitioner is that if he had been prosecuted under S. 76 or S. 131 of the Act, the Presidency Magistrate in Calcutta, before whom his conviction has been had, would have had no jurisdiction to try the offences charged under those sections and that the jurisdiction would have lain exclusively with the Magistrates in Darjeeling. However that may be, that does not take away the jurisdiction which the Presidency Magistrates in Calcutta clearly possess in respect of charges under S. 134, the office of the Registrar with whom the balance-sheet should be filed being in fact in Calcutta. For these reasons we discharge this rule.

V.B./R.K. *Rule discharged.*

1. (1911) 1 K B 588=80 L J K B 396.

A. I. R. 1918 Calcutta 812

RICHARDSON AND WALMSLEY, JJ.

Goljan Bibi—Petitioner.

v.

Nafar Ali and *another* — Opposite Parties.

Rule Nisi No. 973 of 1916, Decided on 19th March 1917, against the order of Dist. Judge, Dacca, D/- 2nd November 1916, in case No. 133 of 1916.

(a) Civil P. C. (1908), O. 41, R. 10 (2)—Appeal dismissed under R. 10 can be re-admitted.

A Judge has jurisdiction to re-admit an appeal dismissed by an order under Cl. (2), R, 10, O. 41, Civil P. C. [P 813 C 1]

But an order re-admitting such an appeal without notice to the other side is not binding on it. [P 813 C 1]

(b) Limitation Act (1908), Art. 168—Appeal dismissed under O. 41, R. 10—Application for readmission should be made within reasonable time.

Even if Art. 168 does not apply to an application for the restoration of an appeal dismissed under R. 16, O. 41, Civil P. C., such an application ought to be made within a reasonable time and ordinarily would be too late if made after thirty days from the date of dismissal. [P 813 C 1]

Bimal Chandra Das Gupta—for Petitioner.

Suresh Chandra Taluqdar—for Opposite Parties.

Richardson, J.—This is a rule calling on the opposite party to show cause why the order of the Officiating District Judge of Dacca, dated 2nd November 1916, should not be set aside. The order was made in the following circumstances. The petitioner filed an appeal in the District Judge's Court on 31st May 1916. On 4th July 1916 she was directed under R. 10, O. 41, to furnish security in the sum of Rs. 80 for the costs of the appeal and of the original suit. The time for furnishing security was more than once extended. On 26th August 1916 the Officiating District Judge refused to extend the time further and dismissed the appeal under Cl. (2), O. 41, R. 10. On 2nd November 1916, the petitioner applied for the readmission of the appeal. By the first of

the two orders made on that date, the Officiating District Judge directed that the appeal should be re-admitted if the amount of the security ordered were deposited in Court by 8th November 1916. By the second order of the same date against which this rule has been obtained, he rejected the application on the ground that it had just come to his notice that the application was time-barred by more than a month. It is not disputed that the Judge had jurisdiction to re-admit the appeal after having dismissed it by an order under Cl. (2), R. 10, O. 41. It is argued for the petitioner that inasmuch as the Officiating District Judge had jurisdiction in the exercise of his powers to re-admit the appeal by his first order of 2nd November, he was functus officio and had no power to pass the second order of the same day. It is further argued for the petitioner that the Officiating District Judge was wrong in deciding that the application was time-barred. Apparently the Officiating District Judge applied Art. 168 of the Schedule of the Lim. Act.

It is contended that that article applies to an application made under R. 19, O. 41, and has no application when an application is made to restore an appeal which has been dismissed under R. 10. On the other hand, it is contended for the opposite party that both the first and second orders of 2nd November 1916 were made by the Officiating District Judge without notice to them and that they are not bound by those orders. On the question of limitation, it is argued for the opposite party that the District Judge is right in applying Art. 168 of the Schedule of Limitation Act. It seems to me that the contention of the opposite party that they are not bound by the order of 2nd November 1916 re-admitting the appeal should be accepted. That raises the question whether this Court ought to exercise its revisional jurisdiction in the matter. In regard to the question of limitation, even if Art.168 does not apply to an application for the restoration of an appeal dismissed under R. 10, O. 41, it is clear that such an application ought to be made within a reasonable time, and by anology an application made after thirty days would ordinarily be an application unduly delayed. The petitioner had had every opportunity of complying with the order for furnishing security and she did not apply to set aside the order dismissing the appeal till 2nd November. As the Officiating District Judge has said, that was more than thirty days beyond the period allowed by Art. 168. Whether the article applies or not, the petitioner did not, in my opinion, act with due diligence in the matter. We have come to the conclusion that this Court ought not to interfere in this case. In that view, the rule should be discharged. We make no order as to costs..

Walmsley, J.—I agree that the rule should be discharged.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 813

MOOKERJEE AND BEACHCROFT, JJ.

Binode Lal Chakraburtti and *others*—Plaintiffs—Appellants.

v.

Preo Nath Chakraburtti and *others*—Defendants—Respondents.

Letters Patent Appeal No. 38 of 1915, Decided on 30th March 1917, against decree of Newbould, J., D/- 12th January 1916.

(a) Limitation Act (1908), Art. 62 — If money received by defendant belongs to plaintiff and is repayable to him, Art. 62 applies.

Article 62, Sch. 1, Lim. Act, applies to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, even where the defendant at the time when he received the money did not intend to pay it to the plaintiff. [P 814 C 1]

The operation of the Article is attracted, if it is established that the money received by the defendant is money which belongs to the plaintiff, and is repayable to him in justice, equity and good conseience. [P 814 C 1]

(b) Civil P. C. (1908), O. 1, R. 5 and O. 2, R. 3—Rent—Suit for—Alternative claim for money decree against plaintiff's cosharer is maintainable.

A suit is maintainable in the form in which a decree for arrears of rent is claimed against the tenant-defendants, with an alternative prayer at the same time for a money decree against the other set of defendan, the cosharers of the plaintiff in case it is held that they have realised the entire rent from the tenant-defendant. [P 814 C 1]

Satish Chandra Ghosh — for Appellants.

Sarat Chandra Basak and *Amullya Kumar Guha*—for Respondents.

Judgment.—In our opinion there can be no room for controversy that the view taken by Walmsley, J., is amply supported by the authorities. The plaintiff instituted this suit for recovery of money in the alternative from two sets of defendants. He claimed arrears of rent from the tenant-defendants, and alleged, at the

same time, that if the entire rent had already been realised from them by his cosharers, he was entitled to a decree as against the latter. This form of action is well known [*Sham Singh* v. *Kishun Sahai* (1), *Aiyathurai Ravuthan* v. *Santha Meera Ravuthan*, (2), *Yerukola* v. *Mudiya Kamudu* (3)]. The Court of first instance found that the entire rent had been collected on 4th November 1907 by defendant 4 who was apparently the managing member of the family composed of the plaintiff and his cosharers. The trial Court accordingly dismissed the suit against the tenant-defendants and made a decree against defendant 4. Thereupon defendant 4 appealed and argued that the claim, as against him, was barred by limitation, inasmuch as the rent had been collected by him on 4th November 1907 and the suit had not been instituted till 18th April 1911. The Subordinate Judge gave effect to this contention and dismissed the suit. That decree has been affirmed by Walmsley, J., on second appeal to this Court.

It is plain that the case is governed by Art. 62, Sch. 1, Lim. Act. That Article applies to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. It is now well settled that this article is applicable even though the defendant at the time when he received the money did not intend to pay it to the plaintiff, the operation of the article is attracted if it is established that the money received by the defendant is money which belongs to the plaintiff and is repayable to him, in justice, equity and good conscience. In support of this proposition reference may be made to the case of *Mahomed Wahib* v. *Mahomed Ameer* (4). The same view has been subsequently adopted in a long series of decisions and the rule embodied in Art. 62 has been applied in a variety of cases more or less analogous in their circumstances to those of the cases before us. We may mention the decision in *Subbanna Bhatta* v. *Kunhanna Banta* (5), *Shanmuga Pillai* v. *Minor Govindasami* (6), *Sankunni Menon* v. *Govinda Menon* (7), *Baiznath Lala* v. *Ramadoss* (8) and *Niader Singh* v. *Ganga Dei* (9). In our opinion, Art. 62 is applicable to this case, and as the plaintiff has not sought the protection of S. 18, Lim. Act, on the allegation of fraud the suit has been rightly dismissed as barred by limitation. The appeal is consequently dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. (1907) 6 C L J 190.
2. (1908) 31 Mad 252.
3. (1909) 4 I C 34.
4. (1907) 32 Cal 527.
5. (1907) 30 Mad 298.
6. (1907) 30 Mad 459.
7. A I R 1914 Mad 572=14 I C 254=37 Mad 381.
8. A I R 1915 Mad 405=26 I C 219=39 Mad 62
9. (1916) 38 All 676=35 I C 86.

A. I. R. 1918 Calcutta 814

MOOKERJEE AND WALMSLEY, JJ.

Baneswar Pramanik and *another*—Plaintiffs—Appellants.

v.

Tarapada Bhattacharjee and *others*—Defendants—Respondents.

Appeal No. 1199 of 1915, Decided on 3rd May 1917, from appellate decree of Sub-Judge, Burdwan, D/- 18th February 1915.

(a) Civil P. C. (5 of 1908), O. 32, R. 3—No guardian ad litem—Decree passed—Minor is in same position as if he were no party to litigation.

A minor, against whom a decree is made in a suit in which though joined as defendant he is not represented by a guardian ad litem, occupies the same position as if he were not a party to the litigation.

(b) Civil P. C. (5 of 1908), O. 32, R. 3—Decree without appointment of guardian ad litem—Mortgage suit against minor representatives of mortgagor—Guardian not appointed — Decree is not operative against minors and must stand cancelled,

A mortgage suit instituted against the representatives-in-interest of the mortgagor, who were minors, was decreed without any guardian ad litem being appointed for them. In a suit by the representatives to set aside the mortgage decree:

Held: that the decree made in the mortgage suit was not oprative against the minor representatives and must stand cancelled, with the consequence that the mortgage suit would be revived and the mortgagee would be entitled to proceed therewith in accordance with law. [P 815 C 2]

Hemendra Nath Sen—for Appellants.

Biraja Mohan Majumdar and *Hira Lal Sanyal*—for Respondents.

Judgment.—This is an appeal in a suit to set aside a mortgage-decree and the execution sale consequent thereupon, on the ground that the decree was made under circumstances which render it inoperative as against the plaintiffs-appellants. There is no dispute as to the facts which have given rise to this litigation. The defendants instituted a suit against the plaintiffs to enforce a mortgage-bond

alleged to have been executed by their father. When the suit was instituted on 25th May 1905, the present plaintiffs, then defendants, were infants. The Court directed the plaint to be registered. As the defendants were infants and as the plaintiffs had proposed their mother for appointment as guardian ad litem, the Court recorded an order to the following effect:

"Issue notice to the minors and the guardian, fixing the 17th July for appointment of the guardian."

On the 17th July, the mother did not enter appearance or signify her willingness to accept the office of guardian ad litem of her infant sons. The Court thereupon proceeded to record the following order:

"The defendants are absent. Portap Chunder Mozumdar, witness for the plaintiffs, is examined and Ex. 1 is used as evidence on behalf of the plaintiffs. According to the reasons given in the judgment, the suit is decreed with costs."

To use the words of Trevelyan, J., in *Dakeshur Pershad Narain Singh* v. *Rewat Mehtan* (1), it is difficult to conceive of a case where the formalities of law have been more neglected than in the present instance. When the proposed guardian did not enter appearance and accept the office, the duty of the Court was to appoint one of its officers to act as guardian ad litem for the infants. The Court not only omitted to take this essential step, but proceeded to decide the case, although 7th July 1905 had been fixed, not for the disposal of the suit, but for the appointment of a guardian ad litem for the infants. In execution of the decree so made, the properties of the infants were subsequently brought to sale and were purchased by the decree-holders themselves. The plaintiffs now seek to have the decree and the execution sale cancelled on declaration that the decree was inoperative as against them. In our opinion, there is no answer to the suit. The Subordinate Judge has placed reliance upon the decision of the Judicial Committee in the case of *Wulian* v. *Banke Behari Pershad Singh* (2). which is clearly distinguishable. There the Judicial Committee held that the proceedings in the earlier litigation showed, on the face of them, that the infants were represented bya properly appointed guardian, although no recorded order of appointment could be traced. In these circumstances, and in the absence of the records of the earlier suit (which had apparently been destroyed), the Judicial Committee ruled that the mere absence of an order to the effect that the mother was appointed guardian ad litem did not invalidate the proceedings. In the case before us, on the other hand, the facts are well established.

The mother was never appointed guardian ad litem of the minor; indeed, she never entered appearance; and the Court proceeded to decide the suit on a date which had been fixed for the appointment of a guardian and not for the final disposal of the suit. In our opinion, this decree must be treated as a decree made against persons who were not represented in the suit and who consequently occupy the same position as if they were not parties to the litigation. This view is supported by the decision of this Court in *Narsingh Narain* v. *Jahi Mistry* (3) and is also in conformity with the decision of the Judicial Committee in *Rashid-un-nisa* v. *Mahammad Ismail Khan* (4). The latter case shows that where infants have not been represented by a guardian duly appointed and competent to represent them for the purposes of the litigation, the decree made against them must be deemed inoperative in law. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed with costs in all the Courts. It is declared that the decree made in the mortgage suit is not operative as against the plaintiffs-appellants and must stand cancelled. The consequence will be that the mortgage suit will stand revived and the mortgagee will be entitled to proceed therewith in accordance with law. The sale consequent on the decree will also stand cancelled and the plaintiffs will be forthwith restored to possession of the property in suit, in execution of the decree of this Court.

V.B./R.K. *Appeal allowed.*

1. (1897) 24 Cal 25
2. (1903) 30 Cal 1021=30 I A 182.
3. (1912) 13 I C 414.
4. (1909) 3 I C 864 (P C).

A. I. R. 1918 Calcutta 816

MOOKERJEE AND WALMSLEY, JJ.

Fanindra Narain Roy— Plaintiff—Appellant.

v.

Kachheman Bibi and *others*—Defendants—Respondents.

Appeal No. 352 of 1912, Decided on 5th July 1917, from appellate decree of Dist. Judge, Birbhum, D/- 22nd July 1911.

Contract Act (1872), S. 2—Consideration what constitutes explained—Benefit to promisor is not necessary—Joint mortgagors though not benefited are liable on mortgage.

In order to support a binding promise it is not necessary that the promisor should benefit by the consideration: it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. *A* along with *B* and *C* executed a mortgage, which the mortgagee accepted in lieu of the security of a prior mortgage executed by *A* alone in his favour:

Held: that *B* and *C* were liable under the mortgage, though they had not received any direct benefit for executing it. [P 816 C 2]

Surendra Nath Ghosal—for Appellant.

Hemendra Nath Sen—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit instituted on 26th February 1906 to enforce a mortgage executed in his favour on 11th April 1893 by four members of a Mahomedan family, by name Sadan, Edu, Badruddin and Lakhu. The suit has now lasted for more than eleven years and has had a chequered career. It was dismissed by the Subordinate Judge on the ground that there was no legal consideration for the mortgage. The decree was confirmed by the District Judge on appeal. On second appeal to this Court, Brett and Sharfuddin, JJ., held that the view which had commended itself to both the Courts below was erroneous in law. The mortgagor had been executed in lieu of a prior mortgage granted by Sadan in 1884 in circumstances, which may be briefly narrated. At a sale held in 1880, in execution of a decree against some members of the family, their properties were sold and passed into the hands of the mortgagee. They supplicated to him to re-transfer to them for a sum of Rs. 300 the purchased property (which apparently included their homestead). He consented, and executed a conveyance which, however, was never registered. The judgment-debtors were unable to pay the decree-holder in cash the consideration settled, and the result was that Sadan executed the mortgage of 1884 for Rs. 300. The conveyance was inoperative in law, but as the statutory period has elapsed since the date of the execution sale and as the judgment-debtors have continued in undisturbed possession, it may be taken that the title acquired by the purchaser at the sale has become extinguished.

The true position, consequently, was that a mortgage was granted to the plaintiff by Sadan in 1884 in order to induce him to forbear from the exercise of his rights as auction-purchaser. On these facts this Court held upon the authority of the decision in *Hurkissen Dass Serowgee* v. *Nibaren Chander Banerji* (1), that the mortgage of 1884 was granted for a lawful consideration. This necessarily justified the inference that the mortgage now in suit, which replaced the earlier mortgage, was also for a lawful consideration. This Court thereupon remanded the case to the District Judge for determination of the other issues in the suit. One of these issues was, whether all the defendants, that is, the representatives of Sadan, Edu, Badruddin and Lakhu, and two other persons, were bound by this transaction. The District Judge has found, as we read his judgment, that the mortgage was, as a fact, granted by these four persons, but he has held that it cannot be enforced against the representatives of the mortgagors other than Sadan and Edu as they were not bound by the execution sale and received no benefit under the mortgage transaction. In this view, he has decreed the suit against the representatives of Sadan and Edu and has dismissed the claim as against the others. We are of opinion that the distinction made by him between the two sets of mortgagors is not sound in principle and cannot be supported. The mortgagors, under the bond now in suit, are all equally bound by the transaction, although two of them might not have been directly benefited by the mortgage transaction. This is clear by the definition of the term consideration in S. 2, Cl. (d), Contract Act. That definition, in so far as it is applicable to the facts of this case, may be stated in the followlng terms:

"When, at the desire of the promisor, the promisee has abstained from doing something, such abstinence is called a consideration for the promise."

1. (1902) 6 C W N 27.

Here, we have, in 1884, a mortgage by Sadan in favour of the plaintiff. The plaintiff was entitled to enforce the security as against Sadan. He was asked to accept, in lieu of that security, a fresh bond executed in 1893 by Sadan aiong with three other persons, viz., Edu, Badruddin and Lakhu. The promise by Edu, Badruddin and Lakhu to be bound by the mortgage plainly formed a good consideration for the abstinence of the mortgagee to sue Sadan upon the first bond. The respondents have, however, argued that a consideration is not lawful unless it benefits the promisor. There is no foundation for this contention, and were it accepted, we should have to substitute the phrase "at the desire and for the benefit of the promisor" for the phrase "at the desire of the promisor." which finds a place in Cl. (d), S. 2. We are confirmed in the view that the contention of the respondents is not well founded, from an examination of the authorities in England. Valuable consideration has been defined as some right, interest, profit or benefit, accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration: it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. This view is supported by the decisions in *Bailey* v. *Croft* (2), *Alhusen* v. *Prest* (3) and *Haigh* v. *Brooks* (4). We hold accordingly that the reasons assigned by the District Judge in support of his conclusion that Sadan and Edu alone were responsible under the mortgage cannot be accepted. As regards defendants 3 and 10, however the District Judge has correctly held that they were in no way bound by the transaction as they were not parties to the mortgage-deed. The result is that this appeal is allowed in part and the decree of the District Judge modified. The decree will be deemed to have been made against all the defendants other than defendants 3 and 10. The appellant is entitled to his costs of this appeal as against the defendant other than defendants 3 and 10, but he must pay defendant 3, who appeared in this Court, his costs of this appeal. The costs incurred by the plaintiff-appellant in all the Courts will be added to the sum due under the mortgage, and a self-contained decree will be drawn up in this Court.

V.B./R.K. *Appeal partly allowed.*

2. (1812) 4 Taunt 611=128 E R 470.
3. (1851) 6 Ex 720=20 L J Ex 440.
4. (1839) 10 Ad & E 309=2 P & D 452.

A. I. R. 1918 Calcutta 817

FLETCHER AND NEWBOULD, JJ.

Brojendra Kumar Saha and *others*—Plaintiffs—Appellants.

v.

Kali Nath Saha and *others*—Proforma-Defendants—Respondents.

Appeal No. 2653 of 1915, Decided on 7th June 1917, from appellate decree of Addl. Sub-Judge, Nadia, D/- 2nd August 1915.

(a) Partnership—Dissolution of—Suit for declaration of title to shares purchased by firm is maintainable.

A suit for a declaration of the plaintiffs' title to a half share in a certain number of shares in a Limited Company purchased out of a fund belonging to a firm, which was carried on by the plaintiffs and the defendants but was subsequently dissolved, is maintainable without an adjustment of accounts of the partnership business, where none of the parties say that any question of accounts remains open, other than the question as to the ownership of the shares. [P 818 C 1]

(b) Specific Relief Act (1877), S. 42—Partnership—Dissolution of—Suit for declaration of title to shares purchased by firm—Decree—Form of, laid down.

In a suit for declaration of title to shares purchased by firm the Court has no power to direct by its decree the Limited Company to register the plaintiffs' names as shareholders, but it should intead direct the defendants to execute a transfer of a half of the shares in suit in favour of the plaintiffs, and to lodge the transfer together with share certificates with the Company for registration. [P 818 C 1]

(c) Civil P. C. (1908), O. 21, R. 34—Decree declaring title to shares is executable on defendant's failure to obey directions of decree.

A decree directing plaintiff's title to shares is executable on defendants' failure to obey its direction in the manner provided for in O. 21, R. 34. [P 818 C 1]

Manmatha Nath Roy—for Appellants.

Judgment.—This is an appeal by the plaintiffs against a decision of the learned Additional Subordinate Judge of Nadia, dated 2nd August 1915, reversing a decision of the Munsif at Kushtia. The plaintiffs brought the suit for a declaration that they were entitled to a half of the shares in the Bengal Paper Mill Company, Limited, and for consequential reliefs. The plaintiffs' case was that the shares had been purchased out of the

fund belonging to a firm which was formerly carried on by the plaintiffs and defendants 1 to 6 but was subsequently dissolved, and that, therefore, the plaintiffs were entitled to a half of the shares. The Court of first instance decreed the suit, as it was not disputed that the plaintiffs were entitled to a half of the ten shares in question. The learned Judge in the lower appellate Court dismissed the whole suit, holding that the plaintiffs could not get a half of the ten shares unless there had been an adjustment of the accounte of the partnership business. In this case none of the parties says that any question of account remains open other than the question as to the ownership of the ten shares. The plaintiffs are clearly entitled to a half of the ten shares. Defendant 1 shall execute a proper transfer of a half of these ten shares.

The decree of the Court of first instance directed the Bengal Paper Mill Company to register the plaintiffs' name. This the learned Judge had no power to do. The decree should, therefore, instead of directing the Company to register the plaintiffs' names, direct defendant 1 to execute a transfer of a half of the ten shares in favour of the plaintiffs and to lodge the transfer together with the share certificates with the Company for registration. If he fails to obey that, the plaintiffs can proceed to execute the decree in the manner provided for in O. 21, R. 34, Civil P. C. The decree passed by the learned Additional Subordinate Judge must be set aside and the appeal decreed in the terms already mentioned. The respondents must pay to the appellants the costs incurred by them in this Court and in the lower Courts.

V.B./R.K. *Appeal decreed.*

A. I. R. 1918 Calcutta 818 (1)

FLETCHER AND RICHARDSON, JJ.

Sekandar Sheikh and *others*—Plaintiffs—Appellants.

v.

Anu Sarkar—Defendant—Respondent.

Appeal No. 43 of 1915, Decided on 16th January 1917, from appellate decree of Sub. Judge., 1st Court, Pabna, and Bogra, D/- 29th June 1914.

Bengal Tenancy Act (1885), Sch. 3, Art. 3—Scope of.

The special rule of limitation in Art. 3, Sch. 3, is not confined to suits in which the landlord himself is a defendant; 24 *Cal* 40, *Ref.*

[P 818 C 2]

Troilokya Nath Ghose—for Appellants.

Govinda Chunder Dey Ray—for Respondent.

Fletcher, J.—This appeal, although it has been argued at some little length, has got absolutely nothing in it. The points have obviously been rightly decided by the lower appellate Court. Two points have been pressed most before us. The first is that defendant 1 purchased the property in execution of the mortgage decree in a suit to which the appellants before us were not parties and that therefore, the plaintiffs are not bound by that decree and by some principle of law which is not altogether clear, it is said that defendant 1 is estopped from alleging that he has got a title by adverse possession, having been settled on the property by the admitted landlord and having ousted the original tenants for more than two years. That is a proposition I do not agree with. The second point that is put forward and argued is that the special rule of limitation in Art. 3, Sch. 3, Ben. Ten. Act, only applies in cases in which the landlord himself is a defendant in the suit. That is not well-founded. The decisions of this Court are the other way, commencing from the decision reported as *Bheka Singh* v. *Nakchhed Singh* (1). The other point raised is as regards the shares. That, of course, is clearly concluded by the finding of fact made by the lower appellate Court. The appeal, therefore, fails and must be dismissed with costs.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1. (1897) 24 Cal 40.

A. I. R. 1918 Calcutta 818 (2)

CHATTERJEA AND RICHARDSON, JJ.

Iswar Chandra Sarma and *others*—Plaintiffs—Appellants.

v.

Kailash Chandra Nath and *others*—Defendants—Respondents.

Appeal No. 2439 of 1915, Decided on 19th July 1917, from appellate decree of Offg. Sub. Judge., Commilla, D/- 4th June 1915.

Landlord and Tenant—Occupancy holding—Person purchasing non-transferable holding in execution of decree cannot enforce his rights against subsequent purchaser in execution of money-decree recognised by landlord.

The plaintiff purchased a non-transferable occupancy holding in execution of a money-decree

but before he took possession from Court, the defendants purchased the same in execution of another money-decree and obtained delivery of possession, and the rent paid by them was accepted by the landlord. In a suit by the plaintiff to recover possession of the holding from the defendants as its prior purchaser:

Held: that as the landlord, who had a right to re-enter upon the land on its abandonment by the heirs of the original tenant, had accepted rent from the defendants and treated them as tenants, there was practically a settlement with them by the landlord and that, therefore, the plaintiff as the purchaser of the interest of the tenant did not acquire any interest which could be enforced against the landlord or the defendants claiming under the landlord. [P 819 C 1]

Gopal Chandra Das—for Appellants.

Gobinda Chandra De Roy, *Hemendra Kumar Das* and *Khemoda Kinkar Roy*—for Respondents.

Judgment. — The plaintiff-appellant as the purchaser of a non-transferable occupancy-holding at a sale held in execution of a money-decree brought the suit out of which this appeal arises, to recover possession of the holding from the defendants. The holding belonged to one Ram Manikya, and, as we have said, it was purchased by the plaintiff in execution of a money-decree on 21st May 1901; but before the plaintiff took possession from Court, defendant 1 purchased the holding at another sale held in execution of a money-decree in September 1902, and obtained delivery of possession in 1903. It is found that the heirs of the tenant Ram Manikya had at that time left the land and even the homestead without arranging for the payment of rent, and that there was an abandonment of the holding by the heirs of the tenant. That being so, the landlord had a right to enter upon the land. He accepted rent from the defendants and treated them as tenants and there was practically a settlement with them by the landlord. Under these circumstances, the plaintiff as the purchaser of the interest of the tenant did not acquire any interest which could be enforced against the landlord or the tenants claiming under the landlord. We think, therefore, that the plaintiff was not entitled to recover possession of the land from the defendants and that the decrees of the Courts below are right. The appeal is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 819

CHATTERJEE AND WALMSLEY, JJ.

Aswini Kumar Nag Majumdar and *others*—Plaintiffs—Appellants.

v.

Madhu Sudan Pal Kundu and *others*—Defendants—Respondents.

Appeals Nos. 1327, 1383 and 1384 of 1913 and 2681 and 3657 of 1914 Decided on 31st January 1917.

Limitation Act (1908), S. 14 — Ejectment suit—Subsequent suit to recover arrears of rent accruing during pendency of suit—Limitation is not extended by reason of ejectment suit.

The limitation for a suit to recover arrears of rent accruing due whilst the landlord was prosecuting a suit for the ejectment of the tenant on the ground of forfeiture is not extended by reason of the continuation of the ejectment suit. [P 820 C 2]

Sarat Chandra Basak and *Surendra Kumar Bose*—for Appellants.

Jadunath Kanjilal—for Respondents.

Walmsley, J.— These five appeals arise out of suits filed simultaneously by cosharer landlords against their common tenant for what may be called rent as a convenient term. Three of the suits were tried by a Munsif, and the appeals were heard by a Subordinate Judge. Two others were tried by the Subordinate Judge and the appeals were heard by the District Judge. There is only one point for decision and it is common to all the suits and appeals, but it was decided in favour of the defendant by the Subordinate Judge and in favour of the plaintiffs by the District Judge. The result is that the three appeals of 1913 have been filed by the plaintiffs against the decision of the learned Subordinate Judge and the two appeals of 1914 by the defendant against the decision of the learned District Judge. The facts that have given rise to the appeals are as follows: The plaintiffs, as landlords, granted leases to the defendant in 1293 *B. S.* and one of the conditions was that the lessee should not alienate his right in any way and that if he did so the leases would be forfeited, and the plaintiffs would be entitled to khas possession of the lands demised. In spite of this stipulation the defendant granted an ijara settlement to one Harashit Ghose for a term of 999 years on 9th Magh 1311. The plaintiffs thereupon instituted suits for ejectment of the defendant on 19th January 1906. Those suits were finally decided by a judgment of this Court passed on 3rd June 1910

by which it was held that the plaintiffs were entitled under the provisions of S. 155, Ben. Ten. Act, to claim from the defendant reasonable compensation for the breach of the conditions of the lease and on the defendant's default to a decree for ejectment. The cases were sent back to the lower appellate Court with directions to determine what is reasonable compensation to be paid by the defendant to the plaintiffs in each case and after fixing under the provisions of S. 155, Ben. Ten. Act, the period within which the compensation should be paid to pass a decree in favour of the plaintiffs for recovery of such sums within the period fixed and on default of the defendant to pay the sums within that period for ejectment of the defendant from the tenure: see *Keshab Lal* v. *Madhu Sudan Pal* (1).

The learned Subordinate Judge, in accordance with these directions fixed the amount of compensation on 7th August 1911, and on 15th August 1911, the sums so fixed were deposited in Court by the defendant.

Meanwhile, on 18th April 1911, the plaintiffs instituted the suits from which these appeals arise claiming rent or money compensation for use and occupation of the land from the last kist of 1311 *B. S.* or the first kist of 1312 *B. S.* down to the end of 1317 *B. S.* The defendant asserts that the claims for periods prior to the first day of 1314 *B. S.* are barred by limitation and that is the question which we have to decide. As already mentioned the learned Subordinate Judge answered the question in one way and the learned District Judge in the other way. Numerous authorities were quoted before us: they are to be found collected in the notes to S. 155 in Mr. Rampini's annotated edition of the Bengal Tenancy Act. Of these cases the plaintiff relies on those of *Mt. Ran-Surno Moyee* v. *Shooshee Mokhee Burmania* (2) and of *Deen Dyal Paramanick* v. *Radha Kishoree Debee* (3). The circumstances of the former, however, are very different from those of the case now under consideration. The second case, and another case to which reference is made in the judgment of *Eshan Chunder Roy* v. *Khajah Assanoollah* (4) are certainly in favour of the plaintiffs' contention but they were considered in the cases of *Watson & Co.* v *Dhonendra Chunder Mookerjee* (5) and of *Hurro Proshad Roy* v. *Gopaul Dass Dutt* (6), and on appeal to the Privy Council against this last decision the true effect of *Rani Surno Moyee's* case (2) was explained: *Huro Pershad Roy* v. *Gopal Das Dutt* (7). It appears to me that on the authority of the Privy Council decision just mentioned it cannot be held that the case of *Deen Dyal Paramanick* v. *Radha Kishoree Debee* (3), should be treated as substantiating plaintiffs' contention.

In support of their argument it was further urged that a suit for rent during the proceedings would have operated as waiver and as authority for this proposition our attention was drawn to a case in which it was held that acceptance of rent from the mortgagee of an occupancy holding as such without protest even for one occasion amounts to a recognition of the rights of the mortgagee as such. A proposition for which the learned vakil has to go so far in search of support needs no comment. It appears to me that on the Privy Council decision reported as *Huro Pershad Roy* v. *Gopal Das Dutt* (7) the plaintiffs might have brought their suit much earlier. At any rate they might have sued as in fact they have now sued for damages on account of use and occupation. A suit framed in that form could not have been interpreted as waiving the right to claim forfeiture. It may be added that the contentions of the plaintiffs would have worn a better complexion if they had waited until the time fixed for making the deposit had expired or until the deposit had been made instead of filing their suits on the 1st Baisakh, and then not as rent suits but as suits for compensation for use and occupation. In my opinion the decision of the learned Subordinate Judge is correct. I think therefore that Appeals Nos. 1327, 1383, 1384 of 1913 should be dismissed and Nos. 2681 and 3657 of 1914 should be decreed all with costs.

Chatterjee, J. —I agree.

V.B./R.K. *Order accordingly.*

1. (1910) 6 I C 685.
2. (1867-69) 12 M I A 244=11 W R (P C).
3. (1872) 17 W R 415.
4. (1871) 16 W R 79.
5. (1878-79) 3 Cal 6.
6. (1877-78) 3 Cal 817.
7. (1883) 9 Cal 255=9 I A 82 (P C).

A. I. R. 1918 Calcutta 821

MOOKERJEE AND WALMSLEY, JJ.

Kalan Singh and *others*—Plaintiffs—Appellants.

v.

Secy. of State—Defendant — Respondent.

Letters Patent Appeals Nos. 144 to 148 of 1915, Decided on 7th June 1917, against decree of Chatterjee, J., D - 20th August 1915, in Appeals, Nos. 1048, 1304 and 1306 to 1308 of 1913.

Landlord and Tenant — Alluvion and diluvion—Tenant surrendering diluvated area and agreeing to pay reduced rent for remainder of lands—He cannot claim diluviated area on re-appearance.

Although the mere fact of a tenant claiming and accepting remission of rent in respect of lands washed away from time to time by the action of a river does not conclusively prove that the tenant abandoned or agreed to abandon his right to such lands on their re-formation in situ, still where the tenant surrenders the diluviated area and agrees to pay a reduced rent for the remainder of the lands, he cannot claim the diluviated area on its re-appearance, as in consequence of his act, his originial holding becomes divided into two holdings one of which continues to be his tenancy, while the other which is under water is vested in the landlord free from his subordinate right as a tenant. [P 821 C 2]

Karunamoy Bose—for Appellants.

Ram Charan Mitter—for Respondent.

Judgment.—This is an appeal under Cl. 15 of the Letter Patent from the judgment of Digambar Chatterjee in a suit for recovery of possession of land upon declaration of title. The plaintiff-appellant held a tenancy under the Government in respect of a tract of 38 bighas of land, which abutted on a river. In 1906, 17 bighas were diluviated by the action of the river. The tenant, thereupon, approached the Government with an application for reduction of rent and prayed that he might be required to pay at the rate of Re. 1 instead of Rs. 3 per bigha in respect of the lands washed away. The Collector declined to accept the suggestion and intimated to the plaintiff that if he desired to retain his title to the area submerged, he must continue to pay the full rent therefor. The plaintiff thereupon offered to surrender the diluviated area. This was accepted by the Collector, with the result that the rent was abated accordingly. The lands diluviated, however, re-appeared the very next year, and on re-appearance were immediately settled by the Government with a number of tenants. The plaintiff next instituted this suit for recovery of possession of the lands upon declaration of title. The Court of first instance dismissed the suit. Upon appeal that decision was reversed by the Subordinate Judge. Digamber Chatterjee, J., has reversed the decree of the Subordinate Judge and restored the decree of dismissal made by the trial Court. In our poinion, it is clear that the plaintiff cannot possibly succeed.

The fundamental point for consideration in the appeal is the legal effect of the action taken by the plaintiff with the concurrence of the Collector, in respect of the submerged lands. It may be conceded, as was pointed out by the Judicial Committee in the case of *Arun Chandra Singh* v. *Kamini Kumar* (1) that the mere fact of claiming and accepting remission of rent in respect of lands washed away from time to time by the action of a river does not conclusively prove that the owner abandoned or agreed to abandon his right to such lands on their re-formation in situ. In this case, however, there can be no doubt as to the true effect of the action taken by the plaintiff in respect of the submerged lands. The question in controversy between him and the Collector was whether he should be allowed to retain his title in the submerged lands upon payment of rent at the reduced rate of Re. 1 per bigha. The Collector rightly or wrongly refused to accept his proposal; he thereupon surrendered the diluviated area and agreed to pay a reduced rent for the remainder of the lands, which thenceforth constituted his new holding. The true position consequently is that what constituted the original holding was, by the action of the plaintiff, divided into two holdings; one of these continued to be his tenancy while the other vested in the Government freed from his subordinate right as a tenant.

This latter portion was at the time of the agreement between the parties under water. When the lands re-formed, they clearly re-appeared as the property of the Government, to which the plaintiff had no right whatsoever. This view is supported by the principles explained by the Judicial Committee in the case of *Felix Lopez* v. *Muddun Moun Thakoor* (2), namely, that a person whose lands have been submerged may, as between him and the State, take most effectual means in

1. (1914) 41 Cal 683=22 I C 317 (P C).
2. (1869-70) 13 M I A 467=14 W R (P C).

his power, by continuing to pay rent for it, to prevent the possibility of any question of abandonment being raised as against him. The plaintiff here deliberately decided not to pay rent for the lands submerged and the proceedings between him and the Collector show conclusively that the effect of the agreement between the parties was to reduce the area of the original holding. In these circumstances, no question of accretion arises. The result is that the decree of Digamber Chatterjee J., is affirmed and this appeal dismissed with costs. It is conceded that this judgment will govern the other Appeals Nos. 145, 146, 147 and 148 of 1915, in each of which a similar order will be drawn up.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 822

TEUNON AND NEWBOULD, JJ.

Ganesh Chandra Sikdar and *another* —Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 246 of 1917, Decided on 16th April 1917.

Bengal Excise Act (as amended by Act 7 of 1914), Ss. 46 and 90—Medicinal preparation, containing alcohol is not outside provisions of Act—Manufacture and sale of medicinal preparation containing alcohol is offence unless exempted under S. 90.

A preparation containing alcohol is not outside the provisions of the Bengal Excise Act as amended by Bengal Act 7 of 1914, simply because it is a medicinal preparation or may be used for medicinal purposes. [P 823 C 1]

The manufacture and sale of Mitra Sanjivani Sudha prepared in accordance with the "Ayurvedic" Pharmacopoeia and used for medicinal purposes only otherwise than in conformity with the provisions of the Excise Act is an offence, unless it is exempted by notification under the provisions of S. 90 of the Act. [P 822 C 2]

Manmatha Nath Mukerjee and *Phanindra Lal Maitra*—for Petitioners.

B. C. Mitter, and *Camell*—for the Crown.

Judgment.—In this case the petitioners before us have been convicted in respect of the manufacture and sale of a liquid substance spoken of as Mitra Sanjivani Sudha and have been sentenced under S. 46 (a), Bengal Excise Act, 5 of 1909 each to pay a fine of Rs. 200 or in default to undergo six weeks' rigorous imprisonment. The manufacture and sale is admitted and the contention of the petitioners, who are Kavirajes by profession, is that Mitra Sanjivani Sudha is a beneficent drug, prepared in accordance with a formula to be found in an Ayurvedic Pharmacopoeia, and used for medicinal purposes only. The ingredients, it is said, are gur, ginger, betel nut and various barks, and after a certain period of fermentation from this base with certain additions in the shape of spices, crushed fruits, and balela skins the finished product is obtained by a process of distillation. The preparation, there is evidence, is prescribed for women suffering from fever or bowel complaints after childbirth and other virtues claimed for it are that it stimulates the appetite, aids digestion and when taken at bed time soothes the wakeful. It may be conceded that the preparation possesses all these virtues, but the question still remains whether it is an excisable article within the meaning of the Bengal Excise Act. In that Act exisable article has been defined as meaning "any liquor or intoxicating drug as defined by or under this Act" and in S. 2, Cl. (14), as amended by Bengal Act 7 of 1914, liquor has again been defined as meaning "liquid consisting of or containing alcohol" and as including various specified substances. It is not disputed that Mitra Sanjivani Sudha contains alcohol and analysis shows that the four sample phials or bottles submitted to the Chemical Examiner consisted of the usual volatile bye-products of distillation and fermentation, volatile essential oils, water and alcohol, the proportion of alcohol ranging from 68.3 per cent. to 87 per cent. In other words, the preparation as sold or as prepared and put up for sale is in alcoholic liquid varying in strength from 31.7 to 13 underproof.

There can, therefore, be no question that the manufacture and sale of this preparation otherwise than in conformity with the provisions of the Excise Act is an offence, unless the petitioners can show that this article has been exempted by notification under the provisions of S. 90 of the Act or that by reason of "repugnancy in the subject" the definition is not applicable. It is conceded that the article is not within the terms of any notification issued under S. 90. It is, however, contended that to Mitra Sanjivani Sudha, as a medicinal preparation manufactured, prescribed and sold by Kavirajes, the definition contained in the Act does not apply and in support

of this contention reliance is placed on the cases reported as *Gonesh Chunder Sikdar* v. *Queen-Empress* (1), *Emperor* v. *Moti Lal Chander* (2) and *Satish Chandra Poy* v. *Emperor* (3). It is unnecessary to discuss these cases which were all decided prior to the amendment of the Act made in 1914. Whatever may have been the state of the law at the time when the foregoing cases were decided, the intention of the law has been made clear by the amended Act of 1914, and to say now that a preparation containing alcohol is not within the provisions of the Bengal Excise Act simply because it is a medicinal preparation or may be used for medicinal purposes, would be to stultify this Court and ignore the plain purpose of the Legislature. On the question of sentence, having regard to the fact that the manufacture of this Mitra Sanjivani Sudha has been continued on the strength of the decision in favour of the elder petitioner in *Gonesh Chunder Sikdar* v. *Queen Empress* (1) and the further fact that it does not appear that prior to the present proceedings the petitioners were warned by the excise authorities, we think that a lesser sentence will meet the ends of justice. We, therefore, reduce the sentence in each case to a fine of Rs. 100, in default three week's rigorous imprisonment.

V.B/.R K. *Sentence reduced.*

1. (1897) 24 Cal 157.
2. (1912) 39 Cal 1053=15 I C 961.
3. (1913) 19 I C 956.

A. I. R. 1918 Calcutta 823

CHATTERJEA AND SMITHER, JJ.

Jagadish Chandra Roy Chowdhury—Plaintiff—Appellant.

v.

Bisweswari Debya and *others*—Defendants—Respondents.

Appeal No. 2156 of 1915, Decided on 6th June 1917, from appellate decree of Dist. Judge, Rangpur, D/- 4th June 1915.

Lease—Construction—Lease-deed for five years providing after expiry of term for fresh settlement—On failure, lessee to hold for indefinite period with enhanced rent—Rights of alienation prohibited—Lease is not heritable or permanent.

Where a kabuliyat which stated that the lands were settled for five years as sarasari jote at a certain rent, provided that after the expiration of the term the lessee shall take a fresh settlement under a fresh kabuliyat and that in case of failure he shall hold and enjoy possession of the land on payment of an excess rent of one anna per rupee every five years, that the lessee shall not be competent to make a gift, sale or mortgage of the tenure to anybody;

Held: that upon a proper construction of the kabuliyat the lessee, if he failed to take a fresh settlement on the expiry of the first term, was to hold and enjoy possession of the land at an increased rent as provided in the kabuliyat and that there was no renewal of this lease at the end of every five years, that the tenancy, therefore, after the expiry of the first term was for an indefinite period, but as there were no words of inheritance in the lease nor were any circumstances, such as long possession, or the fact of succession to heirs or a series of transfers established, the tenure could not be presumed to be heritable or permanent one. [P 823 C 2; P 824 C 1]

Jogesh Chandra Roy and *Romesh Chandra Sen*—for Appellant.

Broja Lall Chuckerbutty and *Kali Prosunno Piplai*—for Respondents.

Judgment.—The plaintiff-appellant sued to recover possession of the land in dispute on the ground that it was held under a temporary tanancy, that on the death of the lessee the right to the tenure did not pass to his widow defendant 1, and that the latter had no right to transfer it to defendant 2.

The suit was decreed by the Court of first instance. On appeal, the District Judge has reversed that decree and dismissed the suit. The plaintiff has appealed to this Court. The learned District Judge has held that the tenure was a permanent one because it was held not for a limited time, and that it was heritable. The question turns upon the construction of the kabuliyat, which is dated September 1904. It states that the lands were settled with Srish Chandar Chuckerbutty, husband of defendant 1, for a term of five years as a sarasari jote at a rent of Rs. 15-14-2½ gundas per year. It then provides that after the expiration of the terms the lessee shall take a fresh settlement under a fresh kabuliyat and that, in case of failure, he shall hold and enjoy possession of the land on payment of an excess rent of 1 anna per rupee every five years. It further provides that the lessee shall not be competent to make a gift, sale or mortgage of the tenure to anybody. We think upon a proper construction of the document that if the lessee failed to take a fresh settlement on the expiry of the first term, he was to hold and enjoy possession of the land at an increased rent as provided in the kabuliyat and that there was no renewal of the lease at the end of every five years. The tenancy, therefore, after the expiry of the

first term, was for an indefinite period. That being so, the rule of construction that a grant for an indefinite period enures, generally speaking, for one's lifetime and passes no interest to his heirs, unless there are some words showing an intention to grant a hereditary interest, applies. In this case, there are no words of inheritance, nor are there any circumstances such as long possession, or the fact of succession to heirs, or a series of transfers from which the Court might draw a presumption that the tenure was a heritable or permanent one. On the contrary the tenure is described as merely a temporary one and the lessee was expressly restrained from selling or otherwise transferring it. It is true that in the absence of any covenant for re-entry such a clause does not give the landlord a right to re-enter; but the terms have a bearing upon the question of intention as to the nature of the grant.

It is true, as contended on behalf of the appellant, that on the expriy of the first term of five years, the lessee could resist the landlords' suit for possession under the covenant for a fresh settlement but the question is whether the right which he had in the tenure passed to his widow and whether the latter could transfer such right to the defendant 2. As we have already said, the interest was not heritable. We are accordingly of opinion that the defendants are not entitled to resist the action of the plaintiff. The decree of the lower appellate Court is accordingly set aside and that of the Court of first instance restored with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 824

CHATTERJEA AND NEWBOULD, JJ.

Ramjash Agarwala—Plaintiff and Defendant — Appellant.

v.

Indian General Navigation Railway Co. Ltd. — Defendants and Plaintiffs — Respondents.

Appeals Nos. 3556 of 1913 and 400 of 1914, Decided on 11th May 1917, from appellate decrees of Sub-Judge, Faridpur, D/- 2nd June 1913.

(a) Contract Act (1872), S. 151—Liability of steamship in respect of goods delivered for carriage is that of insurer.

The liability of a steamship company in respect of goods delivered to it for carriage is that of an insurer; therefore if there is any shortage in weight during transit, the company would be liable therefor. [P 824 C 2]

(b) Carrier—Rights of consignee—Goods delivered to steamship for carriage — Consignee cannot compel to re-weigh goods before taking delivery — He may weigh goods himself and claim price of shortage.

A consignee of goods delivered to a Steamship Company for carriage cannot compel the company to re-weigh the goods before taking delivery. But the refusal of the company to re-weigh does not in any way affect the right of the consignee who may weigh the goods himself and claim the price of the shortage in weight. The mere fact that he has accepted delivery and granted a clear receipt does not extinguish his right to compensation, if he proves that a portion of the goods were lost in transit or while in the custody of the company. [P 825 C 1, 2]

(c) Carrier — Consignee unjustifiably refusing to take delivery—He is not entitled to price but is liable for demurrage charges—Notice to consignee that goods will be sold at auction—No demurrage can be charged for period subsequent to notice.

When a consignee unjustifiably refuses to take delivery of goods, he cannot claim the price thereof from the common carrier, but on the contrary becomes liable for demurrage charges for the period during which the goods remain in the custody of the common carrier. [P 825 C 2]

But no demurrage can be charged for the period subsequent to a notice given to the consignee that the goods will be sold away at auction if he fails to remove them. [P 826 C 1]

D. L. Kashtgir—for Appellant.

P. L. Buckland and *Manmatha Nath Mookerjee*—for Respondents.

Judgment.—This appeal arises out of a suit for the recovery of Rs. 1,591-15-10, being the price of goods delivered by the plaintiff for carriage to the defendant, the India General Navigation and Railway Co., Ltd. The plaintiff's agent delivered at the defendant Company's Booking Office at Mokamah 150 bags of chillies weighing 130 maunds 8 seers for being conveyed to Goalundo. On arrival of the goods at the place of destination, the plaintiff's servant paid the freight, signed the bill of lading and gave a clear receipt in the delivery register of the defendant company. He thereupon obtained the delivery order; but did not take actual delivery as he found some of the bags damaged. He asked the booking clerk to re-weigh the goods and then deliver the same. This was refused and, in consequence, the plaintiff's servant refused to remove the goods. Hence this suit for recovery of the price of the goods. The liability of the defendant company, a Steamer Company in respect of goods is that of an insurer. If therefore there was shortage in weight, the defendant

would be liable. As already stated however the plaintiff did not weigh the goods and the suit is not for the price of goods which might have been found short in weight.

The question for decision in the case is whether the plaintiff could compel the defendant company to re-weigh the goods before taking delivery and, on the latter's refusal to re-weigh, whether the plaintiff was entitled to treat such refusal as a refusal to deliver goods and claim the price thereof. It was contended before us that the consignee is entitled as of right to have the goods re-weighed before taking delivery, but no authority has been shown in support of this broad proposition. We were referred to the case of *Wills* v. *G. W. Ry. Co.* (1). In that case the question was whether non-delivery of a part of a consignment was "non-delivery" of the consignment within the meaning of the contract between the parties. It was a case of short delivery and no question arose as to the consignee's right to have the goods re-weighed by the company. The question was raised in the case of *Janki Das* v. *B. N. Ry. Co.* (2). In that case 290 bags of rice were consigned, two of which were lost and the remaining bags arrived at the destination in a damaged condition. The consignee demanded a re weighment and a certificate of shortage and that not being complied with by the company he refused to take delivery. The Court below held that:

"the railway company is not required by law either to re-weigh or to certify shortage,"

and this Court observed:

"The result then is that of the 290 bags two were not delivered because they were lost and non-delivery of the rest was due to the fact that the plaintiffs would only take delivery on a condition that they were not entitled to impose."

There is no doubt that the matters are made easy for the consignee in a suit, if re-weighment is made by the company before removal of the goods by the consignee, but it is a matter of evidence only. The refusal of the company to re-weigh does not in any way affect the right of the consignee. He may weigh the goods himself, and claim the price of the shortage in weight. The mere fact that he has accepted delivery and granted a clear recipt does not extinguish his right to compensation if he proves that a portion oi the goods were lost in transit or in the custody of the company: [see *E. I. R. Co.*, v. *Sispul Lal* (3)]. The question whether the consignee is entitled to refuse to take delivery in case of short delivery, or the broad proposition that the consignee is not entitled in any case or under any circumstances to have goods, entrusted to a common carrier, re-weighed need not be considered in the present case. In the present case it cannot be said that there was short delivery because the goods were never weighed by the plaintiff, and he is not in a position to say whether there was any shortage. It appears that it was the practice of the defendant company to allow consignees to inspect their goods before granting receipt in the delivery book and have their goods re weighed (if so demanded) in case of suspicion of short weight and enter the short weight in the delivery book. In fact the plaintiff's agent who went to take delivery of the goods in question, appears to have on two other occasions granted qualified receipts for goods with a remark of short weight. He might have adopted the same course in the present case, and if that course was not open to him because he had given a clear receipt, he might have had the goods weighed himself and claimed the price for the shortage.

But he did not avail himself of the opportunity of inspecting the goods before granting receipt, and having granted a clear receipt insisted upon re-weighment and upon the defendant's refusing to re-weigh, he refused to take delievry. We do not think that under the circumstances he was justified in refusing to take delivery of the goods on the ground that they had not been re-weighed by the company, and to claim the price thereof. The appeal must therefore be dismissed. Appeal from Appellate Decree No. 400 of 1914, arises out of a cross suit brought by the company to recover Rs. 519-13-9, on account of godown charges for the period during which the chillies were in the custody of the defendant. If, as we have said, the plaintiff was not justified in refusing to take delivery of the goods, he would be liable for demurrage charges for the period during which the goods were in the possession of the company. It appears however that on 5th January 1911, the company wrote to the plaintiff

1. (1915) 1 K B 199=84 L J K B 449.
2. (1912) 18 I C 509.
3. (1912) 39 Cal 311=12 I C 596.

that the chillies would be sold away at auction if the consignee failed to remove them. The Court of first instance held that the company were not entitled to any demurrage after that date, and, accordingly, allowed only Rs. 153-6-6, as demurrage for the period up to that date and the decree was affirmed on appeal. We think that, that decree is correct and this appeal also must be dismissed.

We make no order as to costs in either case. The result, no doubt, is to be regretted. But the plaintiff appears to have refused to take delivery of the goods on the mistaken notion that he could insist upon the defendants' re-weighing the goods before taking delivery, the defendant company also insisting upon their strict rights to refuse re-weighment.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 826

TEUNON AND RICHARDSON, JJ.

Muchi Mian—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 441 of 1917, Decion 23th May 1917.

Penal Code (1860), S. 216-B—Assisting in any way to evade apprehension—Meaning of, stated.

The words "assisting a person in any way to evade apprehension" in S. 216-B are not to be read as ejusdem generis with two methods specified in the preceding part of the section, viz., supplying with food, shelter, etc.

The accused answering an enquiry of an Inspector of Police replied that the brother, who was charged under S. 411, I, P. C., was in the house promising to produce him, but on going inside the house he returned after a delay of 15 minutes with his brother's son and said that he had made a mistake, as the son was in the house and not his brother. Subsequently on search being made by the Police, the brother was found hiding the house.

Held: that as by the methods he employed the accused did give time and opportunity to the offender to conceal himself or effect his escape, he was guilty under S. 216-B for giving material assistance to the offender in evading apprehension. [P 827 C 1]

Zorab, Manmotha Nath Mukerjee and *Santosh Kumar Pal*—for Petitioner.

Remfry—for the Crown.

Judgment.—In this case the petitioner has been convicted under S. 216, I. P. C., and sentenced to six months' rigorous imprisonment. It appears that the petitioner's brother, one Azizar Rahman, was charged with the commission of an offence punishable under S. 411, I. P. C. that to the knowledge of the petitioner first warrants for Azizar's arrest and then a proclamation under the provisions of S. 87, Criminal P. C., had been issued by a Magistrate. It also appears that the proclamation had been duly published at the house in which the two brothers as joint owners used to reside. On 23rd September 1916, on information received, an Inspector of Police with a sergeant and a posse of constables proceeded to his house and interviewed the petitioner. The facts then found against the petitioner are that in answer to the Inspecaor's enquiry the petitioner replied that Azizar was in the house and promised to produce him. He then went inside the house and after a delay of 15 minutes returned with Azizar's son, and said that he had made a mistake and that it was the son who had come to the house the preceding evening. The learned Sessions Judge has further found that the statement made to the police officer in the first instance, the delay of 15 minutes spent, as the police officer would presumably infer, on a search for the offender, the subsequent production of Azizar's son, and the false statement made with regard to Azizar himself, who on search was in fact found in hiding in the thatch of the roof, were all parts of a plan by which the petitioner sought to give and did give Azizar Rahman an opportunity of making his escape or of concealing himself.

On behalf of the petitioner it is contended that the facts found are insufficient for the finding that the petitioner "assisted (the offender) in any way to evade apprehension" and so "harboured" him within the meaning of Ss. 216-A and 216-B, I. P. C. In support of this contention it is urged that the words "assisting in any way" should be read as ejusdem generis with the two methods specified in the preceding part of the section, and in further support of this view we are referred to the case of *Emperor* v. *Husain Bakhsh* (1). But this case though entitled to our great respect is not one which we are bound to follow and moreover the facts in that case were wholly different. If the intention had been that the words "assisting in any way" should be read as ejusdem generis with the former part of the section, we should have expected the legislature to frame this provision of law somewhat in the following manner:

1. (1903) 25 All. 261.

"the word harbouring' includes the giving of assistance by supplying a person with shelter, food, etc., means of conveyance or otherwise."

As the section has been framed we are not prepared to hold that the ways in which assistance may be rendered must, for the purposes of the section, be restricted to methods which may properly be regarded as ejusdem generis or of a like nature with supplies of good or of other necessary articles.

On the contrary we are of opinion that by the methods he employed the petitioner did give time and opportunity for the offender to conceal himself or effect his escape and thereby gave him material assistance in, evading apprehension. In this view the petitioner has been properly convicted, but having regard to all the facts we are of opinion that the sentence is unnecessarily severe. We therefore reduce the sentence from six month's to three months' rigorous imprisonment. The petitioner will now surrender to his bail and serve out the unexpired portion of his sentence.

V.B./R.K. *Sentence reduced.*

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* A. I. R. 1918 Calcutta 827

CHATTERJEA AND NEWBOULD, JJ.

Innatunnessa Bibi—Plaintiff—Appellant.

v.

Janaki Nath Sircar — Defendant — Respondent.

Appeal No. 2772 of 1914, Decided on 26th February 1917, from appellate decree of Sub.Judge, Dacca, D/- 29th June 1914.

*** Guardians and Wards Act (1890), S. 29—Guardian contracting to sell minor's property at price higher than that fixed in sanction — Contract can be enforced against minor.**

A contract entered into by a guardian appointed as such under the Guardians and Wards Act to sell the minor's property, with the sanction of the District Judge, at a price higher than that fixed in the sanction, is valid and enforceable against the minor: 39 *Cal* 232, *Dist.* [P 827 C 2]

Sarat Chandra Basak and *Mritunjoy Chatterjee*—for Appellant.

Surendra Chunder Sen — for Respondent.

Judgment.—This appeal arises out of a suit for specific performance of a contract for sale alleged to have been entered into by defendant 5 as the guardian of defendants 2 to 4, who were minors, against the defendants 2 to 5, and also against defendant 1 who had purchaed the property from the said defendants. The Court of First Instance dismissed the claim for specific performance of the contract but directed a refund of the earnest money against defendant 5. On appeal, the learned Subordinate Judge, without entering into the merits of the case, dismissed the appeal on the ground that the suit for specific performance of the contract against the minors was not maintainable on the authority of the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed* (1). That case however has no application to the facts of the present case. There the manager of an infant's estate entered into an agreement to purchase certain property on behalf of the minor, and their Lordships held:

"that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by acontract for the purchase of immovable property,"

and that "as the minor was not bound by the contract there was no mutuality" and he could not on attaining his majority obtain specific performance of the contract. In the present case, the guardian of the minors, who had been appointed as such under the Guardians and Wards Act, entered into an agreement to sell the property with the sanction of the District Judge. He was therefore quite competent to sell the property. It is true that the Court, when authorizing the guardian to sell the property, directed him to sell it for Rs. 1,000. That obviously means that the guardian was to sell the property for not less than Rs. 1,000; and the guardian entered into the agreement to sell the property to the plaintiff for Rs. 1,300, which was clearly for the benefit of the minors. The contract therefore under these circumstances, was a valid one and enforcible against the minors. That being so, the decree of the lower appellate Court must be set aside.

We accordingly set aside the decree of the lower appellate Court and send the case back to that Court for a re-hearing of the appeal on the merits. Costs of this appeal will abide the result.

V.B./R.K. *Case sent back.*

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1. (1912) 31 Cal 232 = 13 I C 331 = 39 I A 1 (P C).

A. I. R. 1918 Calcutta 828

RICHARDSON AND WALMSLEY, JJ.

Juman and *others*—Plaintiffs—Appellants.

v.

Mohammad Nobineoaz others—Defendants—Respondents.

Appeal No. 1599 of 1913, Decided on 19th April 1917, from appellate decree of Offg. Sub-Judge, Mymensingh, D/- 8th February 1913.

(a) Transfer of Property (1882), Act S. 54—Property less than Rs. 100 in value—Unregistered instrument unaccompanied by delivery of possession does not confer title.

For the sale of an immovable property of less than Rs. 100 in value an unregistered instrument, unaccompanied by delivery of possession, is of no avail and confers no title. [P 828 C 2]

(b) Evidence Act (1872), S. 91—Deed of sale of immovable property less than Rs. 100 with delivery of possession — Deed though unregistered is admissible as evidence of nature of transaction although it confers no title — Registration Act S. 49—Transfer of Property Act, S. 54

Where an immovable property of less than Rs. 100 in value is sold by delivery of possession and an instrument of sale is also executed but not registered, the instrument is admissible as evidence of the nature of the transaction as under S. 91, Evidence Act, such an instrument, although it does not confer any title and is merely evidentiary, is the only admissible evidence of the nature and terms of the transaction. [P 829 C 1]

Birendra Kumar Dey—for Appellants.

Jatindra Mohan Chowdhuri—for Respondents.

Richardson, J.—The suit was brought by the plaintiffs to recover three plots of land which originally belonged to the plaintiffs 1 and 2 and the predecessor of the other plaintiffs. The defendants are in possession and the principal question is whether they obtained possession as usufructuary mortgagees for a term which has expired or in the character of purchasers. The defendants produced two unregistered conveyances executed by some of the plaintiffs or their predecessors one relating to plots 1 and 2 and the other to plot 3. Neither plots 1 and 2 nor plot 3 exceeds Rs. 100 in value. Relying upon the unregistered documents the Courts below have found that the transaction in each case was a sale, and not a mortgage, and that the sales were completed by the possession duly delivered by the vendors to the vendees. To the extent therefore of the title so acquired and so found the plaintiff's suit has been wholly dismissed.

The plaintiffs have appealed and it has been contended on their behalf that the documents on which the Courts below have relied are not admissible in evidence for want of registration. The point is one upon which there appears to be no express authority, at least none was cited in the argument. Under Cl. 3, S. 54, T. P. Act, "in the case of immovable property of a value less than Rs. 100" a sale "may be made either by a registered instrument or by delivery of the property." It is clear therefore that in such cases an unregistered instrument unaccompanied by possession is of no avail and confers no title: *Makhan Lal Pal* v. *Bunku Behari Ghose* (1). Under the Registration Act, to which by S. 4, T. P. Act, Cls. 2 and 3, S. 54 of the latter Act, are to be read as supplemental, the unregistered instrument would not be admissible in evidence. But when the property sold is less than Rs. 100 in value and the sale is effectuated or completed by delivery of possession, there is no reason why the transaction should not be evidenced by a writing in the terms of a conveyance, even though the document has not been registered. The sale can be effected in two ways either by a registered instrument or by delivery. Registration is not necessary except as an alternative to delivery. Ex hypothesi there is delivery. Where there is delivery there need not be a registered instrument and if an instrument is executed but not registered there is no reason why it should not be admitted as evidence of the nature of the transaction, because neither the Transfer of Property Act nor the Registration Act requires its registration. The title passes by the delivery and does not depend on the unregistered document which is merely a piece of evidence. It may be that in the case supposed the unregistered document is the only admissible evidence of the nature of the transaction. Under S. 91, Evidence Act, where the terms of a grant "have been reduced to the form of document" "no evidence shall be given in proof of the terms" of the grant, "except the document itself" or secondary evidence of its contents when secondary evidence is admissible. This provision, of course, does not exclude proof of the fact of delivery of possession. That fact may be proved whether there is a document or not and whether if there is a document, it does or

1. (1892) 19 Cal 622.

does not require registration. But where there is a grant and a writing to support it, oral evidence of the terms of the grant is excluded. That would seem to be so even when the grant is made not by the document but by the delivery of possession which accompanies it. Though the document does not confer title and is merely evidentiary, it still seems to be the only admissible evidence of the nature and terms of the transaction.

For the reasons indicated, I am of opinion that the documents produced by the defendants were rightly admitted in evidence. On this part of the case therefore the appeal fails. The defendant's vendors purported to sell the entirety of the disputed plots to the defendants but as those vendors did not represent all the cosharer proprietors, the plaintiffs or some of them are entitled to the share or shares which the vendors had no right to sell. As however the lower appellate Court has found that under some informal arrangement the defendants' vendors were in separate possession of properties sold, I agree with the learned Subordinate Judge that the plaintiffs are not entitled to a decree for joint possession to the extent of the unsold shares and that their remedy lies in a suit for partition. The true rights of the parties for instance, the right of the defendants as against the vendor plaintiffs, can only be worked out in such a suit. In my opinion the appeal fails and should be dismissed with costs.

Walmsley, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 829 (1)

CHATTERJEA AND NEWBOULD, JJ.

Hari Mohan Pal and *another*—Defendants—Appellants.

v.

Kailash Chandra Dhur and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 2430 of 1915, Decided on 4th January 1917, from appellate decree of Sub-Judge, Dacca, D/- 16th August 1915.

Evidence Act (1872), Ss. 21 and 31—Mere admission cannot create title which was non-existent.

A mere admission cannot create a title which was non-existent, though it would have been binding upon the person making it if the title admitted had really existed. [P 829 C 2]

Trailokya Nath Ghose—for Appellants.

Amarendra Nath Bose for *Monmotha Nath Roy*—for Respondents.

Judgment.—The plaintiff-respondent appears to have purchased the lands in dispute, which form part of a revenue-paying estate, from the proprietors of the estate. The estate was sold for arrears of revenue. The right, therefore, that the plaintiff had in the lands under his purchase was extinguished by the sale. The learned Subordinate Judge was in error in holding that the plaintiff had some right even after the sale. It is true that the defendant, who represents the purchaser at the revenue sale, in certain cess return admitted that the plaintiff had a howla tenure. But a mere admission cannot create a title. The admission would have been binding upon the defendant had the plaintiff really any howla tenure. But it is not alleged, nor is there any evidence to show, that the plaintiff had any right in the lands, apart from the right which was purchased by him from the proprietors under the kobala of 9th Assin 1275. That right, as we have said, passed by the revenue sale, and that being so we think that the plaintiff's suit must fail.

The judgment and decree of the lower appellate Court are accordingly set aside and those of the Court of first instance restored with costs in this Court and in the Court of first appeal.

V.B./R.K. *Appeal allowed.*

A I. R. 1918 Calcutta 829 (2)

CHATTERJEA AND RICHARDSON, JJ.

Rahamat Ali and *others*—Plaintiffs—Appellants.

v.

Chikan Bibi and *others*—Defendants—Respondents.

Appeal No. 1092 of 1914, Decided on 19th June 1917, from appellate decree of Offg. Sub-Judge, Chittagong, D/- 19th January 1914.

(a) Mahomedan Law—Wakf—Main purpose to provide for religious purposes—Secondary object to secure surplus for descendant—Wakf is valid—Mussalman Wakf Validation Act (1913).

A wakfnama, which is not governed by the provisions of Act 6 of 1913, will be valid if the dominating purpose and intention of the grantor in executing the deed was to provide for religious and charitable purposes and the secondary and subsidiary object was to secure for his descendants any surplus that might remain after defraying the expenses necessary for those purposes. [P 830 C 1]

(b) Mahomedan Law—Wakf—Wakfnama directing portion of income to be paid to

daughter of founder is valid — Mussalman Wakf Validation Act (1913).

Where a wakfnama enjoined the muttawali to perform the acts and ceremonies mentioned in the document and to provide for the preservation and repair of a mosque and then gave to the daughter of the founder the balance of the income of the wakf property after deducting the expenses for those acts and ceremonies:

Held: that the wakfnama, though not governed by the provisions of Act 6 of 1913, was valid. [P 830 C 1]

Tarakeswar Nath Mitter for *D. L. Kastgir*—for Appellants.

Khitish Chandra Sen for *Chandra Sekhar Sen*—for Respondents.

Judgment.—The only question involved in this appeal is whether the wakfnama set up by the defendant is a valid document. In determining the question we have to see whether the effect of the deed was to give the property in question substantially to religious and charitable uses, or whether the effect was to give the property in substance to the donor's family: see *Mujib un-nissa* v. *Abdur Rahim* (1). The wakfnama enjoins the muttawali to perform the acts and ceremonies mentioned in the documents and provides for the preservation and repair of the mosque. Then it says that after deducting the expenses for all these acts from the income of the wakf property, the daughters of the founder would take the balance of the income as their remuneration. The dominating purpose and intention of the grantor in executing the deed evidently was to provide for religious and charitable purposes and the secondary and subsidiary object was to secure for his daughters any surplus that might remain after defraying the expenses. We think, therefore, that the wakfnama, though not governed by the provisions of Act 6 of 1913, is valid. That being so, the decree of the lower appellate Court is affirmed and the appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. (1901) 23 All 233=28 I A 15 (P C).

A. I. R. 1918 Calcutta 830

SANDERSON, C. J. AND MOOKERJEE, J.

Madhoram Hurdeodass—Defendant—Appellant.

v.

G. C. Sett and *another*—Plaintiffs—Respondents.

Civil Appeal No. 36 of 1916, in Civil Suit No. 353 of 1915, Decided on 7th February 1917.

(a) Contract Act (1872), S. 56—Outbreak of war—Performance is rendered impossible—Rights and liabilities of parties—Contract of affreightment does not subsist after outbreak of war—Contract—C. I. F.

Under a C. I. F. contract the defendants (vendors) sent out an order to Europe for supply of certain goods to the plaintiffs (purchasers) in Calcutta, The goods were shipped on 2nd July 1914 in a German vessel which was on the high seas when war broke out between England and Germany, and the vessel was captured by the Government as an enemy ship and brought before the Ceylon Court of Admiralty. On 25th August 1914 the ship was condemned as a lawful prize, but the cargo was released on condition that on its conveyance by the Crown to its destination the Crown would be authorised to recover certain expenses against the cargo released and delivered in Calcutta. On the arrival of the goods in Calcutta, the defendants asked the plaintiffs to take delivery on payment of those expenses. On the plaintiffs' refusal to do so the defendants disposed of the goods in the market, whereupon the plaintiffs instituted a suit for recovery of damages for failure of the defendants to deliver the goods in terms of the contract:

Held; that the plaintiffs were not entitled to recover damages, as the contract between them and the defendants became void under S. 56, Contract Act, inasmuch as by the outbreak of the war, one essential element of the contract, namely, the contract of affreightment, became unlawful and the fact that the defendants at one stage offered to deliver the goods to the plaintiffs on certain terms did not estop them from pleading that the contract had become void under S. 56, Contract Act. The incidents of a C. I. F. contract explained.

[P 834 C 2, P 835 C 1, P 838 C 2 & P 839 C 1]

(b) Contract — Executory contract — Dissolution of, how effected, stated—Contract Act, S. 56.

An executory contract made with an alien enemy in peace time is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy or if it is in its nature incapable of suspension.

A contract is deemed in its nature incapable of suspension, if its proper performance necessitates intercourse with the enemy during the war or where time is of the essence of the contract, or the parties cannot on the restoration of peace be put on a footing of equality. [P 837 C 1]

(c) Contract Act (1872), S. 56—Contract of affreightment may be dissolved by act of Law.

A contract of affreightment may be dissolved without execution not only by act of the parties, but in many cases, by the act of the law. If the voyage becomes unlawful or impossible to be performed, or if it is broken up, either before or after it has actually commenced, by war or interdiction, complete or partial of commerce with the place of destination, the contract is dissolved. [P 837 C 1, 2]

Per *Mookerjee, J.*—Where a ship is condemned as a prize but the cagro is released, the Crown is entitled to impose the payment of freight as a condition of its release and has a lien on the goods till it is paid. [P 838 C 1]

The ultimate conveyance of the goods by the condemned ship to its destination is in no sense a continuation of the original voyage in fulfil-

ment of the contract of affreightment but is essentially a new voyage under new conditions.
[P 838 C 1, 2]

C. C. Ghose, B. C. Mitter and *K. P. Khaitan*—for Appellants.

S. R. Das and *B. L. Mitter*—for Respondents.

Sanderson, C. J.—This is an appeal by the defendants Madhoram Hurdeo Dass against the decision of Chaudhuri, J., whereby he gave judgment for the plaintiffs for Rs. 2,500 as damages for breach of contract and costs. The contract was contained in a letter written by the defendants to the plaintiff, and dated 2nd February 1914, as follows :

Calcutta, 2nd February 1914.

"Messrs. G. C. Sett & B. R. Sett.

"Dear Sirs, Calcutta.

We beg to enter as having sold you through Broker P. N. Mookerjee 150 tons Basic Steel bars with usual 10 per cent. 2nd class extras at £ 5-7-6 per ton C. I. F. i. e,, free Hooghly. Shipment in three monthly lots commencing June, i. e., June, July, August 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms 45 days credit from the date of the delivery of the goods, failing which due date will be calculated from the due date of the delivery, i. e., three days of the landing of the goods. This sale is made on the basis of the existing terms and conditions in the contracts for this class of goods as are current in the market. Interest at the rate of 8 per cent. per annum to be charged on any money unpaid after the due date and rebate for payments before the due date will be allowed at the same rates. You have the option to have the goods weighed so as to arrive at the actual weighment and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godowns from the jetty, and the invoice weight shall be accepted by you as the correct one.

Please confirm.

Yours faithfully
Madhoram Hurdeodass."

The July consignment was shipped by the Belgo-Asiatic Trading Company, from whom the defendants had bought the goods, on 2nd July 1914 at Antwerp on board the ss. "Steinturn" which was a German vessel. Some of the goods were made in Belgium, others were made in Germany as appears from the invoices in respect of the goods. Neither the Bill of lading nor the policy of insurance was produced in Court, but it was assumed for the purpose of the appeal by both sides that the bill of lading was made out in the name of the efendants and that the contingency which happened, viz., the capture and condemnation of the ship and the consequent expenses were not covered by the Policy of Insurance. At the time of declaration of war against Germany, namely, on 4th August 1914, the "Steinturn" was at sea, and at sometime subsequently, which has not been proved, she was captured by a British ship and taken to Colombo. The "Steinturn" was condemned by the Prize Court but the cargo in question was released, and inasmuch as the ship was carrying a general cargo consigned to Madras, Calcutta and Chittagong, it was ordered on 19th November 1914 by the Prize Court that in the event of the Crown in the exercise of its power under a previous order, dated 2nd September 1914, consigning the said cargo to Madras and Calcutta—the Crown be authorised to recover against all cargo released and delivered at Madras and Calcutta in respect of freight Rs. 15.50 per ton and in respect of agency charges such reasonable expenses as might be incurred. Consequently the consignment in question was carried in the "Steinturn" under the above mentioned order and arrangement to Calcutta and arrived there on or about 2nd January 1915. The freight for the carriage from Colombo to Calcutta was Rs. 818-14-0 as is shown from the bill dated 23rd February 1915, in addition there were Rs. 82 for charges in respect of release from the Prize Court and other expenses in consequence of the capture of the "Steinturn" and the conveyance of the cargo from Colombo to Calcutta. The course of events may be taken from the learned Judge's summary of what he describes as the undisputed facts of the case as follows :

That the plaintiffs failed to pay the price of the June shipment and a suit had to be instituted against them which was decreed on 26th January 1915. That copies of three invoices were sent to the plaintiffs by the defendant firm of the goods per ss. Steinturn. In or about the end of September 1914, the defendant firm asked the plaintiffs to keep themselves in readiness to pay for the goods in cash against shipping documents on arrival of the steamer: see their letter dated 24/30th September 1914. Apparently there was a mistake in the invoice as regards the weight, and the plaintiffs called upon the defendants to correct it, but the defendants stated that they were not liable to make any corrections. On 2nd January 1915 the defendant

firm intimated to the plaintiffs that the vessel had arrived in port and requested them to take delivery of the goods by paying for them as early as possible. The cause of late arrival was the seizure of the steamer at Colombo. By an order dated 25th August 1914 on the application of the Crown, the steamer was handed over by the Colombo Prize Court to the custody of the principal Collector of Customs, and the following undertaking and decree was entered on record, namely:

"the Solicitor General on behalf the Crown undertakes that the Crown will restore the ship to its present place, whenever it is called upon to do so by this Court, if the Government of Ceylon on behalf of the Crown are allowed to take charge of the ship, and moves that the Crown be allowed to take charge of the ship, on these terms. It is ordered and decreed that the application be allowed and that the Marshal be directed to let the Government of Ceylon have possession of the ship, after the cargo, goods, wares and merchandise have been warehoused. It is further directed that the Marshal shall require from any person taking over the ship on behalf of the Government an authority to do so signed by His Excellency the Governor or by the Colonial secretary."

The President of the Prize Court appears to have made an order on 19th November 1914 that inasmuch as the steamer contained general cargo sent to Madras, Calcutta and Chittagong, it was for the interest of all persons concerned that the cargo entitled to release, which was consigned to Calcutta, should be delivered at Calcutta; it was further ordered that

"in the event of the Crown in the exercise of its powers conveying the said cargo to Calcutta, the Crown was authorised to recover against all cargo released and delivered certain expenses, namely, In respect of freight Rs 15 50 per ton weight or measure. In respect of agency charges, such reasonable expenses as may be incurred."

"And that the steamer was not to depart from Colombo until after the expiration of three weeks from the date of that order."

On 2nd September 1914 the Prize Court on hearing the Attorney-General made the following order:

"that the Marshal be authorized for the purpose of warehousing the cargo' to put the cargo in the hands of the Crown, the Attorney-General undertaking on behalf of the Crown that in the event of the cargo or any part of it being removed out of the jurisdiction of this Court, it was to be brought back within the jurisdiction upon the order of the Court."

What happened was that Messrs. Graham & Co., merchants of Calcutta, were employed as agents on behalf of the Crown to give delivery of the goods consigned to Calcutta to the consignees. Graham & Co., thereupon, communicated with the defendant firm in respect of the July shipment of the goods which had come out in that steamer, and these goods arrived, as stated above, on 2nd January. The defendant firm had to pay certain charges for freight and commission to Messrs. Graham & Co. for these goods. The defendants allege that by the said letter dated 23rd February 1915, they gave particulars of the costs and charges incurred by them in respect of the consignment, including therein the charges occasioned by the seizure and release. That prior to that date and after the arrival of the goods in Calcutta some correspondence ensued. The defendant firm wrote to the plaintiffs on 4th January 1915, that unless the plaintiff firm immediately sent the price of the goods of the June shipment which had already been delivered to them, as also the price of the goods per ss. "*Steinturn*," they would be compelled to re-sell the goods on the plaintiffs' account. The plaintiffs wrote on the same date that they were prepared to pay for and take delivery of all the goods with the exception of 22 pieces of Basic Steel bars, the weight of which had been incorrectly stated in the invoice. They said that if they (defendants) failed to make over the bill of lading for the goods they would not be liable for any wharf rent, if incurred. On 8th January the plaintiffs said that they were prepared to pay the full price of the three lots which had come per ss. "*Steinturn*" on the defendant firm handing over to them the bills of lading and other documents. They offered to pay the necessary charges for obtaining delivery of the goods from the jetties, and asked for information as to the exact amount payable by them.

There was no reply to this letter. On the 19th January they offered Rs. 4,370 as being the price of the goods including the usual charges. On 27th January Charu Chandra Bose, Attorney for the defendants wrote to the plaintiffs' Attorney the following letter:

"As arranged my clients are now ready to deliver the goods demanded by you on receipt of the price, godown rent and charges."

It will be noticed this letter was written the day after the decree above referred to. It was a consent decree and the defendants say that terms arranged between the parties were that the goods of

the July shipment would be taken delivery of by the plaintiffs after payment of all dues, that Nepal Chunder on behalf of the plaintiffs agreed to pay all costs in respect of the July shipment, freight, etc, that is to say, the extra freight and other charges incurred in respect of the consignment. This arrangement is entirely denied by the plaintiffs. No reply was sent by the plaintiffs to that letter until the 4th February 1915, when they said that nothing had been arranged as suggested by the defendants. They said that the defendants were not entitled to godown rent, and refused to pay same. They complained that the defendants had not specified what charges they were claiming, and expressed their readiness and willingness to pay the price of the goods and the duty, landing and proper charges in respect thereof as were usual in the case of delivery ex-jetty. On the 4th February the defendants, Attorney said that if the goods were not taken delivery of within three days, the defendant would re-sell on the plaintiffs accounts. Apparently these two letters crossed each other.

On the 9th February the defendant firm said that the price and charges to be paid were mentioned in their bills sent to the plaintiffs. Over and above that, the plaintiffs would have to pay godown rent and cartage for the removal of the goods and unless the plaintiffs took delivery of the goods within three days, the defendants would re-sell the goods on the plaintiff's account and risk. On the 12th January the plaintiffs denied that any bills had been submitted to them for payment and refused to pay godown rent and other incidental charges. Nothing further was done by the plaintiffs until the 8th March, when their Attorneys wrote a letter to the defendants' Attorney asking for a statement of the charges the defendants claimed in respect of the said goods and if they found the same reasonable and proper they would ask the plaintiffs to take delivery. On the 10th March they were informed that the defendants had sold the goods to a third person. The action was brought for breach of contracts caused by the failure of the defendants to make over the Bill of Lading or to deliver the goods, and the main point which was urged in this appeal was not taken by the defendants until the trial, when the learned Judge allowed the defendants to amend their defence as follows:

"With further reference to para. 3 of the plaint herein the defendant firm state that the goods forming the July shipment referred to in the said paragraph were shipped from Antwerp on or about the 2nd day of July 1914 per ss. "Steinturn." On the outbreak of war between His Britannic Majesty's Government and the German Empire on the 4th day of August 1914 the said steamer, which was on the high seas, became liable to seizure by the naval forces of His Majesty's Government and as a matter of fact the said steamer was captured, seized and detained by His Majesty's Government at or near Colombo and was subsequently condemned with all the cargo on board by the Colombo Prize Court. The defendant firm submit that on such condemnation of the said steamer and of the cargo therein including the said goods, the contract with the plaintiffs became impossible of performance."

It is clear from the order of the Prize Court that though the ship was condemned, the cargo in question was not condemned. It was, however, argued that although the cargo was eventually released the outbreak of war rendered the performance of the contract of 2nd February 1914 impossible or at all events it rendered the contract of affreightment, which was an implied part of the contract, unlawful and consequently by reason of the provision of S. 56, Contract Act 1872, the contract was void. This defence necessitated an examination of the terms of the contract. After some discussion during the argument it appeared that there was the little, if any, material difference between the interpretations placed upon the contract by the learned Counsel appearing for the plaintiffs and defendants; and both argued the case on the assumption that the contract was an ordinary C. I. F. contract, with this variation that the payment specified in the contract was not to be made as usual against the documents and was not to be made in this case until 48 days after the landing of the goods, that having regard to the special terms of this contract it was not the duty of the defendants to hand over the documents relating to the goods as soon as the documents arrived but that they were entitled to retain them until the goods arrived, when it would be the duty of the defendants to hand over the documents to the plaintiffs for the purpose of taking delivery or for the defendants to take delivery themselves in the first instance and that payment would become due 48 days after the landing of the goods.

The question, therefore, arises what were the incidents of the defendants' undertaking in such a contract. The variation of the terms as to the time of payment does not in my judgment alter the nature of the contract as C. I. F. contract. Taking the well-known incidents of such a contract the defendants' had, firstly, to ship at the port of shipment goods of the description contained in the contract, secondly, to procure a contract of affreightment under which the goods would be delivered in the Hooghly; thirdly, to arrange for an insurance upon the terms current in the trade which would be available for the benefit of the buyers; fourthly, to make out an invoice; and finally, to tender these documents and by reason of the special terms of this contract, to tender such documents upon the arrival of the goods. It may be assumed for the purpose of this case that the goods were of the description contained in the contract and that a contract of affreightment was procured under which in ordinary circumstances the goods would have been delivered in the Hooghly and that a sufficient insurance was arranged. But it was argued on behalf of the defendants that although the goods eventually arrived and were capable of physical delivery in the Hooghly, they did not so arrive under the contract of affreightment procured by them in pursuance of their contract of 2nd February 1914 with the plaintiffs, that the original contract of affreightment of which the Bill of Lading was evidence came to an end as soon as war broke out, that though the goods were in fact carried by the "Steinturn" to the Hooghly, they were carried by her, after she had been condemned by the prize Court in Ceylon and under an arrangement made in pursuance of an order of that Court, by which further freight and expenses became charged upon the cargo, and that inasmuch as the defendants could not deliver the goods under the original contract of affreightment, the performance of their contract was impossible.

In my judgment this contention should be adopted: It was an implied part of the contract of 2nd February 1914 that the defendants should procure a contract of affreightment, under which the goods would be delivered in the Hooghly. That contract of affreightment was procured, and it was represented by the Bill of Lading in the name of the defendants. But the operation of war on such a contract of affreightment made before, but which remained unexecuted at the time war was declared, made the further execution, so far as the defendants, British subjects, were concerned, unlawful, it being a contract with an alien enemy, and the contract of affreightment thereby became dissolved. *Esposito* v. *Bowden* (1). Further the capture of ss. "Steinturn" prevented the delivery of the goods under the contract of affreightment procured by the defendants in pursuance of their contract with the plantiffs, and the goods could not be delivered in the Hooghly except by the payment of further freight and expenses which by the order of the prize Court in Ceylon had become charged on the goods.

The Bill of Lading which under a C. I. F. contract is tendered by the seller to the buyer would be such as would procure delivery of the goods from the ship. In this case the Bill of Lading, if tendered by the defendants, would not by itself have enabled the plaintiffs to obtain delivery of the goods from the ship. Something more would have been necessary to enable the plaintiffs to get delivery, viz., the authority of the agents of the Crown, which authority could only be obtained by the payment of freight from Colombo to the Hooghly and certain other charges.

For these reasons it appears to me that the contract between the plaintiffs and the defendants included the performance of an act (viz., the procuring the contract of affreightment under which the goods would be delivered in the Hooghly, which after the contract was made became impossible by reason of the outbreak of the war, within the meaning of S. 56, Contract Act, and consequently, the contract of 2nd February 1914 was void. I think also that procuring of the further execution of the contract of affreightment, which was an implied part of the contract of 2nd February 1914 became unlawful by reason of an event which the defendants could not prevent, viz., the outbreak of war and consequently the contract of 2nd February 1914 became void by reason of the provisions of S. 56. The learned counsel for the plaintiffs pressed us with the argument that the property in the goods had not passed to the plaintiffs, by reason of the fact that no appropriation

1. (1857) 7 El & Bl 763 =27 L J Q B 17.

of these goods, to which the plaintiffs assented, to the contract in question had taken place until August or September 1915, i. e., after the capture and condemnation of the ss. "Steinturn" and that the plaintiffs' contract, therefore, was not affected by the fact that the goods had been carried in a German vessel at the outbreak of war.

I do not think it is necessary to express any opinion on this point, for in my judgment it is immaterial to the question whether the performance of an integral part of the contract between the plaintiffs and the defendants was rendered impossible or unlawful by the outbreak of war. It was further urged that the contract of affreightment did not relate to the goods, the subject-matter of the contract of 2nd February 1914. This point, as far as I understand, was not raised at the trial, and I think there can be no doubt that the contract of affreightment did in fact relate to the goods, the subject-matter of the contract. But then it was said, even if that be so in point of fact, it cannot be said in law that the contract of affreightment was in pursuance of contract between the plaintiffs and the defendants until something is done which binds the plaintiffs, such as assent by the plaintiffs. Having regard to what I consider is the material question in this case, as intimated already, I cannot agree to the last proposition. I think the assent of the plaintiffs was immaterial and it was merely a question of fact whether the contract of affreightment did really relate to the subject-matter of the contract of 2nd February 1914, and having regard to the date of the invoice, the description and quantities of the goods contained therein, there can be no doubt that in point of fact the contract of affreightment related to the subject-matter of the contract of 2nd February 1914.

As already stated, the defendants did not take up the position now relied upon until the trial of the action, and the defendants on 2nd January 1915 had called on the plaintiffs to take delivery. It was contended that the defendants by reason of such action were estopped from relying on the above-mentioned defence. The plaintiffs were not able to point to any respect in which they had altered their position by reason of the alleged representation of the defendants that they were in a position to give delivery in accordance with the contract, and I do not think that the defendants are estopped from taking the defence upon which they now rely. That defence, for the reasons given above, is, in my judgment, a good one, and, therefore, this appeal should be allowed, and judgment entered for the defendants with costs in this Court and in the Court of first instance. Any extra cost necessitated by the amendment of the defence or costs thrown away by reason thereof to be paid by the defendants to the plaintiffs. Money in Court to be paid out to the defendants.

Mookerjee, J.—This is an appeal by the defendants in a suit for damages for breach of contract. On 2nd February 1914, the defendants agreed to sell to the plaintiffs 150 tons Basic Steel bars to be shipped in June, July and August 1914 in equal proportions. The terms of the contract were set out as follows in a letter addressed by the defendants to the plaintiffs:—

"We beg to enter as having sold you, through broker, P.N. Mookerjee, 150 tons Basic Steel bars, with usual 10 per cent 2nd Class extra, at £5-7-6 per ton, C. I. F., i. e., free Hooghly. Shipment in three monthly lots, commencing June, i. e., June, July and August 1914. Delivery to be completed within three days from the date of the landing of the goods. Terms 45 days credit from the date of the delivery of the goods, failing which due date will be calculated from the due date of the delivery, i. e., three days from the landing of the goods. This sale is made on the basis of the existing terms and conditions in the contracts for this class of goods as are current in the market. Interest at the rate of 6 per cent per annum to be charged on any money unpaid after the due date, and rebate for payments before the due date will be allowed at the same rate. You have the option to have the goods weighed so as to arrive at the actual weighment, and in that case you shall have to notify us, so that we may make necessary arrangements to have our man present. But, in any case, claim for weighment will not be entertained, if made after three days after the arrival of the goods in your godowns from the jetty, and the invoice weight shall be accepted by you as the correct one. Please confirm."

On 14th February 1914, the plaintiffs supplied the specifications; and on 19th February, the defendants sent out an order to the Belgo Asiatic Trading Co. of Brussels for supply of the goods, which were partly of Belgian and partly of German manufacture. The June shipment was received by the defendants in due course and was delivered to the plaintiffs. We are now concerned with the July shipment. The goods were shipped from Antwerp on the 2nd July 1914 in

ss. "Steinturn" a German steamer which was on the high seas when war broke out between England and Germany on 4th August 1914. The ship was captured by the naval forces of His Majesty as an enemy ship and was brought before the Ceylon Court of Admiralty. On 25th August 1914, the ship was condemned as lawful prize, but the cargo was released. On 19th November 1914, the Prize Court ordered that, in the event of the Crown conveying the cargo to destination, the Crown be authorised to recover against all cargo released and delivered at Calcutta the following expenses, namely Rs. 1550 in respect of freight per ton weight or measure, and such reasonable expenses as may be incurred in respect of agency charges. The Government of Ceylon took possession of the cargo on behalf of the Crown, and Graham & Co. were employed to act as their agents. The goods arrived in Calcutta on 2nd January 1915 and the defendants took delivery on payment of freight and agency charges to Graham & Co. Meanwhile, the defendants had, on 30th September 1914, intimated to the plaintiffs that they had received invoices for the goods (copies whereof were enclosed); no mention however was made of the seizure of the ship; indeed, there is nothing to show that either party was, at that date aware of what had happened. On arrival of the goods in Calcutta, there was some controversy between the parties as to whether the plaintiffs or the defendents were liable to bear the charges imposed by the Prize Court.

The plaintiffs denied their liability in this respect, with the result that the defendants disposed of the goods in the market. On 18th March 1915, the plaintiffs instituted the present action for the recovery of Rs. 3, 553-14-6 as damages for failure of the defendants to deliver the goods in terms of the contract. The defendants resisted the claim substantially on the ground that the contract became void when war broke out on 4th August 1914. Choudhuri, J., has overruled this contention and has given the plaintiffs a decree for damages, which he has assessed at Rs. 2,500. On the present appeal the defendants have reiterated the ground which they urged unsuccessfully in the Court below to enable them to escape from liability under the contract. The solution of the question raised clearly depends upon the nature of the contract and the effect thereon of well-established legal principles.

The agreement between the parties constitutes what is known as a C. I. F. or C. F. I. (cost, freight and insurance) contract, subject to an important variation. The rights and liabilities of the parties to a C. I. F. contract were formulated by Hamilton, J., in *Biddel Brothers* v. *Clemens Horst Company* (2), in the following terms, which were approved by Kennedy, L. J., in his celebrated dissentient judgment in the Court of Appeal, *Biddel Brothers* v. *Clemens Horst Company* (3), which was upheld by the House of Lords and characterised by Lord Loreburn, L. C, as a remarkable judgment illuminating the whole field of controversy, *Clemens Horst & Company* v. *Biddell Brothers* (4):

"A seller under a contract of sale containing such terms has, firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J., in *Ireland* v. *Livingstone* (5), or in some similar form; and finally, to tender these documents to the buyer, so that he may know what freight he has to pay and obtained delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that, against tender of these documents, the Bill of Lading, Invoice and Policy of Insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price." [See also *Houlder* v. *Public Works Commissioners* (6).]

In the case before us, there was this departure from the normal incidents of a C. I. F. contract that the payment was to be made, not against the documents, but 48 days after the goods had been landed. It follows accordingly that the defendants were under no obligation to hand over documents to the plaintiffs immediately on receipt thereof; they could tender the documents on arrival of the goods or might take delivery themselves and make over the goods to the plaintiffs. The defendants argue that, in these circumstances, the contract became void on 4th August

2. (1911) 1 K B 214=80 L J K B 584.
3. (1911) 1 K B 934=16 Com Cas 197.
4. (1912) A. C. 18=81 L J K B 42.
5. (1872) 5 H L 395=41 L J Q B 201.
6. (1908) A C 276=77 L J P C 58.

1914, inasmuch as, on that date, one essential element thereof, namely, the contract of affreightment, became unlawful by reason of the outbreak of the war and consequently void. This contention raises the question of the effect of the outbreak of war on an executory contract made with an alien enemy before the war. Such a contract is avoided or dissolved by the outbreak of war, if it enures to the aid of the enemy [*Furtado* v. *Rogers* (7)] or if it is in its nature incapable of suspension [*Griswold* v. *Waddington* (8)]. A contract is deemed in its nature incapable of suspension if its proper performance necessitates intercourse with the enemy during the war [*Esposito* v. *Bowden* (1) *The William Bagaley* v. *United State* (9)] or where time is of the essence of the contract, or the parties cannot, on conclusion of peace, be made equal [*New York Life Insurance Co.* v. *Statham* (10), *Janson* v. *Driefontein Consolidated Mines Limited* (11)]. The principle which underlies this doctrine is best stated in the words of Lord Tenterden quoted by Willes, J., in *Esposito* v. *Bowden* (1): "Another general rule of law furnishes a dissolution of these contracts" (i. e., for the carriage of goods in merchant ships) "by matter extrinsic. If an aggreement be made to do an act lawful at the time of such agreement but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the state to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unload his goods, and the owners find another employment for their ship, and probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage."

Chancellor Kent adopts the same conclusion, for the reason that war, making performance unlawful or impossible either before or after its commencement, dissolves the contract of affreightment.

"The contract of affreightment may be dissovled without execution, not only by the act of the parties, but in many cases, by the act of the law. If the voyage becomes unlawful or impossible to be performed, or if it be broken up either before or after it has actually commenced, by war or interdiction of commerce with the place of destination, the contract is dissolved. There is no difference in principle between a complete interdiction of commerce, which prevents the entry of the vessel, or a partial one, in relation to the merchandise on board, which prevents it being landed. The contract of affreightment in respect to the goods is dissolved, for the shipper cannot demand the delivery of the goods if the landing of them would expose the vessel to seizure. And if the voyage be broken up by capture on the passage, so as to cause a complete defeasance of the undertaking, the contract is dissolved, notwithstanding a subsequent re-capture. (Commentaries, Vol 3, p. 248. See also Vol. 1, p. 66. The contrary rule seems to have been formulated in the French Code de Commerce Ss. 276, 277.")

This was recognized in *Avery* v. *Bowden* (12), which shows that a contract of of affreightment may at once become void by the declaration of war. [See note to *Clemontson* v. *Blessing* (13)]. The doctrine that a contract entered into before war is dissolved by the outbreak of war, when its performance would involve "trading with the enemy", has been recognized in the recent cases of *Duncan Fox & Co.* v. *Schrempft & Bonke* (14), *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*, (15) and *The Parcheni* (16), and an instructive application is furnished by the decision in *Nissim Isaoc Bekhor* v. *Sultanalli Shustary* (17), which further adopts the view taken in *Groom* v. *Barber* (18), that the seller is not bound, in a C. I. F. contract, to provide the purchaser with a policy covering war risks. The decision in *In re Weiss & Co., Weiss & Co. Ltd.* v. *Credit Colonial et Commercial, Antwerp* (19) is not in conflict with the principle already enunciated, and is clearly distinguishable on the ground that the goods had been captured by the enemy before tender of the documents. I see no escape from the position, in the case before us, that the contract of affreightment was dissolved on the date of the outbreak of the war as the sellers could not thereafter insist on its performance by an alien enemy. In this view, the conclusion is

7. (1802) 3 Bos & Pul 191=127 E R 105.
8. 15 Jhonson 57=16 Jhonson 488.
9. 5 Wallace 397=18 Law Ed 583.
10. 93 U S 24=19 Am Rep 512.
11. (1902) A C 484=71 L J K B 857.
12. (1855) 5 El & Bl 714=25 L J Q B 49.
13. (1855) 11 Ex 135=3 W R 510.
14. (1915) 1 K B 365=84 L J K B 730.
15. (1915) 2 K B 386=84 L J K B 1673.
16. 1 Trehern P C 579.
17. A I R 1915 Bom 76 = 28 I C 433 = 40 Bom 11.
18. (1915) 1 K B 316=84 L J K B 318.
19. (1916) 1 K B 846=85 L J K B 533.

inevitable that the contract for supply of goods also became void on that date.

The plaintiffs contend however that no question of the complete execution of the contract of affreightment properly arises in this case, inasmuch as the goods were in fact ultimately brought to their destination by ss. "Steinturn". This argument is obviously fallacious. The substance of the matter is that the goods were not and could not be carried to the port of destination under the original contract of affreightment. This is manifest from the proceedings in the prize Court. The ship and cargo were seized, and although the ship alone was condemned while the cargo was released, the release was conditional on the payment of freight and charges as determined by the Prize Court. That the cargo was properly released is clear from the decision in *In re Cargo, Ex. ss. Rappenfels* (20) as the property in the cargo had at the time of capture vested in the consignees, British subjects [see the observations of Kennedy, L. J., in *Biddell Brothers* v. *Clemens Horst Co.* (3)]; but it is equally clear that the Prize Court, and the Prize Court alone, had jurisdiction to determine the question of freight and the conditions whereon the cargo should be released [*The Corsican Prince* (21)]. As explained by Sir Samuel Evans, the Prize Court deals with such claims in accordance with the law of Nations and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; it may, indeed, discard the contract rate altogether even as a basis for assessment or calculation [*The Twilling Riget* (22)]. It is further indisputable that where the ship is condemned but the goods released, the Crown is entitled to impose the payment of freight as a condition of their release and has a lien on them till it is paid [*The Fortuna* (23), *The Diana* (24), *The Vrow Anna Catharina* (25), *The Vrow Henrietta* (26), *The Roland* (27), *The Parchim* (16)]. Consequently, the fact that the goods were brought to Calcutta ultimately by ss. "Steinturn" is of no assistance to the plaintiffs: it was essentially a new voyage under new condition; it was in no sense a continuation of the original voyage in fulfilment of the contract of affreightment; in the language of Chancellor Kent, that voyage was broken up by capture so as to cause a complete defeasance of the undertaking. The original Bills of Lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court; they would be useful for identification of the consignee in whose favour the Prize Court had decided to release the goods, but they had ceased to be operative legal documents, and delivery on their basis could not be claimed as a matter of right. I hold accordingly, that the contract of affreightment and therewith the C. I. F. contract of sale became void on 4th August 1914. Consequently the rights and liabilities of the parties thereafter must be determined with reference to para. 2, S. 56, Contract Act.

That paragraph, so far as it applies to the present case, provides that a contract to do an act which, after the contract is made, becomes unlawful by reason of some event which the promiser could not prevent, becomes void when the act becomes unlawful. As pointed out in *Karl Etlinger* v. *Chagandas & Co.* (28), this provision deals with a case where the act to be done was at the time the contract was made lawful but a legal prohibition has supervened before the performance of the contract. In such a case, the contract becomes void, and no question of damages for breach thereof arises. The plain language of S. 56 thus renders unnecessary a discussion of the refined distinctions observed in English law in cases of impossibility of performance, as illustrated by the recent decisions in *Horlock* v. *Beal* (29) and *Tomplin Steamship Co.* v. *Anglo Mexican Petroleum Co.* (30). From this standpoint, the correspondence between the parties as to the delivery of the goods is of no assistance to the plaintiffs. The defendants no doubt, at one stage, offered to deliver the goods to the plaintiffs on certain terms, on the assumption that the contract was then in full operation. The

20. (1915) 30 I C 175=42 Cal 334.
21. (1916) P. 195=1 Treheya P C 178.
22. 5 C Rob 82=1 E P C 430.
23. (1802) 4 C Rob 278=1 E P C 392.
24. (1803) 5 C Rob 67=1 E P C 424.
25. (1806) 6 C Rob 269=1 E P C 552.
26. 5 C Rob 75=1 E P C 427.
27. 1 Trehern P C 183.
28. A I R 1915 Bom 232=33 I C 205=40 Bom 301.
29. (1916) 1 A C 486.
30. (1916) App. Cas. 397.

proposed terms however were not accepted; there was thus no new agreement, nor did the principle of estoppel become applicable, as the plaintiffs are not shown to have altered their position in any manner by reliance on the conduct of the defendants. The claim of the plaintiffs is thus based on an alleged breach of an agreement which had become void long before the date when the breach is said to have taken place. In my opinion, such a claim cannot be sustained. On these grounds, I agree that this appeal must be allowed and the suit dismissed with costs.

V.B./R.K. — *Appeal allowed.*

A. I. R. 1918 Calcutta 839

FLETCHER AND RICHARDSON, JJ.

Nakymo Dewani and *others*—Plaintiffs —Appellants.

v.

Jerang Dewan and *others*—Defendants —Respondents.

Appeal No. 58 of 1914, Decided on 17th January 1917, from original decree of Dist. Judge, Darjeeling, D/- 14th November 1913.

Civil P. C. (1908), O. 32, R. 7—Compromise for minor by Court of Wards—Leave of Court is not necessary—Civil P. C. (1882), S. 462—Court of Wards Act (1879), Ss. 18, 57.

Order 32, R. 7, Civil P. C., 1908, or S. 462, Civil P. C , 1882, does not apply when a suit is compromised by the Court of Wards on behalf of a minor ward. Such compromise is binding without leave of the civil Court. [P 840 C 2]

Provas Chunder Mitter and *Tarakeswar Paul Chowdhury*—for Appellants.

B. C. Mitter, *S. N. Banerjee*, *Sarat Kumar Mitter* and *Ram Charan Mitter* —for Respondents.

Fletcher, J.—This is an appeal preferred by the plaintiffs against the decision of the learned District Judge of Darjeeling and Dinajpore, dated 1st December 1913, dismissing the suit. The suit was brought for the purpose of setting aside a compromise that had been entered into in a former suit, which is said to have been in contravention of S. 462, Civil P. C., which was then in force. The facts out of which the case arises are as follows :—One Lochho Tonqui had two sons Chuboo and Dudock. The parties came from the State of Bhutan and the law applicable to the parties is the Buddhist or the Customary Law as is recognized and which is in force in the State of Bhutan. Chuboo, who seems to have rendered important political services to the British Government, was awarded for such services a grant of 74,016 acres of land in the District of Darjeeling. Chuboo died in 1866 having been predeceased by his brother Dudock. Chuboo left one son named Rechak Dewan and a daughter named Enden. Rechak died on 26th August 1899 having been married twice, his first wife being Nakymo Dewani, who is plaintiff 1 in the present suit, and the other wife being one Gudenputty who died in 1903 without issue. Nakymo has had two children both of whom are daughters, namely, Ishay Chhodon and Tashi Lhamoo, who are the other plaintiffs. Chuboo's brother Dudock left an only son Phurboo. Phurboo had two sons, the eldest being Jerang Dewan. There seems to have been some controversy at the earlier stage of these proceedings and in the former suit as to whether Jerang was, in fact, a son of Phurboo, but the fact is that he claimed to be so and, so far as the evidence goes, he was recognized as being the son of Phurboo. There was another younger son of Phurboo and that youngor son was named Gulchhan. He died in May 1903.

The dispute arose as follows :—On the 10th August 1877, after Chuboo's death, the Government made a lease of this property to Rechak, one Tendok Palgar who was then the manager of the property and Phurboo in three equal shares. The Forest Department acquired 44,000 acres out of this property in 1881 and, on 17th July 1899, there was a partition between Rechak and Phurboo, Phurboo getting all the properties in the State of Sikkim and Rechak getting the properties in the District of Darjeeling. On 10th March 1893, the Government granted a lease of 19,000 odd acres of land to Rechak. Then after the death of Rechak, there having been certain disputes in the civil Court which arose out of certain Land Registration proceedings, Nakymo applied to the Court of Wards to take charge of the estate. The Court of Wards at first intimated that Jerang Dewan must also be a party to the petition. However, in the result on 7th November 1905 the Court of Wards declared Nakymo to be a disqualified proprietor and took over charge of the property. On 17th February 1906, the Court of Wards declared the two daughters of Nakymo, namely, Ishay Chhodon

and Tashi Lahmoo to be minors and and, on 7th March of that year, the Court declared them also to be the heirs of Rechak Dewan. From 17th February 1906, the two minors Ishay Chhodon and Tashi Lahmoo were disqualified proprietors and wards under the Court of Wards. Next, on 5th February 1907, Jarang Dewan instituted a suit against Nakymo and the two minors Ishay Chhodon and Tashi Lahmoo. In the course of that proceeding, a compromise was arrived at. That compromise was, as it appears from the petition of compromise and the letter of the Board of Revenue annexed to that petition, approved of by the Court of Wards. The first point that has been argued both here and in the Court below and which apparently is the only point argued in the case is this. That the approval of the Civil Court not having been taken to that compromise under the provisions of S. 462, Civil P. C. then in force, the compromise is voidable as against the two minors. That depends purely on an examination of the sections in the Civil Procedure Code and in the Court of Wards Act. The Court of Wards Act contains two sections that are material to the matter. The first is the 18th section. That provides that

"the Court may sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and advantage of the ward."

The section by itself clearly authorises the Court of Wards to compromise a claim on behalf of the ward, whether a minor or an adult ward, if the Court judges it to be most for the benefit of the property or the advantage of the ward. The other section is S. 51. That providest that, in all suits instituted by or against a minor ward, the Collector of the District or the manager shall, as the case may be, be the next friend or the guardian of the minor for the suit. That is how the matter stands under the Court of Wards Act. It is said that the Code of Civil Procedure has placed an additional restriction on the Court of Wards by further enacting under the terms of S. 462 that any compromise entered into by the Court of Wards on behalf of a minor litigant requires also the approval of the Civil Court. That turns purely on a consideration of the various sections that are in the Civil Procedure Code. It is, however, a matter to be noticed that S. 464 of the Code as originally passed by the legislature clearly did not require the sanction of the Civil Court to a compromise entered into by the Court of Wards. It is said, however, that the alteration in the wording of S. 464 which was effected in the year 1888, altered that provision. S. 464, as it ran after the amendment of 1888, was in these terms:

"Nothing in this chapter shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors."

The view that the learned Judge took in the Court below was that to give the effect that was suggested by the plaintiffs to the provisions of S. 462 would, in fact, derogate from the provisions of the Court of Wards Act so far as suits relating to minors under their charge were concerned. The argument is as follows: S. 51, Court of Wards Act, takes away from the Civil Court the duty of appointing a next friend or guardian ad litem of a minor and appoints the manager under the Court of Wards as the statutory next friend or guardian. Clearly, therefore, the Civil Court has nothing to do with the appointment of a next friend or guardian. Then S. 18 of the same Act gives power to the Court of Wards to compromise generally, which includes both suits in and claims out of Court, and to cut down the provisions of S. 18 by stating that when the ward is a minor, no compromise in a suit should be binding on the minor ward unless the approval of the Civil Court has been obtained as mentioned in the Civil Procedure Code, would derogate from the provisions contained in S. 18, Court of Wards Act. I am of opinion that that argument is well-founded to hold that the sanction of the Civil Court to every compromise, that is entered into under the authority and by the direction of the Court of Wards on behalf of a minor under their charge, would seriously affect, or derogate from, the provisions contained in the Court of Wards Act. This point, as appears from the judgment of the Court below, was the only point argued before the learned Judge, because the learned gentleman who conducted the case in that Court on behalf of the plaintiffs stated that he rested his case solely on the issue concerning vulnerability of the decree of

12th March 1908 and did not invite the Court to decide the issue of title by succession.

The case has also been attempted to be argued before us on the question of fraud, the fraud alleged being that the Court of Wards were deceived in giving their consent to the compromise by having been given false information relating to the course of succession under the Bhutan law. It is almost sufficient to deal with that case by stating that no evidence was given in the case as to what the fraud practised on the Court of Wards was. The Court of Words had before them, as appears from the record, a full statement from the Deputy Commissioner as to what was proposed to be done and, before acting on the information and authorizing the compromise they took the precaution of sending all the papers that they had before them to the Legal Remembrancer, asking him as to what ought to be done with regard to the matter and it was only when the Legal Remembrancer had dealt with the matter fully that the Court authorised the compromise. An allegation like this seems to be wholly insufficient to disturb the act of the Court regularly and properly entered into. Moreover, the evidence that we have in this case raises a serious doubt as to whether the plaintiffs under the Bhutan law had the right of succession to Rechak's properties. There is a considerable body of evidence, notwithstanding some statement more or less loose of His Highness the Maharaja of Sikkim, as to the course of descent, which would go to show that the Court of succession was not through females but was confined to agnatic relationship. In that view, it is not denied that Jerang Dewan would be wholly entitled to succeed to Rechak's properties after his death. The statement of the Maharaja of Sikkim that has been read to be as seems to vague, and nothing definite can be drawn from that. I think that the evidence does show that there was clearly a case in which the Court could enter into the compromise so as to secure the best terms possible for the two minors and there is nothing to suggest that better terms could have been obtained. The alleged fraud is wholly unproved and the gentleman conducting the case in the Court below stated that he did not intend to ask the Court for a decision upon the issue of title by succession. If the Court of Wards acted to the best of their judgment to secure for the two minors, out of the property to which they had nc right at all, 2,000 acres of land and a property of some value in Darjeeling plus the payment of their father's debts, which amounted to Rupees 64,000, I think the compromise was highly advantageous to the wards that the Court had under their charge. There is no evidence to support the case of fraud as set up in para. 23 of the plaint, namely, that a fraud of some sort was practised on the Court of Wards to get them to approve of that compromise. No evidence was given in support of such a case, nor do I think that there is any truth in the story. The Court recognized that these minors had in, fact, under the terms of the law by which they were governed, no right to their father's property and they entered into the compromise to secure the best terms they could so that something might be got for these female wards. Whatever might be the state of affairs, I am quite clear that the evidence adduced is wholly insufficient to establish a case of fraud practised on the Court of Wards in the manner suggested. I think the result arrived at by the learned District Judge is correct. The present appeal therefore fails and must be dismissed with costs. There will be two sets of costs to the two sets of respondents.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 841

FLETCHER AND RICHARDSON, JJ.

Badial Alam—Defendant—Appellant.

v.

Abdul Hakim and *another*—Plaintiffs—Respondents.

Appeal No. 2040 of 1915, Decided on 20th February 1917, from appellate decree of Sub-Judge, Chittagong, D/- 10th May 1915.

(a) Limitation Act (1908), Art. 138—Art. 138 applies to suit by purchaser at sale in execution of decree.

Article 138 applies to a suit by a purchaser at a sale in execution of a decree, although the sale took place before the passing of the Act, provided the plaintiff had time under that article after the passing of the Act within which to bring his suit. [P 842 C 1]

(b) Limitation — Applicability of—Statute of limitation applicable to suit is one which is in force at time of institution of suit.

The Statute of Limitation applicable to a suit is not the one which was in force when the

cause of action accrued but the one in force at the time of the institution of the suit, subject to possible exceptions in respect of cases where the effect of enforcing that rule would be to take away the plaintiff's right of suit altogether.

[P 842 C 1]

Probodh Coomar Das—for Appellant.

Chandra Sekhar Sen— for Respondents.

Judgment.—This is an appeal from a decision of the learned Subordinate Judge of Chittagong, dated 10th May 1915, reversing the decision of the Munsif at Patiya. The suit was brought to recover possession of a plot of land which the plaintiffs alleged they had purchased from a purchaser at a sale in execution of a mortgage-decree. Defendant 2 set up a claim by a purchase from a purchaser from the mortgagor prior to the date of the mortgage. That claim has been found to be false. This defendant has, however, been found to be in possession of 10 gundas of land and he has been given a decree for possession of that share. The only point raised in this appeal is that the plaintiffs' suit is barred by limitation. Clearly it is not barred by limitation if Art. 138, of the present Lim. Act applies. It is said, however, that the former Limitation Act applies because the plaintiff have got a vested right under the provisions of the old Code.

That is clearly not so. The Privy Council has laid down that the Statute of Limitation in force when the suit is brought is not that which was in force when the cause of action accrued. It is quite true that that rule broadly stated has received a qualification in respect of cases where the effect of giving that construction would be to take away the plaintiff's right of suit altogether. But such a case does not arise in the present instance because the plaintiffs had ample time, whether the old or the new Act applies, within which they could bring the suit. We think that the learned Judge of the lower appellate Court rightly applied Art 138, present Lim. Act, in this case. In that view the plaintiffs' suit was brought within time. The appeal is, therefore dismissed with costs.

V.B./R.K. *Appeal dismissed;*

A. I. R. 1918 Calcutta 842

FLETCHER AND NEWBOULD, JJ.

Surendra Krishna Roy Choudhury and *others*—Defendants—Appellants.

v.

Peary Mohan Roy—Plaintiff—Respondent.

Appeal No. 2382 of 1915, Decided on 18th June 1917, from appellate decree of Dist. Judge, 24-Pergannahs, D/- 25th June 1915.

Bengal Tenancy Act (1885), S. 106—Suit under—Court is not limited to question of possession as regards other parties' claim.

In a suit under S. 106. where the dispute is between rival proprietors, the question of possession is the only matter that should be gone into. As regards other parties' claim the Court is not limited to the question of possession.

[P 842 C 2]

Sarat Chander Basak and *Akhoy Kumar Banerjee*—for Appellants.

Amarendra Nath Bose and *Upendra Narain Bagchi*—for Respondent.

Fletcher, J.—This is an appeal by the defendant against a decision of the learned Special Judge of the 24 Pergannahs sitting under the provisions of the Bengal Tenancy Act affirming the decision of the Settlement Officer at Alipore. The appeal arrises out of a proceeding under S. 106, Ben. Ten. Act, and the only question raised in the case whether the Courts were limited to the question as to who was in possession and, having decided that point, whether they could go any further and adjudicate on the rights of the parties.

I think on the question of possession there is a short answer, namely, that this point was not raised in either of the Courts bellow. It is quite true that an issue was settled as to who was in possession, but on appeal, before the learned Judge of the lower appellate Court, it is quite clear that no stress was placed upon this question and the learned Judge did not deal with the case on that footing. I think that the authorities of this Court show quite clearly that where there are rival proprietors this question of possession is the only matter that should be gone into. As regards the other parties claiming, the Court is not limited to the question of possession: vide *Pran Krishna Saha* v. *Trailakhya NathC howdhury* (1). In this case the Court, not being limited to the question of possession, was entitled to go into the question as to the plaintiff

1. (1915) 27 I C 883.

having purchased in execution of a decree on his mortgage. It is said that these parties in the present case are, in fact, rival proprietors because the property is brahmatter; but that is not the meaning of the word within the meaning of the Bengal Tenancy Act or as it is understood in the Indian Courts. The next point raises a matter that we cannot go into in this case.

The plaintiff claims as the purchaser in execution of his mortgage decree and the defendants claim under a subsequent mortgage, although in the suit in execution of the decree in which the plaintiff purchased, the mortgagee under whom the defendants claim was not made a party. We cannot decide the rights of the parties in this case as to whether the plaintiff's case is barred by limitation or any other matter that Dr. Basak's clients may wish to raise either in a suit brought by themselves or in a suit brought by the plaintiff. This is limited to the question of amending the entries in the Record of Rights. That being the only point that this Court can go into in this case, all these points about the rights of the parties under different deeds and executions are not matters that should be touched or decided in the present case. All that we can say is that the learned Judge of the lower appellate Court, on the authorities of this Court, came to a right conclusion. In that view, the present appeal fails and must be dismissed with costs.

Newbould, J.—I agree.

V.B./R K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 843 (1)
Full Bench

WOODROFFE, CHITTY AND SHAMSUL HUDA, JJ.

Tamiz Munshi—Appellant.

v.

Bisweswari Debya Chowdhurani—Respondent.

Letters Patent Appeal No. 1 of 1917, Decided on 29th April 1918, against judgment of Chatterjee and Newbould, JJ., D/- 9th January 1917.

Landlord and Tenant—Raiyat selling portion of non-transferable holding and subsequently surrendering them to landlord—Landlord can treat purchaser as trespasser as it amounts to surrender of whole.

Where a raiyat, after having sold portions of his non-transferable occupancy holding, expressly surrendered those portions to the landlord and then took a new settlement of the remainder of the holding:

Held: that the taking of the new settlement of the remainder of the original holding operated in law as an implied surrender of it, so that there was in fact a surrender of the whole holding which entitled the landlord to treat the purchaser of a portion of the holding as a trespasser and to eject him. [P 843 C 2]

Bimal Chandra Das Gupta—for Appellant.

Dwarkanath Nath Chakraburty and *Ramoni Mohan Chatterjee*—for Respondent.

Woodroffe, J.—In my opinion there was in fact a surrender of the whole holding. I agree with Newbould, J., when he says:

> "It may be conceded that relinquishment of the holding means a relinquishment of the whole holding but whole holding has been surrendered. The part sold to the defendant-appellant was expressly surrendered and the taking of a new settlement of the remainder of the holding operated in law as an implied surrender of the remaining portion."

It has been said that this is a new case. It, however, arises as a point of law on the admitted facts, and on the findings of the facts as found by the Subordinate Judge. This appeal is, therefore, dismissed with costs.

Chitty, J.—I agree.

Shamsul Huda, J.—I also agree.

V.B./R.K *Appeal dismissed.*

A. I. R. 1918 Calcutta 843 (2)

FLETCHER AND RICHARDSON, JJ.

Lakhi Charan Saha and *others*—Plaintiffs—Appellants.

v.

Mokar Ali—Defendant — Respondent.

Appeal No. 1115 of 1915, Decided on 15th February 1917, from appellate decree of Offg. Addl. Sub-Judge, Chittagong, D/- 10th February 1915.

Bengal Tenancy Act (1885), S. 21—Settled raiyat holding land at fixed rate of rent under permanent lease acquired right of occupancy—Right is not annulled by sale for arrears of revenue of estate under Bengal Revenue Sales Act (1859), S. 37.

Contract or no contract, every raiyat who is a settled raiyat of a village and obtains a raiyati interest in other lands in that village acquires a right of occupancy in those other lands. Consequently, a settled raiyat of a village holding land within the village under the terms of a permanent lease at a fixed rate of rent has a right of occupancy in the land which is not annulled by a sale for arrears of revenue of the estate comprising the village. [P 844 C 1]

Dhirendra Lal Kastgir and *Khitis Chandra Sen*—for Appellants.

Abdul Jawwad—for Respondent.

Fletcher, J.—This is an appeal from a decision of the learned Officiating Additional Subordinate Judge of Chittagong, dated 10th February 1915, affirming the decision of the Munsif of Hathazari. The suit was brought by the plaintiffs to recover khas possession of the land in dispute. The plaintiffs purchased a revenue paying estate which was sold for arrears of revenue under the provisions of Act 11 of 1859. The question in this case is: "has the contesting defendant a protected interest within the meaning of the proviso to S. 37 of the Act"?

The facts found are these:—First of all, it has been found that the contesting defendant is a settled raiyat of the village within the meaning of the Bengal Tenancy Act. Secondly, it has been found that he holds the land in suit which is in the same village as the villageof which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent. Whatever may be the law as regards other classes of raiyats, it is quite clear on the terms of S. 21, Ben. Ten. Act, that, contract or no contract, every raiyat who is a settled raiyat of a village and obtains a raiyati interest in other lands in that village acquires a right of occupancy in those other lands; and, if that is so, the present defendant seems to me clearly to have a right of occupancy in the land in dispute. If he has a right of occupancy, he comes clearly within the proviso to S. 37, Act 11 of 1859, and has an interest which has not been annulled by the sale for arrears of revenue. In that view, I agree in the decision arrived at by the learned Judge of the lower appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

Richardson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 844

CHATTERJEA AND GREAVES, JJ.

Mahabir Misser and *others*—Plaintiffs—Appellants.

v.

Nanda Kishore Misser and *others*—Defendants—Respondents.

Second Appeal No. 2181 of 1913, Decided on 5th January 1915, from decision of Sub-Judge, Mozafferpore, D/- 19th May 1913.

(a) Registration Act (16 of 1908), S. 17 (2) (6)—Compromise though not restricted to subject-matter but embodied in decree is judicial act and does not require registration—Quaere—Whether such decree can act as res judicata on other matters.

A decree recording an agreement as one of the terms of a compromise though not relating to the suit, is a judicial record of the agreement of the parties and is admissible in evidence. [P 845 C 1]

Therefore such an agreement recorded in a decree, does not require registration and is admissible in evidence without registration, [P 846 C 1]

Quaere:—Whether a compromise decree can operate as res judicata upon any matter other than that relating to the suit. [P 845 C1,2]

(b) Adverse possession—Nature—Possession must be open and continuous—Tethering of cattle or throwing cow dungs on land does not amount to adverse possession.

Possession in order to be adverse must be adequate in continuity, in publicity and in extent.

The only act of "tethering of cattle, and throwing cow-dungs on the land" unaccompanied with the assertion of any adverse right does not necessarily denote that a claim of ownership to the land was thereby asserted. [P 846 C 1]

Sib Chandra Palit—for Appellant.

Judgment.—Two questions have been raised in this appeal. The first is whether a certain compromise decree in a previous suit between the parties operates as res judicata or, at any rate, is evidence of an agreement between the parties with reference to the land in suit, and the second, whether the suit is barred by limitation. The present suit is for recovery of possession of 2 cottas odd of parti (waste) land, which was recorded as plaintiff's brit (rent-free) land in the Record of Rights. The Court of first instance decreed the suit, but the lower appellate Court reversed that decree, and the plaintiffs have appealed to this Court. It appears that there was a previous suit between the parties about another piece of land (3 cottas in area), which ended in a compromise. The terms of the compromise were set out in a petition which, after stating that each party will remain in possession of one-half of the 3 cottas in dispute in that suit, ran as follows:

"Be it noted that the brit lands shall remain in possession of each of the parties in the same way as they stand entered in the survey khatian. . - A decree may be passed in this suit in favour of the plaintiffs in respect of 1 cotta 10 dhoors of land as per (following) boundaries."

The whole of the petition of compromise including the above was recited in the decree and the order was: "It is ordered that the suit be decreed as per terms of the petition of compromise." The learned Subordinate Judge was of opinion that the recital about the brit lands did not appear to be an agreement, but a "mere notice of the intention of the parties," and that the recital was too

vague to refer to plot No. 845 (the plot to which the land in suit is alleged to appertain). But plot No. 845 is one of the brit plots entered in the survey khatian, and we are of opinion that the clause:

"the brit lands shall remain in possession of each of the parties in the same way as they stand entered in the survey khatian,"

amounted to an agreement between the parties, and an agreement about all the brit lands entered in the survey khatian, including plot No. 845 which was one of the plots entered therein. The learned Subordinate Judge was further of opinion that even if it was an agreement, it was outside the scope of the suit, and being unregistered, was inadmissible in evidence. It is contended on behalf of the appellant that the compromise decree operates as res judicata and, at any rate, is evidence of the agreement. We are of opinion that it does not operate as res judicata. O. 23, R. 3, provides that when a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith, so far as it relates to the suit. It is true all the terms of the compromise were recited in the decree, but the compromise, in so far as it related to the suit, was with respect to the 3 cottas (the subject-matter in dispute in that suit), and the Court was expressly asked to pass a decree in the suit in favour of the plaintiff in respect of 1 cotta 10 dhoors of land, being a moiety of the land in suit, and the order of the Court that the suit be decreed as per terms of the petition of compromise evidently had reference to the prayer made in the petition, viz., that a decree might be passed with respect to one-half of the land in suit.

It is contended, however, that the agreement about the brit lands formed the consideration for the compromise, and that therefore the decree operated as res judicata with regard to it also. But even if it did form consideration for the compromise, the Court was never asked to pass a decree with respect to any matter other than the land in dispute in that suit. There was no decree as regards the brit lands, and the decree cannot therefore, operate as res judicata with regard to the brit lands. In this view it is unnecessary to consider the authorities upon the question whether a compromise decree can operate as res judicata upon any matter other than that relating to the suit, upon which there is some conflict of judicial opinion. But although the decree does not operate as res judicata, we think the agreement recited in the decree is admissible in evidence, though not registered. In the case of *Pranal Anni* v. *Lakshmi Anni* (1), the Judicial Committee of the Privy Council observed as follows:

"If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in the suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer her the moiety of land now in dispute".

In that case although the razinamah which was submitted to the Court referred by way of remark to the arrangement arrived at between the parties with respect to the lands not forming the subject-matter of the suit, the Court in its order referred only to the lands in dispute in that suit.

In the present case the decree states, "on perusing the petition of compromise to the effect," and then recites all the terms of the compromise including those relating to the brit lands. The order o the Courts viz., that the suit "be decreed as per terms of the petition of compromise," must be taken to refer to all the terms, including those relating to the brit lands, although it must be taken to have given effect to the terms of the compromise only in so far as they related to the suit, as the only decree which the Court was asked to pass was with respect to the lands in dispute in that suit. But all the terms including those relating to the brit lands were submitted to the Court, and were perused by it, and the order of the Court must be taken to have referred to or narrated the agreement relating to the brit lands. In any case the agreement relating to the brit lands was recorded in the decree. Under O. 23, R. 3, Civil P. C., the Court is to record the agreement of compromise, and to pass a decree in accordance therewith in so far as it relates to the suit. A decree, therefore, recording an agreement as one of the terms of the compromise, though not relating to the suit, is a legal

1. (1899) 22 Mad 508=26 I A 101 (P C).

record of the agreement between the parties and as such available to the appellant as evidence. We are accordingly of opinion that the agreement recited in the decree does not require registration and is admissible in evidence. The learned Subordinate Judge should have, therefore, considered it as a piece of evidence in the case. The second contention relates to the question of limitation. The learned Snbordinate Judge has found that the lands were parti (waste). That being so, we do not appreciate what he means by saying,

"such being the character of the lands' the plaintiffs could have shown that they exercised dominion over the lands in dispute before the Bhado of 1318 F. S.. when the defendants are said to have got into them."

The only acts of possession exercised by the defendants as found by the Subordiate Judge are "tethering of cattle, and throwing cow-dungs on the land." But such acts, if unaccompanied with the assertion of any adverse right, would not necessarily denote that a claim of ownership to the land was thereby asserted, and as observed by the Judicial Committee in the case of *Radhamoni Debi* v. *Collector of Khulna* (2) possession in order to be adverse must be adequate in continuity in publicity and in extent. The learned Subordinate Judge does not appear to have considered these matters in deciding the question of limitation. We are of opinion that the case should go back for a hearing of the appeal. The decree of the lower appellate Court is accordingly set aside and the case remanded to that Court for a re-hearing of the appeal in accordance with the above remarks. Costs to abide the result.

V.B./R.K. *Case remanded.*

2. (1900) 27 Cal 943=27 I A 136 (P C).

A. I, R. 1918 Calcutta 846

RICHARDSON AND ROE, JJ.

Sailabala Debi and *others*—Decree-holders—Petitioners.

v.

Nritya Gopal Sen Poddar and *others*—Judgment-debtors—Opposite Parties.

Rule Nisi No. 839 of 1914, Decided on on 3rd December 1915, against order of Dist. Judge, Dacca, D/- 18th May 1914, in Misc. Appeal suit No. 24 of 1914.

Civil P. C. (1908), O. 21, R. 90—Sale in execution of rent decree—Mortgagee of non-transferable occupancy holding entitled to set aside sale—"Whose interests are affected by sale"—Meaning of.

A mortgagee of an entire non-transferable occupancy holding, who has purchased the holding in execution of his mortgage-decree, is a person "whose interests are affected by the sale" of the holding in execution of a rent-decree, within the meaning of O. 21, R. 90, of the Civil P. C. 1908, and as such has a locus standi to apply under that rule to set aside the sale. [P 847 C 1]

The words of R. 90 "whose interests are affected by the sale" are very wide: 28 *I. C.* 182. *Dist.* [P 847 C 1]

Ramesh Chandra Sen—for Petitioners.

Brojendra Nath Chatterjee and *Biraj Mohan Mozumdar*—for Opposite Parties.

Judgment.—This is a rule calling upon the opposite party to show cause why the order of the district Judge of Dacca, dated 18th May 1914, should not be set aside. The matter arises out of the sale of a holding at the instance of the landlords in execution of a decree for arrears of rent. The holding had previously been sold by a mortgagee of the original tenant in execution of a decree on the mortgage and purchased by the mortgagee for the sum of Rs. 400. At the sale at the landlord's instance, the holding was purchased by the landlords for the sum of Rs. 38 only. The mortgagee then applied under O. 21, R. 90, Civil P. C., to have the sale set aside on the ground of material irregularity and fraud in conducting the sale. The Court of first instance held that the mortgagee had no locus standi to make such an application and, for that and other reasons, dismissed the application. On appeal, the learned District Judge held, on the contrary, that the mortgagee was entitled to make the application and, on the merits, he set saide the sale. We are asked to set aside the order of the District Judge an the ground that he had no jurisdiction to make it, the mortgagee not being a person entitled to apply under the rule referred to. It should be mentioned that the sale in both instances was the sale of an entire holding. The question at issue depends on the meaning to be attached to the words "whose interests are affected by the sale" in O. 21, R. 90. Our attention was invited by the learned pleader for the petitioners (the landlords) to the ruling of this Court in the case of *Abdul Rahman Sarkar* v. *Promode Behary Dutta* (1). In that case, it was held (the case arose in Eastern Bengal)

1. (1915) 28 I C 182.

that the purchaser in execution of a mortgage decree of an entire non-transferable occupancy holding was not competent to apply under O. 21, R. 89, Civil P. C., to set aside under that rule a subsequent execution sale held in execution of a rent-decree in which the landlord himself had purchased the property. The language of R. 89, is, however, not the same as the language of R. 90. The words of R. 90 "whose interests are affected by the sale" are very wide and, in our opinion, it is impossible to say that the mortgagee in the present case does not come within the rule. For one thing, he is interested in the sale-proceeds and is clearly entitled to any balance of the sale-proceeds remaining over after the landlord's dues have been satisfied. It seems to us that his interests were clearly affected by the sale which he seeks to have set aside and that the view adopted by the learned District Judge is correct. That being so, the rule must be discharged with costs. We assess the hearing fee at two gold mohurs.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 847 (1)

CHITTY AND SMITHER, JJ.

Sristidhar Ghose and *others*—Plaintiffs—Appellants.

v.

Kedareswar Biswas and *others*—Defendants—Respondents.

Appeal No. 2883 of 1915, Decided on 26th April 1918, from appellate decree of Sub-Judge, Khulna, D/- 2nd August 1915.

Bengal Land Revenue Sales Act (1859), S. 59—Sale of permanent tenure at revenue sale does not affect howla in existence from before last settlement of permanent tenure.

Within a resumed khas mahal there was a nim-osat taluk (permanent tenure), of which the last settlement had taken place in 1908. Under this nim-osat taluk there had existed a howla from 1883. The nim-osat taluk was sold in 1912 at a revenue sale under Act 11 of 1859:

Held: that the sale of the nim-osat taluk did not affect the howla which had been in existence from before the last settlement of the nim-osat taluk. [P 847 C 2]

Sarat Chandra Basak and *Bepin Chandra Bose*—for Appellants.

Jadu Nath Kanjilal — for Respondents.

Judgment.—This appeal is preferred by the plaintiffs and arises out of a suit brought by them to recover rent from defendants 1 to 11 as osat howladars. The plaintiffs claimed as purchasers at a 9 pies share in a nim-osat taluk, within revenue sale of resumed khas mahal bearing Touzi No. 856. The revenue sale took place on 20th March 1912 (1318). The tenant defendants pleaded that they were not liable to pay rent direct to the plaintiffs inasmuch as there was in existence a howla created long ago by the outgoing owners of the nim-osat taluk in favour of themselves.

When the case first came on for hearing before us on 7th March last, we were of opinion that a remand would be necessary for the determination of several questions of fact. On further consideration however we came to the conclusion that all we required to know was when the nim-osat taluk was least re-settled. It was argued before us on behalf of the plaintiffs-appellants that the howla, if it existed, was annulled by the revenue sale in 1912. The date therefore of the last settlement of the nim-osat taluk was clearly of the highest importance. We accordingly adjourned the case for the vakils to obtain the necessary information from their clients. It is now conceded for the appellents that the last settlement of the nim-osat taluk took place in 1908. The learned Subordinate Judge has found that the howla existed from 1290 (1883) and that rent was paid in respect of it down to 1316, two years after the final publication of the Record of Rights in Chait 1314. He further finds that it had an existence altogether separate from and independent of the nim-osat taluk. It follows that it could not be affected by the sale of the nim-osat taluk in 1912 (1318) (see section 52 Act 11 of 1859). In these circumstances it is clear that the plaintiffs cannot recover rent directly from the tenant defendants, and that their suit was rightly dismissed. This appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 847 (2)

TEUNON AND NEWBOULD, JJ.

Narendra Nath Lahiri and *others*—Defendants—Petitioners.

v.

Charu Chandra Bose—Plaintiff—Opposite Party.

Civil Rule No. 714 of 1917, Decided on 1st February 1918, against order of Sub-Judge, Alipore.

Specific Relief Act (1877), S. 9—Thakurbari—Possession of—Actual possession of key to door amounts to physical possession for purposes of S. 9.

Where plaintiff appointed the pujari of a Thakur Bari, defrayed the expenses of worship, repaired the building and held the actual possession of the key by which the door of the Thakurghar was opened:

Held: that the possession of the plaintiff was such physical possession as the provisions of S. 9 were intended to protect, notwithstanding that the Thakur Bari, as the residence of a deity, was open to the public. [P 848 C 1]

Rash Behari Ghose and *Hira Lal Sanyal*—for Petitioner.

B. C. Mitter and *Rupendra Kumar Mitra*—for Opposite Party.

Judgment.—This Rule is directed against an order made by the Subordinate Judge of Alipore under the provisions of S. 9, Specific Relief Act. The litigation is between two rival claimants to the sole shebaitship of a Thakur of the name of Siddeswari. The learned Subordinate Judge has found that the plaintiff in the suit brought in his Court was in possession of the Thakur Bari of this Thakur and of the site thereof, and has made an order directing that he do recover possession from the rival claimant. His order is attacked before us on the ground that the Thakur Bari as the residence of the deity or a house of god is open to the public and inasmuch as the defendant has not removed the image of the Thakur, it cannot be said that he has dispossessed the plaintiff from the Thakur within the meaning of S. 9, Specific Relief Act. We are unable to accede to this contention. On this earth Thakurs and other deities must be represented and their interests protected by mundane persons. The learned Subordinate Judge has found that the plaintiff was in possession of this Thakur Bari by appointing the pujari, by defraying the expenses of the deity's worship, by repairing and in fact reconstructing the building, and by holding actual possession of the key by which the door of the Thakurghar is opened. In our view that is physical possession such as the provisions of S. 9, Specific Relief Act are intended to protect. We, therefore, discharge this Rule with costs, five gold mohurs.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 848

FLETCHER AND SMITHER, JJ.

Bymkesh Chakrabartty——Plaintiff—Appellant.

v.

Jagadiswar Roy and *others*—Defendants—Respondents.

Appeal No. 2603 of 1915, Decided on 2nd April 1915, from appellate decree of Sub-Judge, Jessore, D/- 12th August 1915.

Evidence Act (1872), S. 13 — Status of tenant—Decree in favour of stranger is admissible.

A decree (whether obtained by the plaintiff's predecessor or a stranger), in which it was found that the defendants-tenants had a holding in a certain estate on a certain rental, is admissible under S. 13 for the purpose of showing that the defendants held a holding in that estate on that rental. [P 848 C 2]

Surendra Madhab Mallik and *Satis Chandra Bose* —for Appellant.

Fletcher, J.—This is an appeal by the plaintiff from a decision of the learned Subordinate Judge of Jessore, dated 12th August 1915, affirming a decision of the Munsif of the same place. The plaintiff brought the suit to recover rent for the years 1313 to 1316 B. S. He sued as a 5-annas 4-pies cosharer and he alleged that the defendants had a holding of which the rent was Rs. 17. The estate in which the plaintiff was a cosharer bore tauzi No. 250 of the Jessore Collectorate. The plaintiff is a person who has purchased this share in the month of September 1906. In support of his claim the plaintiff gave in evidence a decree obtained by another cosharer also of a 5 annas 4-pies share in which it was found that the defendants had a holding in the estate of which the Tauzi number was 250 of the Jessore Collectorate, and that the rent of that holding was Rs. 17 per annum. It is quite clear that to prove these facts the decree in the other suit was a relevant document. There cannot be any doubt about it whether the decree was by a predecessor of the plaintiff or by a stranger; under the provisions of the Evidence Act that decree is admissible and, no doubt, it is an important document. The learned Judge in the primary Court thought that the decree was not admissible at all. The learned Judge in the lower appellate Court held that the decree could only be given in evidence if the plaintiff could prove that the person who had obtained it was his cosharer. What I understand the learned Judge meant is

that the plaintiff had got to prove that Jogendra, i. e., the person who had obtained the decree and the present plaintiff were cosharers in the estate at one and the same time and that otherwise the document would not be admissible in evidence. That, I do not agree, was the proper view at all. This document was obviously admissible under S. 13, Evidence Act, for the purpose of showing that the defendants held a holding in this estate Tauzi No. 250 and that the rent of that holding was Rs. 17. The case must therefore go back to the lower appellate Court to have the appeal re-heard after due attention being given to the decree obtained by Jogendra. Costs of this appeal and of the lower appellate Court will abide the result of the re-hearing by the learned Subordinate Judge.

Smither, J.—I agree that the decree is admissible in evidence and the case must therefore go back.

V.B /R.K. *Case sent back.*

A. I. R. 1918 Calcutta 849

MOOKERJEE AND RICHARDSON, JJ.

Meher Ali and *another*—Defendants—Appellants.

v.

Kalai Khalashi — Plaintiff—Respondent.

Second Appeal No. 2929 of 1913, Decided on 23rd March 1915, against decree of Dist. Judge, Faridpur, D/- 7th June 1913.

(a) Bengal Tenancy Act (8 of 1885), S. 4—Raiyat at fixed rent can create a permanent heritable under-raiyat interest.

A raiyat at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee, although the latter is an under-raiyat : *A I R* 1914 *Cal* 485, *Foll.* [P 849 C 2]

(b) Lease—Permanency—Word "kayemi" imply not fixity of rent but permanency of occupation.

The use of the term "kayemi" in a kabulyat imports not fixity of rent, but only permanence of occupation of the land : 12 *C W N* 175 ; 6 *C W N* 916 and 1 *W R* 5, *Ref.* [P 850 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 4—An occupancy raiyat cannot create permanent heritable under-raiyati interest.

Where the plaintiff is an occupancy raiyat, he is not competent to create in favour of his grantee a permanent heritable under-raiyati interest. [P 850 C 1]

Where the grantee is an under-raiyat of an occupancy raiyat, his interest is not heritable : 31 *Cal* 757 and 11 *C W N* 519, *Ref.* [P 850 C 1]

(d) Lease—Permanency— Words "sthayee karsha kabulayat" do not imply permanent heritable interest.

The description of a kubulyat as "sthayee karsha kabulyat" does not necessarily imply that the grantee was intended to have a permanent heritable interest. [P 850 C 1]

(e) Landlord and Tenant — Ejectment—Ejectment suit before end of agricultural year—Tenant dead—Proper form of decree would be against representatives to be executed after end of year.

Where the suit was instituted before the expiry of the agricultural year current at the time when the original under-raiyat died :

Held : that the proper form of the decree would be one for ejectment against his representatives, the defendants, to be executed only on the expiry of that particular agricultural year. [P 850 C 2]

Surendra Chandra Sen—for Appellants.

Rupendra Kumar Mitra—for Respondent.

Judgment.—This is an appeal by the defendants in an action in ejectment. The ancestor of the defendants executed a kabulyat in favour of the plaintiff on 1st June 1889 in respect of the disputed land, which covers an area of six cottas. The original tenant died in 1910. On 4th April 1911, the plaintiff commenced this action to eject defendants who are his descendants, on the ground that as the household interest was not heritable, they had no right to remain in occupation of the land. The Courts below have decreed the suit. In support of the present appeal, it has been urged that the plaintiff was a raiyat at a fixed rate of rent and was competent to create, as he did, a permanent heritable interest in favour of his grantee, although the latter was an under-raiyat. It has not been disputed by the respondent, and in view of the decision in *Hari Mohan* v. *Atal Krishna Bose* (1) (*Rule No.* 1260 *of* 1913 *decided on* 17*th June* 1913), it cannot be disputed, that this result would follow if the plaintiff is a raiyat at a fixed rate, but it has been argued that he is not a raiyat of that description.

In the kabulyat executed by the ancestor of the defendants in favour of the plaintiff the interest of the latter is described as a kayemi karsha jote. The contention of the appellant is that the use of the term kayemi indicates that the plaintiff was a raiyat at a fixed rent. This position has been controverted by the respondent, and reliance had been placed on the decision in *Fazel Sheikh* v. *Keramuddi Sheikh* (2) to show that the term kayemi does not necessarily indicate fixity

1. A I R 1914 Cal 485=23 I C 925.
2. (1902) 6 C W N 916.

of rent. Reference has also been made to para. 15 of the report of the Rent Law Commission, dated 15th July 1880 published in the Calcutta Gazette of 21st July 1880. The opinion was expressed by the Commissioners, as the result of their inquiries, that in Backergunj even the interest of a howladar is not held at a fixed rent, and this indeed, was the view adopted by the Court in the case of *Huromohan Mookerjee* v. *Rance Lalun Monee Dassee* (3). If the interest of a howladar does not imply fixity of rent, it is obvious that a subordinate tenant, whose interest is that of a kayemi karshadar, does not hold at a fixed rent. We are of opinion that the use of the term "kayem" imports not fixity of rent, but only permanence of occupation of the land, and this view is in accordance with that adopted in *Gajratulla* v. *Girish Chandra Bhaumik* (4) and *Fazel Sheikh* v. *Keramuddi Sheikh* (2). The position, then, is that the plaintiff was an occupancy raiyat and was not competent to create in favour of the ancestor of the defendants a permanent heritable under-raiyat interest.

It has been finally argued on behalf of the appellant that as the kabulyat is described as sthayee karsha kabulyat, the intention of the grantor, whatever restrictions there might have been on his own right, was to create a permanent and heritable interest in the grantee, and that notwithstanding the provisions of S. 85, Ben. Ten. Act, it is not open to him to question the validity of the grant made by him. In our opinion, there is no force in this contention, for the description of the kabulyat as "sthayee karsha" kabulyat does not necessarily imply that the grantee was intended to have a permanent heritable interest. We must take that expression along with the description of the interest of the grantor himself, who was only an occupancy raiyat, and not a raiyat at a fixed rent; he could not consequently be assumed to have created in the grantee a permanent heritable interest in contravention of the express provisions of the law. In this view, no question of estoppel arises. If, then, the grantee was an under-raiyat, as he must be held to have been, it cannot be disputed that his interest was not heritable. This view is supported by the cases of *Arip Mandal* v. *Ram Ratan Mandal* (5) and *Jamini Sundar Dass* v. *Rajendra Nath Chuckrabutty* (6). With reference however, to the decision of the Full Bench in *Arip Mandal* v. *Ram Ratan Mandal* (5), it has been argued that as the present suit was instituted before expiry of the agricultural year in which the tenant died, the suit was premature and was bound to fail. We are not prepared to accept this contention as well-founded. Assuming that the suit was instituted before the expiry of the agricultural year current at the time when the original under-raiyat died, the proper form of the decree would be one for ejectment against his representatives, the defendants, to be executed only on the expiry of that particular agricultural year. It is not disputed that the agricultural year mentioned has expired long ago and that the defendants have nevertheless continued in occupation of the land. The decree for ejectment made by the Court below must consequently be affirmed and this appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

3. (1864) 1 W R 5.
4. (1908) 12 C W N 175.
5. (1904) 31 Cal 757.
6. (1907) 11 C W N 519.

A. I. R. 1918 Calcutta 850

SANDERSON, C. J. AND MOOKERJEE, J.

Budhu Lal—Appellant.

v.

Chattu Gope—Respondent.

Appeal No. 12 of 1916, Decided on 27th November 1916, from original order of Chaudhuri, J., D/- 6th December 1915, reported in 36 *I. C.* 472.

(a) Letters Patent (Cal.), Cl. 15—Order of remand on refusal to sanction is judgment under Cl. 15 and hence appeal lies.

An application was made in the Small Cause Court, Calcutta, on behalf of the defendant, for sanction to prosecute the plaintiff, under S. 209, I. P. C., for having fraudulently and dishonestly and with intent to injure and annoy the defendant made a claim which he knew to be false and also under S. 193, I. P. C., for having, in an application for leave to institute a suit, knowingly and intentionally made a false statement when legally bound to state the truth. The Judge of the Small Cause Court refused the sanction, on the ground that the statements were not made in the course of a judicial proceeding and that there had been an undue and unreasonable delay in making the application. Defendant then applied to the High Court, and the learned Judge who heard the application came to the conclusion that the statement had been made in the course of a judicial proceeding, and that the delay had been explained away; and he made an order that the matter should be further investigated by the learned Judge of the Small Cause Court and that

that Judge should determine, upon the materials placed before the Court and having regard to his decision, whether or not sanction should be granted:

Held: that the order of the learned Judge of the High Court was a "judgment" within the meaning of Cl. 15 of the Letters Patent and that an appeal lay against that order under that clause: 8 *B. L. R.* 433 and 4 *Cal.* 531, *Rel. on*: *A. I. R.* 1914 *Cal.* 597; 12 *M. L. J.* 408; 43 *Cal.* 857; 13 *B. L. R.* 91 and 30 *Mad.* 311, *Ref.* [P 852 C 1; P 853 C 2]

(b) Criminal P. C. (1898), S. 195 (6)—Cl. 6 does not authorize remand for further inquiry.

Under S. 195 (6) the sole power given to the learned Judge of the High Court was to revoke a sanction given or to grant a sanction refused by the subordinate Court and that he had no power to remand the case for further inquiry and decision by the Small Cause Court. [P 854 C 1; P 855 C 2]

Per *Mookerjee, J.*—Where a subordinate Court refuses sanction under S. 195, the superior Court is authorized either to confirm that order or to grant sanction, but it has no power to remand the case for further inquiry and for final disposal in accordance with the result thereof: 16 *M. L. J.* 45*n*; 33 *All.* 512; 8 *I. C.* 679 and 7 *P. R.* 1913 *Cr., Rel. on.* [P 855 C 2]

(c) Criminal P. C. (1898), S. 195—Superior Court has inherent power to take fresh evidence.

In dealing with an application for sanction under S. 195, Criminal P. C., in appeal, a superior Court has inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it, e g. to take further evidence in its discretion: 32 *Cal.* 379 and 33 *Mad.* 90, *Diss. from.* 32 *I. C.* 157, *Rel. on.* [P 855 C 1; P 857 C 2]

(d) Practice—Procedure—Act creating new procedure—That alone must be followed.

In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms and remedies there prescribed and no others must be followed. [P 856 C 2]

(e) Criminal P. C. (1898), Ss. 195 (6), 435 and 439—Cl. 6 provides for correction of lower Court's order—Power of superintendance is not derived from S. 435 or S. 439 or S. 115, Civil P. C.

Section 195, Criminal P. C., creates a special jurisdiction and provides in Cl. 6 the machinery for the correction of possible errors committed by the primary Court. Consequently the interference by the High Court must be attributed neither to S. 115, Civil P. C., nor to Ss. 435 and 439, Criminal P. C , but to S. 195 (6) of the latter Code: *Case-law discussed.* [P 856 C 2]

The Criminal Procedure Code does not contain a provision corresponding to S. 151, Civil P. C., but that section does not lay down any new principle: it merely embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. This inherent power is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised ex debito justitae to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. [P 857 C 2]

(f) Criminal Trial—Inherent power—Criminal Courts have inherent power though no analogous provision as S. 151, Civil P. C., occurs in Criminal P. C.—S. 151 Civil P. C. gives only legislative recognition to inherent power which already exists it does not create one—Inherent power, how to be used stated.

Criminal Courts, no less than civil Courts, exist for the administration of justice, and Courts of both description have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of justice: 16 *I. C.* 257 and 36 *Cal.* 44, *Ref.* [P 857 C 2]

K. N. Chowdhury—for Appellant.

B. C. Mitter—for Respondent.

Preliminary Judgment

Sanderson, C. J.—In this case the learned Standing Counsel has taken a preliminary point that there is no right of appeal. The position is as follows: An application was made in the Small Cause Court of Calcutta on behalf of the defendant, for sanction to prosecute the plaintiff, under S. 209, I. P. C., for having fraudulently and dishonestly and with intent to injure and annoy the defendant made a claim which he knew to be false and also under S. 193, I. P. C., for having, in an application for leave to institute a suit, knowingly and intentionally made a false statement when legally bound to state the truth. One of the learned Judges of the Small Cause Court refused the sanction basing his judgment upon two grounds. The first was that the statements were not made in the course of a judicial proceeding, and the second was that there had been undue and unreasonable delay in making the application. The statement referred to was made upon affirmation upon an application for leave to sue people who were outside the jurisdiction of the Small Cause Court. The application having been refused, a further application—I advisedly use this word and do not use the word appeal—was made to Chaudhury, J., alleging that the decision of the learned Judge of the Small Cause Court was wrong, and that sanction ought to have been granted. The learned Judge came to the conclusion that the statement had been made in the course of a judicial proceeding, and that the delay had been explained away; and, he made an order that the matter should be further investigated by the learned Judge of the Small

Cause Court and that that Judge should determine, upon the materials placed before the Court and having regard to Chaudhuri, J's. decision, whether or not sanction should be granted.

Against that decision the plaintiff Budhu Lal has appealed. Thereupon, as I have already stated, the learned standing counsel took a preliminary objection that there was no appeal, on the ground that the order made by Chaudhuri, J., was not a judgment within the meaning of Cl. 15, Letters Patent. I do not think that I need dwell at length upon one point to which reference was made by the learned standing counsel, because he did not really to my mind seriously urge it. I do not think it can be said that this was an order made in a criminal trial within the meaning of the words in Cl. 15. The point that the learned standing counsel earnestly argued is that it is not a judgment within the meaning of that clause. Now, the definition of the word "judgment" relied upon is that contained in the learned Couch, C. J's judgment in the well known case of *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1). The passage (which is at p. 453) is this:

"We think that 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

Now, there have been numerous cases dealing with this point, and I think I am right in saying that the definition given by the learned Chief Justice has never been regarded as absolutely exhaustive, and whenever this point is taken the Court has to make up its mind whether the particular order in question is a judgment within the meaning of Cl. 15 having regard to the nature of the order. In my judgment the order which was made in this case by the learned Judge is a judgment within the meaning of Cl. 15. Therefore there is a right of appeal. Let me state quite shortly how the matter appears to my mind: Two points were taken before the learned Judge. The first of them was that the statements relied upon were made in the course of a judicial proceeding. The second was that although there had been delay, that delay could be and was explained away. As regards the second point the learned Judge thought that there was an explanation of the dealy.

As regards the first point, he came to the conclusion and decided that the statements were made in the course of a judicial proceeding. Now, was not that a question which was between the parties? Certainly it was. The plaintiff was alleging on the one hand that the statements were not made in the course of a judicial proceeding, the prosecution, on the other hand, was alleging that they were made in the course of a judicial proceeding. It may be said that this was the main question between the parties. If the learned Judge had come to the conclusion that the statements were not made in the course of a judicial proceeding, that would have put an end to the matter, and the application would be dismissed. This case therefore comes within the exact words of the learned Couch, C. J. when he said:

"It means a decision which affects the merits of the question between the parties determining some right or liability."

Of the other cases which have been referred to, one is *Ebrahim* v. *Fackhurunnissa Begam* (2), which is a decision of Garth, C. J. He says,

"I think that the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point, not affecting the merits or result of the entire suit."

As I have pointed out, the decision of the question as to whether the statements were made in the course of a judicial proceeding, was one which affected the merits or result of the entire matter, for if it had been decided in one way, viz, in favour of the applicant's contention, it would have put an end to the proceedings altogether. For these reasons I think that the order appealed against is a judgment within the meaning of Cl. 15 of the Letters Patent, and that there is a right of appeal.

Mookerjee, J.—I agree that the appeal is competent and that the preliminary objection must be overruled. The appeal is directed against an order of Chaudhuri, J., which purports to have been made under Cl. (6), S. 195, Criminal P. C. The appellant instituted a suit

1. (1872) 8 B L R 433=17 W R 364.

2. (1879) 4 Cal 531.

against the respondent in the Court of Small Causes at Calcutta. The defendant entered appearance; but at the trial the plaintiff made no attempt to prove his claim, with the result that the suit was dismissed. An application was subsequently made on behalf of the defendant for sanction to prosecute the plaintiff under S. 195, Criminal P. C. for offences punishable under Ss. 193 and 209, I. P. C. The Small Cause Court Judge dismissed the application for sanction, principally on the ground that no offence had been committed, because a statement made on oath in the course of a proceeding for leave to sue is not a statement made in a judicial proceeding. The defendant thereupon applied to Chaudhuri, J., under S. 195 (6), for reversal of this order of the Small Cause Court Judge. Chaudhuri, J., came to the conclusion that the statement mentioned must be deemed to have been made in the course of a judicial proceeding and that consequently the order of the Small Cause Court could not be sustained. He did not, however forthwith grant sanction to prosecute the plaintiff under S. 195, but directed the Small Cause Court Judge to hold an enquiry and to pass such orders as might seem fit and proper, on the result thereof. The appeal is directed against this order. The contention of the respondent is that the decision of Choudhuri, J., is not a judgment within the meaning of Cl. 15, of the Letters Patent. That clause, in so far as it is material for the purposes of the present case provides that

"an appeal shall lie to the High Court from a judgment, not being a sentence or order passed or made in any criminal trial of one Judge of the said High Court."

It is obvious that the order in question cannot in any sense be described as a sentence passed or order made in any criminal trial by one Judge of this Court. The proceeding before Chaudhuri, J., fell within the scope of S. 195 (6) and although of a criminal nature [*Hume* v. *Puresh Chander Ghose, In re An Attorney* (3)], was plainly not "a criminal trial" *Chakrapani Aiyangar* v. *King-Emperor* (4). The question accordingly arises, whether the decision was a judgment. Reference has been made to the definition given by Sir Richard Couch, C. J., in the case of *Justice of the Peace for Calcutta* v. *Oriental Gas Company* (1):

"Judgment in Cl. 15 means a decision which affects the merits of the question between the parties determining some right or liability. It may be either final or preliminary or interlocutory. The difference between them being that a final judgment determines the whole case or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

According to this definition, the circumstance that the order directs an inquiry and is consequently of a preliminary or interlocutory character, does not shew that it is not a judgment. The true question in controversy thus is, whether the decision affects the merits of the question between the parties by determining some right or liability. Now, the appellant is liable to be prosecuted only after sanction has been granted under S. 195, Criminal P. C., for offences within the scope of Ss. 193 and 209, I. P. C., if the atatement imputed to him may rightly be held to have been made in the course of a judicial proceeding. The Small Cause Court Judge took a view favourable to him; Chaudhuri, J., has expressed a contrary opinion. It is clear to my mind that in these circumstances the decision does affect the merits of the question between the parties by determining liability. It is not necessary for our present purpose to refer to the numerous judicial decision which embody an attempt to define or elucidate the meaning of the term judgment as used in Cl. 15 of the Letters Patent, and which were analysed by me in the case of *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (5); but I desire to emphasise this point that the definition given by Sir Richard Couch, while it furnishes a useful test, is not a statutory definition and cannot be deemed inflexible and exhaustive. In every case where the Court is called upon to decide whether the decision under appeal is or is not a judgment within the meaning of Cl. 15 of the Letters Patent, regard must be had to the nature and the contents of the order.

It may not be easy to reconcile all the reported decisions on their special facts, or to draw a dividing line between different classes of cases, such as *Hadjee Ismail* v. *Hudjee Mahomed* (6) and *Ebrahim* v. *Fackhrunnissa Begam* (2). But the present case is reasonably free from difficulty, and I entertain no doubt that

3. A I R 1914 Cal 597=41 Cal 446=22 I C 321.
4. (1902) 12 M L J 408.
5. (1916) 43 Cal 857=34 I C 634.
6. (1874) 13 B L R 91=21 W R 303.

the appeal is competent: cf. *Rama Iyer* v. *Venkatachala Padayachi* (7).

Final Judgment.

Sanderson, C. J.—This is an appeal from the decision of Chaudhuri, J., given on 6th December 1915, whereby he directed that an inquiry should be held by one of the learned Judges of the Small Cause Court as to whether sanction should be given to prosecute one Budhu Lal, the plaintiff in the Small Cause Court Suit and the appellant in this Court upon the materials placed before that Court, and whether the grounds upon which the jurisdiction of the Court was invoked when leave was asked for to institute the said Suit No. 15292 of 1913, are true or untrue.

We have already disposed of the preliminary point taken by the learned Standing counsel and held that an appeal lay from the decision of Chaudhuri, J. We have now to decide the appeal on the merits.

I have already sufficiently stated the facts in giving judgment on the preliminary point, and I need not repeat them. The first point which arises is whether the learned Judge had jurisdiction to make the order in the form to which I have already referred. The application was headed: "In the matter of S. 115, Civil P. C.," but the learned Judge at the hearing suggested that it would be more appropriate if it were made under the Criminal Procedure Code, and in fact the learned standing counsel treated it as such an application, and the learned Judge purported to make the order under S. 195, Criminal P. C. The Small Cause Court being subordinate to this Court, it is clear that this Court had jurisdiction under S. 195 (6), Criminal P. C., to deal with the application; but in my judgment it is equally clear that under this section there was no power in the learned Judge to remand the case to the Small Cause Court for further inquiry. Under this section the sole power given to this Court is to revoke a sanction given or grant a sanction refused by the subordinate Court and therefore in my judgment, the order made in the form already referred to, which amounted to a remand for further inquiry and decision by the small cause Court, cannot be upheld. This was not really disputed by the learned standing counsel, but he urged that such an order could be supported by reference to S. 115, Civil P. C. As regards this point, it must be remembered that the proposal of the learned Judge to deal with this application under S. 195, Criminal P. C., was adopted on behalf of the applicant, and in my judgment, it would not be right for us in a case of this kind, which is of a criminal nature, to allow the applicant, who is really the C. I. D., to shift his ground again even if we had power to act under S. 115, Civil P. C.

The ordinary rule of this Court is that it will not interfere and exercise its powers under S. 115 Civil P. C., if the aggrieved party has other remedy available, though it may do so in exceptional cases. There being the remedy provided by S. 195, Criminal P. C., I do not think it would be right for us under the circumstances of this case, even if we have jurisdiction so to do, to exercise the powers given to the Court under S. 115, Civil P. C. It must therefore be considered what order should be made in this case. It has been decided by Chaudhuri, J., that the learned Judge of the Small Cause Court was wrong in holding that the application for leave to sue was not a stage in a judicial proceeding, and I concur in Chaudhuri, J.'s judgment. He held further that the delay in making the application had been explained to his satisfaction: I see no reason to differ from his decision on this question of fact. The circumstances of the case were certainly remarkable, so far as the facts, which we have before us, indicate.

The plaintiff instituted (it is said on behalf of another person) seven suits in the Small Cause Court against Chattu Gope (the petitioner before Chaudhuri, J.,) and others: the case against Chattu Gope being based on a promissory note alleged to have been given in respect of money advanced by the plaintiff at the request of a third person and to have been executed by Chattu Gope in Calcutta in September 1911. Chattu Gope and the other defendants in these suits being resident outside Calcutta, the plaintiff Budhu Lal, made application for leave to sue, and swore that the money was lent in Calcutta and payable in Calcutta. When the cases came on for trial, neither the plaintiff nor the alleged other person gave any evidence themselves or produced any witnesses, but agreed to abide by the defendant's denial on oath of their lia-

7. (1907) 30 Mad 311.

bility. No decision has been given on the merits of the application for leave to prosecute, and under the circumstances of the case, in my judgment, it is desirable that such a decision should be arrived at by this Court; and the proper course will be to remit the application to a Division Bench and as Chief Justice, I determine as I have power to do, that the case shall be remitted to Teunon and Chaudhuri, JJ. By this course I hope further delay will be prevented. The question remains whether on the hearing the application will be confined to the materials which were before the Small Cause Court, or whether the Court will have power to take evidence. I should be sorry to be compelled to hold that the Court had no power to take evidence on such an application as this. If I was compelled so to hold, unfortunate results might happen: it might happen that the Judge of a subordinate Court might decide to refuse sanction to prosecute on a point of law without giving the accused person an opportunity of being heard on the merits. Upon an application under S. 195, Criminal P. C., the High Court might decide (as it did in this case) that the judgment of the subordinate Court on the point of law was wrong: and the Court would then have to decide whether sanction to prosecute should be granted. In such a case it would be a great hardship on the accused person if he were debarred from giving his explanation before the High Court, especially as the Judge of that Court under S. 195 could not remand the case for further inquiry and decision.

In my judgment the learned Judges can take evidence as to the merits of the application. In fact evidence in the shape of affidavits, has already been given before Chaudhuri, J., and the affidavits are on the file available for the use of the Court—it will be open to the Court to consider such evidence and to take further evidence if it thinks fit, due care of course being taken if any examination of witnesses takes place, that the person against whom the charge is made is not put into a position of prejudice, or called upon in any way to incriminate himself.

Mookerjee, J.—I agree that the order made by Chaudhuri, J., cannot be supported. The Small Cause Court Judge dismissed the application for sanction to prosecute the appellant under S. 195, Criminal P. C., on the ground that the alleged offence had not been committed in relation to any proceeding in any Court. The applicant for sanction then brought up the matter to this Court under S. 195 (6) read with S. 195 (7) (c), Chaudhuri, J., had held, and in my opinion correctly held; that the ground assigned by the Small Cause Court Judge in support of his order is erroneous; he has accordingly discharged that order and remanded the case for inquiry and final disposal by the Small Cause Court Judge. It has been argued before us that the order of remand for fresh investigation is erroneous as not contemplated by S. 195 (6). That clause provides that any sanction given or refused under the section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate. Whereas, in the case before us the subordinate Court has refused sanction the superior Court is, upon a plain reading of S. 195 (6), authorized either to confirm that order or to grant sanction: but the superior Court is not authorized to remand the case for further inquiry and for final disposal in accordance with the result thereof. This position cannot be and has not been contested; it is indeed supported by several judicial decisions: *Anonymous* (*L. P. A.* (*Mad.*) *No.* 37 of 1906) (8), *Beni Pershad* v. *Sarju Pershad* (9), *In re Kamma Narayanappa* (10) and *Muhammad Ishaq* v. *Muquinuddin* (11). But the Standing Counsel has contended that when a subordinate civil Court has made an order under S. 195, the High Court is competent to interfere, not merely under Cl. (6) of that section, but also in the exercise of its revisional powers under S. 115, Civil P.C. and to pass, under this latter section, such order as it may deem proper. In support of this view, reliance has been placed upon the decision of Pugh, J., in *Ramdin Bania* v. *Sew Baksh Singh* (12), which is based upon the view taken by the Allahabad High Court in *In the matter of Bhup Kunwar* (13) and *Salig Ram* v. *Ramji Lal* (14). There has been considerable divergence of judicial opinion upon the question, whether, when a High Court revises an order of a subordinate

8. (1906) 16 M L J 45n.
9. (1911) 33 All 512=9 I C 982.
10. (1910) 8 I C 679.
11. (1913) 7 P R 1913 Cr =19 I C 178.
12. (1910) 37 Cal 714=6 I C 473.
13. (1904) 26 All 249.
14. (1906) 28 All 554.

civil Court made under S. 195, Criminal P. C., the source of the authority for such interference should be sought in S. 115, Civil P. C., or in S. 439, Criminal P. C.

The cases of *Ram Prosad Roy* v. *Sooba Roy* (15), *Guru Charan Shaha* v. *Girija Sundari Dasi* (16), *In re Chennanagoud* (17), *Muhammad Yakub* v. *Muhammad Tyab* (18), *Salig Ram* v. *Ramji Lal* (14), *Kannambath Imbichi Nair* v. *Manmathanath Raman Nair* (19), *Kali Prosad Chatterji* v. *Bhuban Mohini Dasi* (20), *Mahomed Bhakku* v. *Queen-Empress* (21), *Ramjit Singh* v. *Shibba Mal* (22), *In re Bal Gangadhar Tilak* (23) and *Emperor* v. *Bankatram Lachiram* (24) directly or impliedly support the view that S. 115, Civil P. C., is applicable. On the other hand, the decisions in *Bishen Singh* v. *Amritsaria* (25), *Emperor* v. *Barkat Ram* (26), *Shankar Rao* v. *Shaik Daud* (27), *Musaji* v. *Mohammed Walayatullah Khan* (28) and *Nallapparaju Venkataramaraju* v. *Medisetti Achayya* (29) favour the view that it is competent for the High Court to revise the order of the subordinate civil Court in such circumstances, only under Ss. 435 and 439, Criminal P.C. In my opinion, this controversy as to-the rival claims of S. 115, Civil P. C. and Ss. 435 and 439, Criminal P. C. is based upon a misapprehension, and the fallacy which underlies the decision of Pugh, J., in *Ramdin Bania* v. *Sew Baksh Singh* (12) is the erroneous assumption that one of these sections must be applicable. The true view is that S. 195 creates a special jurisdiction, as explained in *Adimulam Pillay* v. *Krishnayen* (30), and provides in Cl. (6) the machinery for correction of possible errors committed by the Primary Court. Consequently, upon well-known principles, the interference by the High Court must be attributed neither to S. 115, Civil P. C., nor to Ss. 435 and 439, Criminal P. C., but only to S. 195 (6), Criminal P. C. As Lopes, L. J., observed in *Reg.* v. *Essex County Court Judge* (31),

"in the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms and remedies there prescribed and no others must be followed."

To the same effect is the exposition by Lord Halsbury in *Pasmore* v. *Oswaldtwistle Urban District Council* (32):

"The principle that where a specific remedy is given by a Statute, it thereby deprives the person, who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law."

In the case before us, the machinery for correction of possible errors is provided in Cl. (6), S. 195, and, consequently, the party who seeks relief must have recourse thereto and cannot invoke the aid of S. 115, Civil P. C., or Ss. 435 and 439, Criminal P. C. The remedy provided is not restricted in scope; the superior tribunal is not limited to an examination of questions of fact or questions of law alone, but may, upon a review of all the circumstances, either affirm or reverse the order of the Primary Court [*Jamna Das* v. *Sabapathy Chetti* (33) and *Ram Raja Dat* v. *Sheo Dayal* (34)]. It is thus immaterial, whether the remedy provided in Cl. (6) is regarded as in the nature of an appeal or a revision, specially when we remember that as explained by Westbury, L. C., in *Attorney-General* v. *Sillem* (35) and by this Court in *Secy. of State* v. *British India Steam Navigation Company* (36), what is technically called revision is only one aspect of the appellate jurisdiction. I am not unmindful that successive applications of S. 195 (6) may be necessary, when the primary Court is subordinate in the second decree to a High Court. That recourse may be had to the remedy provided by S. 195 (6), in this manner, is shown by numerous decisions [*Girija Shankar Roy* v. *Binode Sheikh* (37), *Habibur Rahman* v. *Munshi Khoda Bukhsh* (38), *Palaniappa Chetti* v. *Annamalai Chetti* (39), *Kannambath Imbichi Nair* v. *Manathanath Raman*

15. (1897) 1 C. W. N. 400.
16. (1902) 29 Cal 887.
17. (1903) 26 Mad 139.
18. (1903) A W N 172.
19. (1906) 29 Mad 122.
20. (1904) 8 C W N 73.
21. (1896) 23 Cal 532.
22. (1905) A W N 85.
23. (1902) 26 Bom 785.
24. (1904) 28 Bom. 533.
25. (1908) 5 P. R. 1908 Cr.
26. (1911) 10 I C 121.
27. (1908) 4 N L R 140.
28. (1908) 6 O C 216.
29. (1916) 33 I C 824.
30. (1912) 14 I C 805.
31. (1887) 18 Q. B. D. 704.
32. (1898) A C. 387.
33. (1913) 36 Mad 138=12 I C 521.
34. (1915) 37 All 439=29 I C 229
35. (1864) 10 H L C 704.
36. (1911) 9 I C 183.
37. (1907) 5 C L J 222.
38. (1907) 11 C W N 195.
39. (1904) 27 Mad 223.

Nair (19), *Muthusami Mudali* v. *Veeni Chetty* (40) and *In re Narayana Nadan* (41)], though there has been some divergence of judicial opinion on the subject [*Baran Barai* v. *Mata Parsad* (42), *Kanhai Lal* v. *Chhadammi Lal* (43) and *Mohammad Yasin* v. *Cheda Lal* (44)].

The position then is that the assistance of this Court could in the present case have been invoked only under S. 195 (6), Criminal P. C. Under that provision, the only order which Chaudhuri, J., was competent to pass, subject to the observation I shall presently make, was to grant sanction, if he was of opinion that sanction had been refused on erroneous grounds. But I am further of opinion that Chaudhuri, J., had, in the view I take, no jurisdiction to deal with this matter. Under the rules of Court (Ch. 2, R. 5), he would have jurisdiction if this were a matter under S. 115, Criminal P. C., but as it falls within S. 195 (6), it could be decided only by a Judge or Judges to whom it might have been allocated by the Chief Justice [*cf. Kalli Kinkar Sett* v. *Dinobandhu Nandy* (45), *Jamna Das* v. *Sabapathy Chetti* (33)]. I thus see no escape from the conclusion that the order made by Chaudhuri, J., must be set aside, first, because it was made without jurisdiction, and secondly, because it contravened the provisions of S. 195 (6). The application must consequently be re-heard by such Judge or Judges as may be appointed by the Chief Justice.

When the case comes to be re-heard, the question must arise, whether the Court is competent to hold an enquiry into the facts, and for this purpose to act on evidence adduced before it or before the subordinate Court under its direction. The cases of *Rama Iyer* v. *Venkatachala Padayachi* (7) and *Krishna Reddy* v. *Emperor* (46) support the view that the Court does not possess such power under S. 195 (6). I am not prepared to accept this proposition as well founded in law, and in this conclusion I am supported by the decision of Piggott, J., in *Rahamatullah* v. *Emperor* (47). The section does not specify the procedure to be followed by the superior tribunal, and I feel no doubt that the Court has inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it. As I had occasion to observe in the course of my judgment in the case of *Pulin Behary Das* v. *Emperor* (48), criminal Courts, no less than civil Courts, exist for the administration of justice, and Courts of both description have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of Justice: see also *Sheikh Ahmed Ali* v. *Keenoo Khan* (49). I am not unaware that the Criminal Procedure Code does not contain a provision corresponding to S. 151, Civil P. C.; but that section does not lay down any new principle; it merely embodies a legislative recognition of the inherent power of the Court to make such order as may be necessary for the ends of justice. This inherent power is in no sense restricted in application to civil cases; it is equally applicable to criminal matters The power is not capriciously or arbitrarily exercised; it is exercised ex debito justitiae to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the legislature as indicated in statutory provisions.

Let me examine the matter before us in the light of this principle. If the Small Cause Court had adopted the course commended by Turner, L. J., in *Tarakant Bannerjee* v. *Pudomoney Dossee* (50), as desirable in all appealable cases, namely, to complete the investigation and pronounce an opinion on all the important points, this Court, in the event of disagreement with the subordinate Court on the question of law, would still have ample material before it to enable it to give judgment on the merits. Inasmuch as such materials have not been recorded by the primary Court, there is no conceivable reason why suitable

40. (1907) 30 Mad 382.
41. A I R 1915 Mad 223=23 I C 479.
42. A I R 1914 All 395=25 I C 528.
43. (1909) 31 All 48=1 I C 5.
44. (1915) 29 I C 540.
45. (1905) 32 Cal 379.
46. (1910) 33 Mad 90=5 I C 881.
47. (1916) 32 I C 157.
48. (1912) 16 I C 257.
49. (1909) 36 Cal 44=1 I C 202.
50. (1863-66) 10 M I A 476=5 W R 63 (P C).

measures should not be adopted in that behalf, in other words, why steps should not be taken by the superior tribunal to have the evidence recorded either before itself or before the subordinate Court under its direction. Such a step may be necessary, not merely in the interest of the prosecution but also for the protection of the accused. I hold accordingly, that when the case is re-heard, the Court will be at liberty to give such direction, as it may deem necessary, for ascertainment of all disputed questions of fact, to enable it to decide whether sanction should be granted or refused.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 858

WOODROFFE AND MOOKERJEE, JJ.

Ramendra Nath Ray—Plaintiff—Appellant.

v.

Brojendra Nath Dass and *others*—Defendants—Respondents.

Civil Suit No. 97 of 1914 and Civil Appeal No. 9 of 1917, Decided on 2nd March 1917.

(a) Civil P. C. (1908), O. 1, R. 3—Causes of action—Joinder of, R. 3 applies.

Order 1 , R. 3, is not limited to joinder of parties but also applies to joinder of causes of action. [P 859 C 2]

(b) Letters Patent (Cal.) Cl. 15—Decision that suit is multefarious is judgment.

A decision that a suit is multifarious and has been so constituted as to joinder of parties and causes of action that it cannot be entertained as framed, is a judgment within the meaning of Cl. 15, Letters Patent. [P 861 C 1]

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action depends upon the allegations made in the plaint. [P 861 C 2]

A suit was instituted against four sets of defendants for the recovery of goods and documents of title relating thereto or, in alternative, of the value of goods, on the allegation that one af the defendants obtained possession of the goods, which were the plaintiff's property, with the documents of the title, by means of fraud and subsequently transferred them to the other defendants. The relief claimed in the suit was not the same against all the defendants, and the trial Court, holding that there had been a misjoinder of causes of action in the suit, adjourned the suit to a specified date with liberty to the plaintiff to elect meanwhile as against which of the defendants he would proceed, but did not specifically order that on the failure of the plaintiff so to elect, the suit would be dismissed:

Held: that the decision of the trial Court was a judgment, as it was in substance a decision that the suit would not lie as framed, with the result that if the plaintiff did not elect, the suit would be dismissed, and so an appeal lay against it under the Letters Patent. [P 859 C 1 P 861 C 1]

(c) Letters Patent (Cal). Cl. 15—Appeal—True test of competency, stated.

Per *Mookerjee, J.*—The true test to be applied in the solution of the question of the competence of an appeal under the Letters Patent from an adjudication is, not the form of the adjudication but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be, if it puts an end to the suit, so far as the trial Court is concerned, the adjudication may properly be deemed a judgment within the meaning of Cl. 15, Letters Patent. [P 860 C 2]

B. C. Mitter, S. R. Das and *K. P. Basu*—for Appellants.

B. L. Mitter, C. C. Ghose; D. C. Ghose, Buckland, Surita, Langford James and *N. Sircar*—for Respondents.

Woodroffe, J.—This suit is brought against four sets of defendands and the point in issue is, whether there has been misjoinder of parties and causes of action. In the judgment under appeal Chitty, J., has held that the plaintiff who claims such right cannot be allowed to proceed in one suit against the defendants, and adjourning the hearing, gave the plaintiff a fortnight to elect against which of the defendands he would proceed. Though the learned Judge does not expressly say so, it is quite clear on the judgment and proceedings that if the plaintiff does not elect and persists in his claim to sue all defendants, his suit will be dismissed. The position is substantially the same as if the Court had dismissed the action unless the plaintiff elected under the liberty given to him. It has been objected that no appeal lies. The first question is whether this is a judgment. It seems to me that it is, for it is an adjudication that the suit cannot lie as framed and cannot proceed as presented and that the Court cannot hear it. Such adjudication was based on the view that the suit is bad for misjoinder of causes of action and parties. The Court is said to be unable to entertain the suit the reason being of a like nature with defect of jurisdiction and not a mere irregularity. A decision to this effect which will be followed by dismissal unless the plaintiff abandons rights to which under the law he claims to be entitled, is, in my opinion, a judgment affecting the merits of the question and determining some right or liability between the parties. It has not been contested that if there were a final order having this effect, it would be a judgmant. The argument is that there is no such order, that all

the Court has done is to adjourn the suit, that it has not directed an election or dismissed the suit, and that, therefore, the appeal is premature.

We must look at the substance of the matter. The order giving the plaintiff liberty to elect, a liberty he did not desire and an order which he opposes, is nothing but an adjudication that he cannot proceed on the plaint as framed, and such an adjudication necessarily implies the result which follows on persisting with such a suit, namely, dismissal. The judgment makes clear why the plaintiff was called upon to elect. There appears to me to be in substance a decision that the suit will not lie as framed, with the result that if the plaintiff insists on his alleged rights the suit will be dismissed. I am of opinion that on these facts an appeal will lie. On the merits the question is this. The frame of the suit is admittedly not supported by O. 2, R. 3. It is then said that it is justifid by O. 1, R. 3. To this, it is replied, firstly, that this last rule deals with parties and not joinder of causes of action, and in the alternative and on the supposition that it does deal with joinder of causes of action, the present case does not on the facts fall within the rule. O. 1 is headed "parties" and O. 2 "frame of suit". The question of parties involves that of causes of action and vice versa. A person is made a party because there is a cause of action against him, and where causes of action are joined, parties are joined. In a perfectly framed Code which dealt in separate chapters with parties and causes of action, the provisions should be exactly parallel, looking at the same matter from its different aspects in a way according to which the provisions of one order would be in conformity with the provisions of the other. So much may be conceded, and if the solution of the question were doubtful, one might have hesitated on this ground to hold that a suit might be framed under O. 1 in a manner not provided for by O. 2 which, according to its heading, specifically deals with the frame of a suit. But in the present case we have to deal with the wording of a rule, the meaning of which has been construed. There are decisions of the English Courts on rules from which our own are taken. These decisions are subsequent to the year 1896, when O. 16, R. 1, was amended. It has been held that that Order deals not only with joinder of parties, but also joinder of causes of action, notwithstanding that O. 16 like O. 1 is headed "parties" only [*Compania Sansinena* v. *Houldar* (1), *Bullock* v. *London General Omnibus Co.* (2), *Markt* v. *Knight Steamship Co.* (3) and *Times Cold Storage Co.* v. *Lowther* (4)].

This, notwithstanding incidental observations to a contrary effect in *Thompson* v, *London County Council* (5), is not disputed before us. The decisions in the Bombay High Court given in 1908 and referred to in *Jankilai* v. *Srinivas Ganesh Valsankar* (6) do not refer to the latest English decisions. It is conceded before us that it cannot be now contended that O. 16, from which O. 1 is taken, does not refer to joinder of causes of action. These decisions were on O. 16, R. 1 corresponding to O. 1, R. 1, but are equally applicable to O. 1, R. 3, which is in exactly the same terms as O. 1, R. 1, substituting the word "defendant" for "plaintiff." Indeed in England, where the rule relating to the joinder of defendants is in differing terms from that relating to joinder of plaintiff, it has been held that they should be interpreted on similar principles. It must be held then that O. 1, R. 3, does refer to joinder of causes of action. The next question then is whether the joinder in the present case is justified by that rule. It is contended that it is not, it being argued that there are different sets of transactions and no common question of law or fact. The foundation of the case, on which the rest of it depends, is the alleged fraud of B. N. Dass. If such fraud is proved the question is, did the defendants who all claim under B. N. Dass obtain any title?

If the plaintiff fails to prove fraud on the part of B. N. Das, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence: but that does not make the case any the less one of a common question of law and fact. The same act or transaction which concerns all parties is the alleged fraud of B. N. Das, and this involves a common

1. (1910) 2 K B 354=79 L J K B 1094.
2. (1907) 1 K B 264=76 L J K B 127.
3. (1910) 2 K B 1021=79 L J K B 939.
4. (1911) 2 K B 100.
5. (1899) 1 Q B 840.
6. A I R 1914 Bom 193=20 I C 533=38 Bom 120.

question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this the possession of all is alleged to be wrongful. Whether a common question arises may be tested by seeing what the evidence will be. In the shorthand notes Chitty, J., expressed the opinion that the evidence will be common, and that if there were separate suits they might be heard together with consent. In the judgment the learned Judge qualified this statement by saying that this was true upto a point. It is true so far as the plaintiff's cause of action, as based on the fraud of B. N. Das, is concerned, though there may be some facts which are particular to particular parties being offered in proof of the plaintiff's case (e. g., present possession of the goods as result of such fraud) or by the defendants as part of their defence. The rule does not say that all questions must be common. It is sufficient that there is a common question. In my opinion, then, the plaint is within the provisions of O. 1, R. 3.

It may be conceded that the case of the Bengal National Bank raises points which do not affect other defendants. For the Bank is not concerned with the transactions with Cartwright & Co. or the two Mills which claim through them. Goods covered by Railway Receipt No. 9 have not been stopped in transit, having been already delivered to Lansdowne Mill. The plaint asks for declaration that the plaintiff is entitled to the document (Railway Receipt No. 9) and to the goods covered thereby which are said now to be with the Lansdowne Mill. The Bank claims to deal with the goods if it can do so. The common root of title is B. N. Das. I am of opinion, therefore that the suit is not bad for misjoinder of parties and causes of action. Should it, however be convenient, the Court may [See *Umabai Mangeshrao* v. *Vithal Vasudeo Shetti* (7)] direct the successive trial of the issues separately affecting different defendants. Thus the question of the alleged fraud of B, N. Das touching all the defendants may be tried first. If it fails, there is an end of the case. If it succeeds and the Bengal National Bank does not wish to be present at the trial of the issues, so far as they affect the other defendants, viz., Cartwright & Co, and those claiming through them, there is no reason why it should attend. I would, therefore decree, this appeal with costs.

Mookerjee, J.—This appeal is directed against a determination by Chitty, J. that there has been a misjoinder of causes of action in this suit and that the plaintiff cannot be allowed to proceed against the defendants as they at present stand on the record. A preliminary objection has been taken to the competence of the appeal, on the ground that this decision does not constitute a "judgment" within the meaning of Cl. 15, Letters Patent.

Stress has been laid on the circumstance that the order as drawn up merely adjourns the suit to a specified date with liberty to the plaintiff to elect meanwhile as against which of the defendants he will prosecute the suit, and does not specifically state, as the order of Channel, J., did in the case of *Frankenburg* v. *Great Horseless Carriage Co.*, (8), that, on his failure so to elect, the suit will be dismissed. In my opinion, there is no subtance in the preliminary objection. It is plain that the true test to be applied in the solution of the question of the competence of the appeal is, not the form of the adjudication, but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be there is no doubt that it does, in the present instance, put an end to the suit, so far as the trial Court is concerned; from this standpoint the adjudication may properly be deemed a judgment, not merely within the test formulated by White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar* (9), but also within the definition given by Couch, C. J., in the *Justices of the Peace for Calcutta* v. *Oriental Gas Co.*, (10),

"judgment in Cl. 15 means a decision which affects the merits of the question between the parties determining some right or liability."

That this does not necessarily involve an actual decision on the right in controversy between the parties is clear from one of the illustrations given by Couch, C. J., himself. He pointed out the obvious difference between an order for the admission of a plaint and an order for its rejection, and added the observation that

"the former determines nothing, but is merely the first step towards putting the case in a shape for determination, the latter determines finally,

7. (1909) 33 Bom 293=1 I C 120.

8. (1900) 1 Q B 59[illegible]=69 L J Q B 147.
9. (1912) 35 Mad 1=8 I C 340.
10. (1872) 8 B L R 433=17 W R 364.

so far as the Court which makes the order is concerned, that the suit as brought will not lie; the decision, therefore is a judgment in the proper sense of the term."

The same view is confirmed by the decision of Couch, C. J., in *Hadjee Ismail Hadjee Hubeeb* v. *Hadjee Mahomid Hadjee Jasoob* (11), where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under Cl. 12, Letters Patent. The order, he said, was of great importance to the parties, was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have; it might fairly be said to determine some right between the parties, namely, the right to sue in a particular Court. To the same effect is the decision of the Judicial Committee in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (12) that an appeal lies against an order which, in substance, decides a question of jurisdiction. Now, when a Court refuses to proceed with the trial of a suit on the ground of misjoinder of parties and causes of action the Court may fairly be said, in the words of Beverley, and Jenkins, JJ. in *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (13), to be unable to entertain it and the reason is of a like nature with defect of jurisdiction. As pointed out by Lord Herschell and Lord Russell in *Smurthwaite* v. *Hannay* (14) and by Lord Halsbury in *Subrahmania Ayyar* v. *King-Emperor* (15), an objection that a suit is multifarious is really an objection that the suit has been constituted, as to joinder of parties and causes of action, in a way not authorized by the law and the rules applicable to procedure. The decision that a suit is so constituted and cannot be entertained as framed is, in my opinion, a judgment within the meaning of the Letters Patent. It may further be usefully borne in mind that, as was pointed out in *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (16) and *Budhu Lal* v. *Chattu Gope* (17), the various definitions or elucidations of the terms "judgment" to be found in a variety of cases in the reports are not statutory definitions, and, while they furnish useful tests, they cannot be deemed inflexible and exhaustive. In the present case, if we look at the nature and the contents of the order, there is no escape from the conclusion that it would be idle to hold that the plaintiff should refuse to elect, should get his suit dismissed, and, then, prefer an appeal against the decree of dismissal as he would be unquestionably entitled to do. I am not disposed to place a narrow construction upon the term "judgment" and thereby to postpone the inevitable determination, by the Court of Appeal, of the controversy as to the constitution of the suit. The preliminary objection must, consequently, be overruled.

The determination of the question, whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action, depends upon the allegations made in the plaint. The suit is framed in the alternative for the recovary of goods and documents of title relating thereto or of the value of the goods. The plaintiff asserts that the bales of jute in controversy were his property and that Brojendra Nath Das by means of fraud obtained possession thereof with the documents of title. The plaintiff further asserts that the goods have subsequently passed into the possession of the Lansdowne Jute Mills and the Hastings Jute Mills through Cartwright & Co, to whom they were transferred by Brojendra Nath Das. The plaintiff next alleges that one of the documents of title, namely, a railway receipt has passed from Brojendra Nath Das to the Bengal National Bank, though the goods covered thereby are in the possession of the Lansdowne Jute Mills. On these allegations, the plaintiff joined as defendants Brojendra Nath Das, Cartwright & Co., the Lansdowne Jute Mills, the Hastings Jute Mills and the Bengal National Bank. The relief he seeks is the recovery of the goods and the documents of title, or, in the alternative, the value of the goods. As regards the alternative claim, he seeks a decree for the entire sum against Brojendra Nath Das and Cartwright & Co. or proportionate sums against the other three defendants according to the value of the goods and documents in the possession of each of them. Before the trial of the suit, the Delhi and London Bank were added as defendants on the applica-

11. (1874) 13 B L R 91=21 W R 303.
12. (1888) 9 Cal 482=10 I A 4 (P C).
13. (1898) 23 Cal 821.
14. (1894) A C 494=63 L J Q B 737.
15. (1902) 25 Mad 6[illegible]=28 I A 257 (P C).
16. (1916) 43 Cal 867=34 I C 634.
17. (1918) 44 Cal 816=39 I C 465.

G. N. Das
Advocate High Court
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Srinagar.

tion of the Hastings Jute Mills, on the ground that they were interested in the subject-matter of the litigation. Chitty, J. has held that the suit cannot proceed on the plaint as framed, because not framed in conformity with O. 2, R. 3. Civil P. C. 1908.

He has further held that the plaintiff could not successfully claim the benefit of O. 1, R. 3. His view in substance is that O. 1, R. 3, is limited to joinder of parties and has no application to questions of joinder of causes of action, which must be deemed to be governed exclusively by O. 2, R. 3. For the solution of this, the fundamental question in this appeal, it is necessary to examine the provisions of Orders 1 and 2.

Order 1 relates to parties to suits. O. 2 relates to frame of suits. Consequently, at first sight, it might seem, as if the two Orders related to two distinct topics. Such a view, however, would obviously be based upon an unsubstantial distinction, because when a plaintiff frames his suit he joins parties as defendants ordinarily because he claims to have a cause of action against them; in othsr words, when the legislator has to frame rules for joinder of parties and joinder of causes of action he examines, on the two occasions, the same problem though from different standpoints. Accordingly, in a Code which is ideally arranged with due regard to logic and symmetry, one would expect to find in the chapter on joinder of causes of action provisions which accurately correspond to similar provisions in the chapter on joinder of parties. Codes however, are rarely, if ever, accurately logical and symmetrical. It would consequently, be unsafe to assume that because a particular rule finds a place in O. 1, which treats of parties to suits, it can have no bearing on questions of misjoinder of causes of action, it is manifestly necessary that some regard at any rate must be paid to the history of the legislation on the subject: *Maharajah Ishuree Persad Narain Sing* v. *Lal Chutterput Sing* (18), *Brown* v. *Mclachlan* (19), *Kripa Sindhu Mukerjee* v. *Annada Sundari Debi* (20).

Now it is well known that O. 1, R. 1, is a reproduction of O. 16, R. 1, of the Rules of the Supreme Court, in England, while O. 1, R. 3, which corresponds to Rules of the Supreme Court, O. 16, R. 4, is yet substantially different in phraseology therefrom. O. 2, R. 3, again corresponds to Rules of the Supreme Court, O. 18, R. 1, but differs therefrom in an important respect. Thus as O. 1, R. 1, which provides for the joinder of plaintiffs is identical with Rules of the Supreme Court, O. 16, R. 1, it is consonant to well established principles of statutory interpretation that we should determine the exact scope of the rule in our Code in the light of the decisions in the superior Courts in England which have explained the true construction of Rules of the Supreme Court, O. 16, R. 1. As White, C. J., observed in *Lovelock & Lewes* v. *Malabar Timber and Saw Mills* (21), in considering the construction of a section in an Indian Act which is professedly based on an English enactment, which in fact reproduces almost word for word the language of the English enactment, we are in practice, if not in theory, bound by the decisions of the English Court of Appeal. Now it is well known that the English rule, as it now stands, was introduced on 26th October 1896, to meet the difficulty created by the decision of the House of Lords in *Smurthwaite* v. *Hannay* (14), to the effect that the rule as it previously stood did not relate to joinder of causes of action but applied only to joinder of parties in respect of the same cause of action.

The scope of the rule was greatly extended by alteration, and it can no longer be said that the Order relates only to joinder of parties and not to joinder of causes of action. Reference may, in this connection, be made to the judgment of Bowen, L. J., in *Hannay and Co.* v. *Smurthwaite* (22), which emphasises the distinction between the expression "right to any relief" which was used in the old rule and the phrase "any right to relief" which is used in the rule now in force. The history of this alteration is explained in the case of *Oxford and Cambridge Universities* v. *George Gill* (23), which followed the decision in *Stroud* v. *Lawson* (24). That the altered rule covers joinder of parties as also causes of action must now be treated as indisputable in view of the decisions in *Bullock* v. *London*

18 (1841-46) 3 M I A 100=6 W R 27 (P C).
19. (1872) 4 P C 543.
20. (1908) 35 Cal 34.
21. (1913) 18 I C 997.
22. (1893) 2 Q B 412.
23. (1899) 1 Ch 55=68 L J Ch 34.
24. (1898) 2 Q B 44=67 L J Q B 718.

General Omnibus Co. (2), *Compania Sansinena* v. *Houldar* (1), *Markt* v. *Knight Steamship Co.* (3) and *Times Cold Storage Co.*, v. *Lowther* (4). It is further worthy of note that although the phraseology of Rules of the Supreme Court, O. 16, R. 3, which relates to joinder of defendants has not been altered, its scope has recently been deemed to have been enlarged by reason of the alteration effected in Rules of the Supreme Court, O. 16, R. 1, which treats of joinder of plaintiffs: *Compania Sansinena* v. *Houldar* (1). Consequently, as under our Code, the rule relating to the joinder of defendants has been framed on the same lines as the altered rule relating to the joinder of plaintiffs (O. 1, R. 1 and 3), there is even much stronger reason here than in England to hold that O. 1, R. 3, applies to questions of joinder of parties as also joinder of causes of action. I do not feel pressed by the phrase "save as otherwise provided", which occurs in O. 2, R. 3 (1). I am not prepared to read into this rule the words "in this order" after "provided," specially in view of the language used in Rules of the Supreme Court, O. 18, R. 1, whereon our rule is based. Nor do I feel embarrassed by the decision in *Thompson* v. *London County Council* (5), *Munday* v. *South Metropolitan Electric Light Co.* (25) and *Greenwood* v. *Greenwood* (26), which do not militate against the view that Rules of the Supreme Court, O. 16, Rr. 1 and 3, relate to misjoinder of parties as also causes of action. The decision in *Thompson* v. *London County Council* (5), which overlooks the cases of *Stroud* v. *Lawson* (24) and *Oxford and Cambridge Universities* v. *George Gill* (23), was explained in *Frankenburg* v. *Great Horseless Carriage Co.* (8) and *Compania Sansinena* v. *Houldar* (1). The case is an authority only for this principle, if you have suffered a wrong, it may be that A is the person who has committed it, in which case he is liable, but, perhaps, you are not certain that it may not be B who has committed it and, if so, B is liable; as between A and B they are strangers to each other in the matter, and, then, because you cannot ascertain whether A or B committed the wrong, you cannot bring the action for damages against A and B jointly. The two other decisions mentioned are clearly distinguishable on their special facts. Similarly, *Gower* v. *Couldridge* (27), which followed *Sadler* v. *Great Western Ry. Co.* (28) and was explained in *Frankenburg* v. *Great Horseless Carriage Co.* (8), only illustrates the principle that if you have a cause of action against A and B for a tort X and quite a separate cause of action against B for tort Y, you cannot in one action unite claims in respect of both torts X and Y against A and B. Reliance has been placed on behalf of the respondents on the decision of the House of Lords in *Sadler* v. *Great Western Railway Co.* (28) which was applied in *Gower* v. *Couldridge* (27) and of the Court of appeal in *Stroud* v. *Lawson* (24), but neither case lends support to the theory that Rules of the Supreme Court O. 16, is restricted to joinder of parties and throws no light on questions of joinder of causes of action.

The matter is one essentially of substance and not of form, as Romer, L. J., observed in *Frankenburg* v. *Great Horseless Carriage Co.* (8), and I am not prepared to put a narrow construction upon the provisions of O. 1. On the one hand, we have the fundamental principle that needless multiplicity of suits should be avoided, on the other hand, we have the equally essential principle that the trial of the suit should not be embarrassed by the simultaneous investigation of totally unconnected controversies. The Legislature has effected a compromise of these two principles by means of the rules embodied on O. 1 and 2, which may possibly overlap to some extent in their application to concrete cases. It is not the function of Court, however, to determine how far the rules are appropriate. We are bound to interpret them in their natural sense and apply them to the circumstances of each case. I hold, accordingly, that O. 1, R. 1, and O. 1, R. 3, apply to questions of joinder of parties as also of causes of action, and I respectfully dissent from the contrary view adopted by Davar, J., in *Umalai* v. *Bhavu Balvant* (29) and *Jankibai* v. *Shrinivasa Ganesh Valsankar* (6) without examination of or reference to the later decisions in England, as to the scope and meaning of the corresponding rules in that system.

25. (1913) 29 T L R 346.
26. (1909) 100 L T 68.
27. (1898) 1 Q B 348=67 L J Q B 251.
28. (1896) A C 450=65 L J Q B 462.
29. (1910) 34 Bom 358=3 I C 165.

The question next arises, whether the present suit has been constituted in conformity with O. 1, R. 3. The determining factors applicable here are, first, could the right to relief against the defendants be said to be in respect of or arising out of (expressions obviously of wider import than relating to) the same act or transaction, and, secondly, would any common question of law or fact arise, if separate suits were brought. As regards the first test, there can, in my opinion, be no doubt that the right to relief against each of the defendants is based upon the same act, namely, the alleged fraud of Brojendra Nath Das, and this is so, notwithstanding the fact that there may have been subsequent acts or transactions in which the different defendants are individually concerned and which may enable them to airse distinct defences. As regards the second test, it is clear that if different suits were instituted, at least one common question of fact would arise, namely, the exact nature of the act imputed to Brojendra Nath Das, which would have to be investigated presumably on the same evidence separately adduced in the several suits. Here, again, it is important to observe that the Code does not require that all the questions of law or fact which arise should be common to all the parties. The contention of the respondents was, in fact, based upon two fallacious assumptions, namely, first that the rules require that each of the defendants should have been concerned in all the transactions, and secondly, that, if different suits were brought, no question would arise in which all the defendants were not interested. There is clearly no foundation whatever for either of these assumptions: *cf. Drincqbier* v. *Wood* (30). There is further no basis for the hypothesis, put forward at one stage on behalf of the defendants, that question of joinder of parties and causes of action are governed by different principles according as the claim is founded on breach of contract or on tort; as Collins, M. R., observed in *Bullock* v. *London General Omnibus Co.* (2), there is no reason for such a distinction. In my opinion the case before us is completely covered by O. 1, R. 3. I may add that the underlying principle of this conclusion is in exact conformity with what has been the recognised rule in this Court in two well-known classes of cases, namely, first, suits by reversioners for recovery of the estate of the last full owner alienated by a limited or qualified owner during her period of possession and enjoyment, and, secondly, suits for possession by the real owner against holders under derivative titles from a trespasser as common source. The decision in *Ishan Chunder Hazra* v. *Rameswar Mondol* (31) may be taken as representative of the former class of cases. On the other hand, the decision in *Nundo Kumar Nasker* v. *Banomali Gayan* (32), where Hill, J., refers to the instructive cases of *Hodgins* v. *Hickson* (33) and *Minet* v. *Johnson* (34), may be taken as the type of the second class of cases. I do not feel pressed by the decisions in *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (13) and *Sarala Sundari Dasi* v. *Saroda Prosad Sur* (35), which ruled that under the Code of 1882 there was no provision for joinder of distinct causes of action against distinct defendants.

The Code of 1908 brings the rules on the subject in a line with the corresponding rules in England, and the object which the framers of the new Code had in view, would be completely frustrated, were the Courts to allow their effect to be qualified by reference to decisions under the Code of 1882, pronounced on provisions some of which, at any rate, have been omitted or materially altered (see for instance Ss. 31 and 45 of the Code of 1882). There is no force in the contention that grave inconvenience will be caused to some of the parties as they will have to be present during the discussion of questions which specially affect others alone. The remedy for any possible inconvenience on this ground is supplied by the provisions of O. 2, R. 6, which authorises the Court to order separate trials of causes of action which though joined in one suit connot be conveniently tried or disposed of together. As pointed out by Scott, C. J., in *Umabai Mangeshrao* v. *Vithal Vasudeo Shetti* (7), the Court is competent to direct the successive trial of the issues separately affecting different defendants and to record interlocutory judgments thereon to be

30. (1899) 1 Ch 393=68 L J Ch 181.

31. (1897) 24 Cal 831.
32. (1902) 29 Cal 871.
33. (1878) 12 Ir L T 104=39 L T 644.
34. (1891) 63 L T 507.
35. (1905) 2 C L J 602.

made the basis of the final judgment at the conclusion of the trial of the whole case. In my opinion, the suit as framed is not open to objection on the ground of misjoinder of parties and causes of action and should consequently be tried on the merits. I agree that the appeal must be allowed with costs and the order of Chitty J., reversed.

V.B./R.K. *Appeal allowed.*

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* A. I. R. 1918 Calcutta 865

MOOKERJEE AND CUMING, JJ.

Abu Hamid Zahir Ala—Plaintiff—Appellant.

v.

Golam Sarwar — Defendant—Respondent.

Appeal No. 291 of 1914, Decided on 18th August 1916, from original order of Sub-Judge, 24-Parganahs, D/- 23rd May 1914.

*** Arbitration—Validity—Majority award—Absence of some arbitrators from meetings—Award is not valid.**

Inasmuch as the parties to a submission to arbitration have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made. The operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a majority award; even where less than the whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrator. 7 *All.* 523; *Dalling* v. *Matchett*, (1740) *Wiles.* 215; *Pering and Keymer, in the matter of*, (1835), 5 *Ad. & E* 215 *Rel on* 6; *W R* 95 *Dist.* [P 866 C 2]

Mahendra Nath Roy and *Satis Chander Mukherjee*—for Appellant.

Rishindra Nath Sarkar—for Respondent.

Judgment.—We are invited in this appeal to consider the propriety of an order of dismissal of an application under para. 17, Sch. 2, Civil P. C., 1908, for the enforcement of a private award. The relevant portion of the agreement of reference was in these terms:

"Considering it desirable to decide the matters in dispute by arbitrators and so appointing the above-mentioned gentlemen as arbitrators, we execute this deed of reference and agree that the award, which all the arbitrators unanimously or the majority of the arbitrators will make, will be accepted as a decree of a superior Court and will have force and be valid at all places. In case of difference of opinion among the arbitrators, the majority of them will make and be competent to make their award unanimously. To that no objection by any of us will be entertained nor shall we be competent to make any."

Under this instrument, five gentlemen were appointed arbitrators, three of whom alone signed the award. The application with which we are now concerned was made for the enforcement of this award. The defendant objected that there was no valid award in law because two of the arbitrators had not attended all the sittings and one at least did not take part in the final deliberations. The plaintiff contended that inasmuch as three arbitrators who had made the award had attended all the meetings, and as a majority of the arbitrators was competent to make a valid award, the award was legal and enforceable.

The Subordinate Judge has overruled these contentions on the ground that all the arbitrators should be present at all the meetings and particularly at the last when the final act of arbitration is done, though as a result of this united deliberation there may be an award by a majority only of them. In our opinion, the view taken by the Subordinate Judge, is correct. It is now firmely settled, as ruled in *Nand Ram* v. *Fakir Chand* (1), that when a case has been referred to arbitration, the presence of all the arbitrators at all the meetings and above all at the last meeting, when the final act of arbitration is done, is essential to the validity of the award. There the case had been referred by the Court to the arbitration of three persons and the parties had agreed to be bound as to the matters in dispute by the decision of the majority. One of the arbitrators subsequently refused to act and withdrew from the arbitration. Oldfield and Mahmood, JJ., held that the award of the majority was not binding. A similar view was taken in *Sreenath Ghose* v. *Raj Chunder Paul* (2). Our attention, however, has been drawn to the earlier decision in *Kazee Syud Naser Ali* v. *Mt. Tinoo Dossia* (3) as an authority for the contrary position. We are of opinion that this case is clearly distinguishable, and is an authority only for the proposition that an award of arbitrators cannot be set aside on the ground that it is erroneous for that only two out of three arbitrators signed the award when the parties agreed to abide by the

1. (1885) 7 All 523.
2. (1867) 8 W R 171.
3. (1866) 6 W R 95.

decision of the majority. There is nothing to indicate that the arbitrator who did not sign the award had not taken part in the deliberations. The principle which underlies the view we take is best stated in the words of Russell, which have now beccme classical, quoted as they were with approval in *In re Beck and Jackson* (4) and *Khelut Chunder Ghose* v. *Tarachurn Koondoo* (5):

"As the arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow Judges, so that by conference they shall mutually assist each other in arriving at a just decision."

The same point of view had been emphasised in *Dalling* v. *Matchett* (6), where the Court of Common Pleas observed as follows:—"It has often been said that if that one had been present" that is, the arbitrator who did not attend

" he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always received this answer that every one has a right to argue and debate as well as to give his vote and it is possible at least that the person absent may, if he had been present at the meeting, have made use of such arguments as may have brought over the majority of the rest to be of his opinion."

The matter was put substantially in the same way in *Pering and Keymer, In the matter of* (7). Lord Denman observed:

"Any two, under such submission as this, that is, a submission which provides for a valid award by the majority, may make a good award. But then it must be after disussion with the other arbitrator. If after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him."

Coleridge, J., added:

"The parties have not got what they stipulated for. They stipulated that two at least should make the award; but no two could make it till each arbitrator had been consulted."

This view accords with that adopted in *Peterson* v. *Ayre* (8); *White* v. *Sharp* (9); *Templeman, In re* (10); *Burton* v. *Kinght* (11); *Morgan* v. *Bolt* (12) and *Doberor* v. *Morgan* (13). We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a majority award; even where less than the whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators. The inference follows that in the present case there is no valid award. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold mohurs.

V.B./R.K *Appeal dismissed.*

4. (1857) 1 C B (n s) 695.
5. (1866) 6 W R 269.
6. (1740) Wiles 215.
7. (1835) 3 Ad & E 245.
8. (1854) 14 C B 665.
9. (1844) 1 Car & K 348.
10. (1842) 6 D P C 962.
11. (1705) 1 Eq Ca Abr 50.
12. (1863) 7 L T 671.
13. (1903) 34 Can Sup Ct 125.

A. I. R. 1918 Calcutta 866

CHATTERJEA AND CHAPMAN, JJ.

Guru Pada Haldar — Decree-holder —Appellant.

v.

Tarit Bhusan Roy Chowdhury and *others* — Judgment-debtors — Respondents.

Appeal No. 272 of 1912, Decided on 12th May 1915, from order of Sub-Judge, Alipore, D/- 25th March 1912.

Limitation Act (1908), Art. 182 (2) —Suit for partition—High Court passing consent decree directing valuation — Supplementary decree passed subsequently by trial Court set aside—Original decree held capable of execution —Limitation held to run from date of setting aside of supplementary decree.

In a partition suit the High Court on appeal passed a consent decree directing that the plaintiff was to pay to the defendant the price to be asscertained by the Court of first instance within one month from the date of the valuation being made and upon such payment being made the defendant was to convey her share to the plaintiff. The case then went back to the Court of first instance which made the valuation and passed a supplementary decree in the terms of the High Court decree. On revision the High Court held that no supplementary decree should have been passed and that the only decree in the case was the consent decree passed by the High Court. The defendant then applied for execution of the decree offering to execute the conveyance and agreeing to recover from the plaintiff as much as she could out of the valuation fixed by the Court of first instance:

Held: that the decree was capable of execution that; limitation under Art. 182 (2), Sch. 1,

Limitation Act began to run from the date on which the High Court set aside the supplementary decree passed by the Court of first instance.

[P 868 C 1]

Rash Behary Ghose and *Monmotha Nath Mookerjee*—for Appellant.

S. R. Das, D. N. Mitter and *Baikuntha Nath Mitra*—for Respondents.

Judgment.—At the hearing of an appeal from an original decree in a partition suit the dispute between the parties was settled by the plaintiffs agreeing to purchase the share of defendant 1, at a price to be fixed by the Court of first instance. By consent of parties a decree was made to the following effect:

"The plaintiff do pay to defendant 1 the price so ascertained within one month from the date of the valuation being made and upon such payment being made the defendant 1 do convey her share to the plaintiff."

This order was made on 4th June 1903 in this Court. The case then went back to the Subordinate Judge, who fixed the value at Rs. 26,290 and on 12th December 1905 passed a supplementary decree directing the plaintiffs to pay that amount and defendant 1 to execute a conveyance. There was an appeal to this Court and it was held that no appeal lay as no supplementary decree should have been passed and that the only decree in the case was the decree of the High Court dated 4th June 1903, which became capable of exeeution one month after the making of the valuation. This order was passed on 14th June 1909. Defendant 1 then applied for the execution of the decree on 23rd August 1911, and was opposed by the plaintiffs who contended first that the decree was incapable of execution and secondly, that it was barred by limitation.

As regards the first point it was argued that when the plaintiff failed to make the payment the defendant could not force them to take a conveyance as there was no such direction in the decree and if the full amount could not be realized from them the defendant could not be forced to execute a conveyance for any lesser amount that could be realized. They contended that the defendants must bring a fresh suit for the specific performance of the contract embodied in the consent decree. The contract having been embodied in the decree the defendant could perhaps have brought a suit on the basis of the decree. In such a suit he would have to offer to make the conveyance for the amount of value fixed for which he could only obtain a money decree which he might or might not succeed in fully realizing. That would not improve his position in any degree or that of the respondents. As he offers to make a conveyance and takes the risk of realising what he can from the plaintiffs we do not see the necessity of a fresh suit on the decree. The consent decree supplemented by the valuation is quite sufficient as a decree which would give the same remedy to the defendant without going through the circuit of a fresh suit. The learned vakil who represented the defendant in the Court below did not give an undertaking to make the conveyance for whatever he could realize from the plaintiffs, but the learned vakil who represents him here has intimated to us the readiness of his client to execute the conveyance and realize the value or whatever portion of it he could from the plaintiffs. We think this is a reasonable solution of the difficulty raised by the first objection.

As regards limitation it is contended that the application should have been made within 3 years from 12th January 1905, i. e., one month after the valuation made by the supplementary decree. It is contended that as the High Court held that the decree appealed against ought not to have been passed and interfered by way of revision, Art. 182, Cl. 2, Sch. 1, Lim. Act. has no application and reliance is placed on the decision of the Judicial Committee of the Privy Council in the case of *Batuk Nath* v. *Munni Dei* (1). There the appeal was filed but not prosecuted and by the rules of the Privy Council the appeal stood dismissed without any order to that effect. There was therefore, no order of the appellate Court to commence the counting of limitation from. Here there was an appeal as well as an order of the appellate Court which terminated the existence of the appeal. In the case of *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (2) it was held that the clause applied even if the appeal was rejected as filed out of time. In the case of *Wazir Mahton* v. *Lulit Singh* (3) it was held that the clause would apply even if the appeal

1. A. I. R. 1914 P C 65=36 All. 284=23 I C 644=41 I A 104 (P C).
2. (1889) 16 Cal 250.
3. (1883) 9 Cal 100

was rejected as incompetent. In this case the appeal was filed by the plaintiffs mainly on the question of valuation and after contest was rejected as incompetent but an order was made which superseded the decree of the Court below.

We think the application was within time. In this view of the case we allow the appeal and direct the Court below to proceed with the execution upon the defendant executing a conveyance of his share as agreed and binding himself to be satisfied with whatever part of the value he could realise by execution against the vendees. The appellant not having agreed to give any undertaking in the Court below we make no order as to costs in this appeal.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 868

MOOKERJEE AND CUMING, JJ.

Delendra Nath De and *others* — Petitioners.

v.

Tulsimoni Dasi—Opposite Party.

Civil Rule No. 510 of 1916, Decided on 11th August 1916, against order of Land Acquisition Judge, 24 Pergannahs, D/. 17th June 1916.

Land Acquisition Act (1894), S. 32—Compensation money invested under S. 32—Special Judge can deal with question of application of money—Hindu widow applying for portions of money so invested must show happening of events entitling her to spend funds in custody of Court.

The sum awarded as compensation for land acquired under Act, which is invested in Government securities under the provisions of S. 32 remains in the custody of the Special Judge, so that he is competent to deal with the question of its application. [P 868 C 2]

Consequently, he is the proper officer to determine whether any portion of the fund so invested should be made over to the widow of the person to whose estate the land acquired belonged and for this purpose to investigate whether contingencies have happened which entitled the widow to make an absolute alienation of the fund. [P 869 C 1]

Where the widow applies to the Special Judge for portions of the fund so invested it is incumbent upon her in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund in the custody of the Court. When she has satisfied the Court that such events have happened the burden of proof shifts to the reversioners to meet her allegations. [P 869 C 1]

Section 32, Land Acquisition Act, contemplates the application of the compensation money in the purchase of other lands, which when acquired must become additions to the estate of the full owner from whom the widow derives title. But an application of the money to save a land comprised in the estate inherited by the widow from her husband, from an impending sale, is not an investment "in the purchase of the other lands" within the meaning of that section. [P 869 C 1, 2]

Sib Chunder Palit and *Hit Lal Guha* —for Petitioners.

Dwarka Nath Mitter — for Opposite Party.

Judgment.—We are invited in this Rule to set aside an order, made by a Special Judge under the Land Acquisition Act, for the disposal of a portion of a fund in his custody which had been invested in Government securities under S. 32. It appears that land which formed at one time part of the estate of one Khagendra Nath Dey and had, after his death, vested in his childless widow Tulsimoni Dasi was acquired under the Land Acquisition Act. The sum awarded as compensation was accordingly invested in Government securities under the provisions of S. 32. The widow has now applied to the Land Acquisition Judge to take steps to sell a portion of the Government securities in order to enable her to satisfy a charge created by a receiver on land comprised in the estate inherited by her from her husband. Notice of this application was served upon the reversioners who entered appearance and objected. The Land Acquisition Judge thereupon heard the objections and overruled them. We are now invited to set aside this order on two grounds: first, that the Land Acquisition Judge had no jurisdiction to entertain the application of the widow; and secondly, that, if he had jurisdiction, he should have not made the order without inquiry into the truth of the allegations made by her. In our opinion, the first contention is not well founded but the second must prevail.

As regards the first objection, we observe that the principle applicable to cases of this character was explained by this Court in *Mrinalini Dasi* v. *Abinash Chunder Dutt* (1) and *Kamini Debi* v. *Promotho Nath Mookerjee* (2). These cases show that as the fund is in the custody of the Special Judge, he is competent to deal with the question of its application. There is no controversy that the Special Judge is competent to apply the fund in the purchase of other lands or in payment to a person who has

1. (1910) 6 I C 508.
2. (1912) 39 Cal 33=10 I C 491.

become absolutely entitled thereto. Such authority however implies a power to make an inquiry. There is no foundation for the contention that the application should have been made to the District Judge. If the land had not been acquired for public purposes, it would have been open to the widow to alienate the same on the allegation of legal necessity without the permission of the District Judge. No doubt in such an event the purchaser would have taken the property subject to the inevitable risk of a challenge from the reversioners when the succession should open out. The land however has been converted into money and is in the custody of the Special Judge; he is consequently the proper officer to determine whether any portion of the fund should be made over to the widow and for this purpose to investigate whether contingencies have happened which entitle the widow to make an absolute alienation of the fund. The first objection consequently fails.

As regards the second objection, it is plain that the Special Judge shohld have taken evidence to determine judicially whether the allegations of the widow are or are not well founded on fact. The orders recorded in the order sheet seem to indicate that the view which found favour with the Special Judge was that the burden lay upon the reversioners to substantiate their objections. The true position, however as explained in the case of *Kamini Debi* v. *Promotho Nath Mookerjee* (2) is that it is incumbent upon the widow in the first instance to establish that events have happened which entitle her to spend either in whole or in part the fund in the custody of the Court. When she has satisfied the Court that such events have happened, the burden, no doubt, shifts upon the reversioners to meet her allegations. Reliance however was placed on behalf of the widow upon the decision in *In re Pfleger* (3) to show that it was competent to the Special Judge to apply the funds in the purchase of other lands and that in the case before us, the application in substance invited the Special Judge to take action in this direction. In our opinion, this contention is ingenious but unsound. What S. 32 contemplates is the application of the compensation money in the purchase of other lands. But these lands when acquired must become additions to the estate of the full owner from whom the widow derives title. The substance of the transaction proposed here, on the other hand, is that a portion of the fund should be applied to discharge a burden which has been imposed upon another portion of the estate of the husband of the lady. The contention put forward is that if the charge is not so satisfied, the property encumbered would be sold and would pass out of the hands of the widow. But if the funds in the custody of the Special Judge are applied to save the property from impending sale, the result clearly is, not "the investment of money in the purchase of other lands," but the satisfaction of a charge imposed upon another portion of the estate. This, in our opinion, could never have been intended by the framers of S. 32 as an "investment."

The result is that this Rule is made absolute and the order of the Special Judge discharged. The record will be returned to him in order that he may hold an inquiry into the truth of the allegations made by the widow and to determine whether circumstances have arisen which justify an alienation by the widow for legal necessity. If a case of legal necessity is made out the Special Judge will make an order for the proposed application of the fund in his custody; otherwise, the application must be dismissed. There will be no order for the costs of this Rule..

V.B./R.K. *Case remanded.*

3. (1868) 6 Eq 426.

A. I. R. 1918 Calcutta 869

MOOKERJEE AND BEACHCROFT, JJ,

Padu Mohammad and *others*—Petitioners.

v.

Chutra Nath Chaudhury and *others*—Opposite Parties.

Rules Nisi Nos. 895 to 899 of 1917, Decided on 22nd March 1917, against the order of Munsif, Thakergaon; in Suits 261, 262, and 268 to 270 of 1916.

Provincial Small Cause Courts Act (1887) S. 25—Small Cause Judge dismissing suit on merits after holding it to be non-cognisable acts without jurisdiction—High Court set aside judgment and directed return of plaint—Civil P. C. (1908), O. 7, R. 10.

A Judge of a Small Cause Court cannot proceed to try and dismiss, suit on the merits, which he, on the objection of the defendant, holds not to

be cognizable by a Small Cause Court, for under O. 7, R. 10, it is incumbent upon him to return the plaint at any stage of the suit for presentation to the proper Court. [P 870 C 2]

A suit which was in essence a suit for rescission of a contract and consequential relief was brought in a Small Cause Court The defendant objected to the jurisdiction of the Court and also objected to the claim on the merits. The Judge found that the suit was not cognizable by the Court but nevertheless proceeded to try the case on the merits and ultimately dismissed it.

On the application of the plaintiff for setting aside the judgment, the High Court set it aside and directed the plaint to be returned to the plaintiff in order that he might present it to the proper Court for trial of his claim. [P 870 C 2]

Sarat Chandra Roy Chowdhury and *Lal Mohan Ghose* —for Petitioners.

D. N. Bagchi—for Opposite Parties.

Judgment —We are invited in this rule to set aside a decree of dismissal made by a Court of Small Causes. The suit was in essence for rescission of a contract, and in the alternative, for declaration that the contract was either void or voidable and for consequential reliefs. Objection was taken by the defendants that the suit was excluded from the cognizance of a Court of Small Causes under Cls. 16 and 19, Sch. 2, Provincial Small Cause Courts Act. The defendants also objected to the claim on the merits. The Small Cause Court Judge found that the suit was not cognizable in his Court under Cls. 16 and 19; but, notwithstanding this conclusion, he proceeded to try the case on the merits and ultimately dismissed it. The plaintiffs now contend that the only course open to the Judge was to direct that the plaint be returned to the plaintiffs for presentation to the proper Court. This view has been controverted by the defendants. In our opinion the order made by the Small Cause Court Judge is obviously wrong.

Order 7, R. 10 of the Code of 1908, which applies to Provincial Small Cause Courts, as is clear from O. 50, provides that the plaint shall, at any stage of the suit, be returned to the plaintiff for presentation to the Court in which the suit should have been instituted. The words "at any stage of the suit" were introduced in the Code of 1908, and did not appear in the corresponding provision of the Code of 1882, namely, S. 57. These words really amount to a legislative approval of the decision of a Full Bench of the Bombay High Court in the case of *Prabhakarbhat* v. *Vishwambhar Pandit* (1). Consequently, it was incumbent on the Small Cause Court Judge to return the plaint to the plaintiff for a presentation to the proper Court [*Ladhaji Nathaji* v. *Hari* (2)]. The rule is accordingly made absolute, and the order of the Small Cause Court Judge set aside. The plaint will be returned to the plaintiff in order that he may present it to the proper Court for retrial of his claim. As the rule has been opposed, we make it absolute with costs which we assess at one gold mohur. We are of opinion that the rule should not have been opposed, and if it had not been opposed, we should not have been disposed to allow costs to the petitioner. It is conceded that this judgment will govern the analogous Rr. 896 to 899 of 1916. These rules also are made absolute with costs—one gold mohur in each case.

V.B./R.K *Rule made absolute.*

1. (1884) 8 Bom 313.
2. (1899) 23 Bom 679.

A. I. R. 1918 Calcutta 870

CHATTERJEA AND SMITHER, JJ.

Nripendranath Roy — Plaintiff—Appellant.

v.

Birendranath Roy and *others*—Defendants—Respondents.

Appeal No. 516 of 1915, Decided on 30th May 1917, from original decree of Sub-Judge, Rajshahi, D/- 8th September 1915.

Civil P. C. (1908), O. 1, R. 9, O 2, R. 5 and O. 6, R. 17—Word "estate" in O. 2, R. 5 includes even estate in its physical sense—Suit against executor as sucd and personally is maintainable when both claims arise in reference to same estate—Suit against excutors personally dismissed on ground that defendants being in possession as executors could not be sued personally—Court should have given opportuuity to amend plaint instead of dismissing suit.

A suit for recovery of an estate, on declaration of plaintiff's title thereto as a shebait or in the altarnative (if the property is found not to be debutter) as owner by right of inheritance to his deceased adoptive father against the defendants in their personal capacity was dismissed on the ground that as the defendants were in possession in their capacity as executors under the will of a testator, they could not be sued in their personal capacity:

Held: (1) that inasmuch as the testator obtained possession of the estate and held it until his death and under his will it vested on his death, in his executors and inasmuch as the plaintiff averred that the executorship of the defendants ceased after his adoption, the Trial Court ought to have allowed the plaintiff an opportunity to amend the plaint by suing the defendants both

as executors and in their personal capacity, instead of dismissing the suit on the ground of misjoinder or non-joinder of parties; [P 872 C 2]

(2) that as the alternative 'claims of the plaintiff arose out of the same transaction, the plaintiff could maintain the suit as a shebait or in the alternative in his own right as owner.

[P 874 C 2]

The word "estate" in O. 2, R. 5, means not only the "estate" rightly and properly held by executors, but also the "estate" in its physical sense, so that a claim against the executor as such can be joined with a claim against him personally, when both the claims arise in reference to the same estate. [P 873 C 1]

C. R. Dass, Brojo Lal Chakerbutty, Jatindranath Lahiri, Biraj Mohan Mazumdar and *Nagendranath Ghose*—for Appellant.

Rash Behari Ghose, Dwarkanath Chuckerbutty, Priya Sankar Mazumdar and *Sarat Chandr Khan*—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of possession of the properties in dispute on a declaration of the plaintiff's right thereto, and for other reliefs. The plaintiff's case shortly stated is that there were certain debutter properties of the Nattore Raj family deities, that Raja Shibnath belonging to the younger branch (chota taraf) of the family inherited the same as shebait, and after his death his widow adopted Raja Ananda Nath, who accordingly obtained the said debutter properties by inheritance as shebait together with certain other properties acquired with the income of the debutter properties. Ananda Nath left four sons, Raja Chander Nath, Kumud Nath, Nagendra Nath and Jogendra Nath, who remained in possession of the properties in shebait right. The first three sons died leaving their widows but without any issue, and it is alleged that Jogendra Nath committed oppression upon his brother's widows who were helpless and obtained from them an ekrar by which the bulk of the properties was given up to him. Defendant 8, the widow of Nagendra Nath, under the authority given by her husband adopted the plaintiff on 23rd Aghyan 1316, and the plaintiff thereupon as the heir of Nagendra Nath became entitled to 1/4th share of the estate as shebait, and to joint possession accordingly. Defendant 1 is the grandson and heir of Jogendra Nath and the plaintiff alleged that defendants 2 to 6 on behalf of defendant 1 and jointly with him are in possession of the estate and prevented the plaintiff from taking possession of the properties. The plaintiff further states that so far as he has come to know on inquiry Raja Shibnath and his descendant had a shebaiti right only in the properties, but that if the properties were found not to be debutter, then the plaintiff's title to 1/4th share by right of inheritance might be declared and a decree for joint possession in respect of the same might be passed. The plaintiff also claimed mesne profits and costs and further reliefs.

The defence denied that there was any authority given by Nagendra Nath to defendant 8 to adopt or that the plaintiff was adopted by her, and it was alleged that the properties were not wholly debutter but were personal properties, some of which were charged with the sheba and worship of family deities, and that Jogendra Nath and his executors having been in adverse possession thereof for over 12 years defendant 1 had acquired an indefeasible title thereto. Various other pleas were raised. The main pleas so far as they are material for the purposes of the present appeal, were that defendants 2 to 6 were in possession of the Estate as executors under the will of Jogendra Nath, and could not be sued in their personal capacity, and that the plaintiff could not maintain the suit as a shebait and in his own right as owner. Various issues were raised in the case, issues 1 and 3 being as follows: (1) Is defendant 1 and are defendants 2 to 6, as described in the plaint, in possession of the properties in dispute as alleged? Has the plaintiff any cause of action against them? (2) Is the suit bad for misjoinder of causes of action? Are the executors to the will of Kumar Jogendra Nath Roy necessary parties to the suit? If so, is the suit bad for non-joinder of parties.

The suit was dismissed by the Court below on a decision of issues 1 and 3 only without trying the suit on the merits. The plaintiff has appealed to this Court. The first question for consideration therefore is whether the suit can be maintained against defendants 2 to 6, unless they are sued as executors. That they are executors under the will of Jogendra Nath is not disputed, and it is found by the Court below that defendants 2 to 5 are in possession of the share claimed as executors. Now Jogendra Nath in his lifetime obtained possession of the share claimed and held it until his death, and

under his will it vested on his death in his executors (S. 4, Probate Act) and any right of suit against Jogendra Nath survived against the executors (S. 89, Probate Act). It is contended however on behalf of the appellant that although they might have held the share as part of Jogendra Nath's estate as executors prior to the adoption of the plaintiff, they could not after the said adoption hold it as part of that estate, because on the adoption of the plaintiff, the arrangement under which Jogendra Nath and, after his death, his executors held possession of Nagendra Nath's share came to an end, and therefore it ceased to be part of Jogendra Nath's estate, and the executors as such could not hold the share as part of that estate. It is further contended that the plaintiff claims the share as the adopted son of Jogendra Nath, and he has sued defendants 2 to 5 as the persons who are in possession of it and who prevented him from taking possession to which he was legally entitled. If the plaintiff does not succeed in establishing his title, the suit will fail on the merits, and on the other hand if he has a title to the share it does not form part of Jogendra Nath's estate, in which case defendants 2 to 6 are not holding it as executors but only as trespassers, and that therefore in either case, it is not necessary to sue them as executors.

But in the first place, if, as contended on behalf of the appellant, only the persons in possession should be sued, defendant 1 should be dismissed from the suit. It is true the plaintiff says that the "defendant" (which would include defendant 1 also) prevented him from taking possession, but defendant 1 at the date of the suit was a minor, and it is found by the Court below that he is not in possession, the possession being still with the executors. In the next place, defendants 2 to 5 assert that the share claimed by the plaintiff is part of Jogendra Nath's estate, they profess to hold it as part of that estate, and they did not at any time assert any right of their own. Whether the share claimed by the plaintiff could be rightfully withheld from him by the executors as being part of Jogendra Nath's estate after the alleged adoption of the plaintiff is a matter to be decided in the suit, but it is as executors of Jogendra Nath's estate that they prevented him from taking possession. If they are trespassers, they acted as trespassers on behalf of the estate as executors and the question whether or not the share is part of that estate should be determined in the presence of the executors who represent the estate. The appellant seems to be apprehensive that by suing defendants 2 to 5 as executors he would be taken to have admitted that the properties are part of Jogendra Nath's estate, but as contended on behalf of the respondents no such inference can possibly arise from suing the defendants as executors. O. 1, R. 9, lays down that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The suit could not therefore be dismissed on the ground that defendants 2 to 6 were not sued as executors. The suit could have proceeded against them as trespassers, but any decree passed in the case would not have bound the estate of Jogendra Nath.

Every suit should as far as practicable, be so framed as to prevent further litigation concerning the subject in dispute. We are of opinion that although the suit should not have been dismissed on the ground that defendants 2 to 6 were not sued as executors they are proper parties to the suit, and the plaintiff ought to have been called upon to amend the plaint for the purpose. It is pointed out on behalf of the appellant that under the will of Jogendra Nath the powers of the executors to manage the estate are limited to the minority of defendant 1. It is also pointed out that there were six executors under the will, one of them did not accept the office of executor, and another has died since the institution of the suit and according to the will the minimum number of executors at any time must be six, and therefore a less number of executors cannot properly represent the estate. It is further contended that if the properties are debutter, the shebaiti right cannot be legally dealt with by a will. Those questions have not been gone into, and we do not express any opinion on these points. If however it be held that defendands 2 and 4 to 6 do not represent the estate, the suit cannot proceed against them as executors, and so far as Jogendra Nath's estate is concerned the defendant 1 as heir would represent the

estate. O. 1, R. 7, lays down that where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

We think that under these circumstances, and in order to effectually and completely adjudicate all the questions involved in the case, defendants 2 and 4 to 6 should be sued personally as well as executors, and defendant 1 sued as the residuary legatee and heir of Jogendra Nath. It is contendad on behalf of the respondents that a claim against the executor cannot be joined with a claim against him personally, and we are referred to the provisions of O. 2, R. 5. That rule prohibits such a joinder, unless the claim against the executor personally is alleged to arise with reference to the estate in respect of which the defendant is sued as executor. In the present case, the executors might have fairly believed that the share claimed by the plaintiff forms part of Jogendra Nath's estate, and might have prevented him from taking possession thereof in their character as executors as they profess to have done, although the Court may eventually decide that the plaintiff had title to the share, and that therefore the executors had no right to prevent him from taking possession. It is said that the word "estate" means the estate rightly and properly held as executors, and not the "estate" in its physical sense. We are of opinion however that the word is used in both senses, and the joinder is permissible when both the claims arises in reference to the estate.

Here defendants 2 and 4 to 6 claimed to be in possession of the property as part of Jogendra Nath's estate at the date of the plaintiff's adoption and prevented the plaintiff from taking possession professedly in their character as executors. The plaintiff has claimed mesne profits and costs, and if the piaintiff succeeds, the Court will have to decide whether defendants 2 to 6 are liable (if at all) personally or as executors. We think in the circumstances the case comes within the exception mentioned in O. 2, R. 5. The next question is whether the claims as shebaiti and as owner can be joined in the same suit. It is not disputed that claims in the alternative can be joined in the same suit. It is contended however on behalf of the respondent that such joinder is permissible only where the alternative claims are put forward in the same character although they may be inconsistent and that if the plaintiff claims to fill two inconsistent character she will have to elect at the hearing which claim he will rely on. We are referred to the cases of *Rawlings* v. *Lambert* (1) and *Thomas* v. *Hobler* (2). But these cases were decided before the Judicature Act was amended. The English rule (O. 16, R. 1) was altered in 1896, and the first part of that rule corresponds to O. 1, R. 1, of our Code which runs as follows:

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of fact or law would arise,"

and alternative claims since the amendment of the rule have always been allowed to be joined in the same suit, provided they have arisen out of the same transaction. We were also referred to the case of *Stroud* v. *Lawson* (3). In that case the plaintiff in his statement of claim, on his own behalf, claimed damages from the defendants, who were Directors of a Company, for inducing him by fraud to purchase shares in the company and he also claimed in the same action on behalf of himself and all the other share-holders of the company a declaration that the payment of dividend (on the shares of the company when there were no profits) was ultra vires and illegal, and it was held that the plaintiff was not entitled under O. 16, R. 1, to join both the causes of action in one suit. But as was pointed out by A. L. Smith, L. J., the first claim was a Common law action of deceit personal to the plaintiff and in the second part of the statement of claim, the plaintiff sued the same defendants and the company limited not in his personal capacity, but in a wholly different capacity, and that they were wholly separate and distinct causes of action which did not arise out of the same transaction or series of transactions.

"According to the terms of the rule the plaintiff in this case cannot join the two causes of action which he is putting forward in different

1. (1860) 1 J & H 458=70 E R 826.
2. (1862) 4 De G F & J 199=45 E R 1160.
3. (1898) 2 Q B 44=67 L J Q B 718.

capacities, unless he can show that they both arise out of the same transaction."

Now, do the alternative claims in suit arise out of different transactions? Looking at the substance of the plaint, the plaintiff's case appears to be that as the adopted son of Nagendra Nath, he is entitled to the same interest in the properties as Nagendra Nath had. He alleged that Nagendra held the properties as shebait but that if the Court finds that they are not debutter, and were held by Nagendra Nath as his personal properties the plaintiff would still be entitled to his share. If the plaintiff succeeds in establishing that he is the adopted son of Nagendra Nath, that the arrangement entered into by defendant 8 terminated on his adoption, and there is no other bar to his right, he would be entitled to succeed whether the properties were held by Nagendra Nath as shebait or in his own right. It is to be observed that although the defendants pleaded that the properties were not absolutely debutter, they stated that some of the properties were charged with the expenses of sheba of the family deities. If there is no deed of dedication, and specially in cases where the debutter is claimed to be the debutter of family deities from ancient times, the determination of the question whether the properties are absolutely debutter or personal properties merely charged with the expenses of the sheba, depends upon the conclusion to be drawn from the facts which may be proved. The principle as to alternative relief is thus stated by Sir W. Page Wood, V. C., in *Rawlings* v. *Lambert* (1) referred to above:

"You have no right to allege two inconsistent states of facts and ask relief in the alternative, for the two cannot be true; but you have always a right to state the facts of the case, the documents and deeds, and ask the conclusion of the Court on these facts and documents, and say the Court may come to one conclusion of law or it may come to another, and you may ask the Court to come to a conclusion on the facts which you have disclosed, having stated everything that will enable the Court to form a proper judgment. You may ask the judgment of the Court on the two alternatives. That may be done on any bill without objection."

See also *Evans* v. *Davis* (4) where (at p. 754). Fry, J., observed, "a plaintiff may draw two inconsistent inferences from the same state of facts." It is contended on behalf of the respondents that the plaintiff's duty as trustee is in conflict with his interest as owner, but the second alternative would arise out of the same facts and would have to be considered only if the first alternative fails and in fact would follow from it. If the respondent's contentions were allowed the plaintiff must first sue as shebait and then when he fails, he will have to bring a fresh suit in his right as owner though upon the same state of facts and transactions. But every suit should be so framed as to prevent further litigation concerning the subject in dispute, and O. 1, R. 2, provides that where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may order separate trials.

In the case of *Radha Mohun Mundul* v. *Jadoomonee Dosee* (5) the plaintiff sued to recover certain properties as heires of her husband as if they were personal properties; it was found that they were debutter properties, and the Court of first instance held that she could not succeed as she had not sued as shebait. The High Court treated the objection as one of form and gave her relief; the Judicial Committee were of opinion that the High Court were right in treating the objection which had been made to the reception of the claim by the Subordinate Judge as an objection rather of form than of substance. In the present case the plaintiff in effect asks for a declaration that he as the adopted son of Nagendra Nath has in the properties in suit the same interest, shebait or otherwise, which Nagendra Nath had, and he asks for possession accordingly. That being so, the plaint is not open to any serious objection on this point. That last question is the question of costs. No doubt the general rule is that the party applying for amendment must pay costs up to the stage when amendment is applied for. But the Court below does not appear to have allowed the plaintiff any opportunity to apply for amendment. The suit should not have been dismissed for misjoinder or non-joinder of parties, and under the circumstances we think that the plaintiff should be directed to pay the costs up to the stage when the preliminary issues (1 and 3) were decided, because that was the stage when the Court ought to have given the plaintiff an opportunity to apply for amendment. We assess the costs up to that stage at Rs. 1,500.

4. (1879) 10 Ch D 747=48 L J Ch 223.

5. (1875) 23 W R 369.

A question has been raised on behalf of the respondents whether the order of costs should be made against the plaintiff or against his next friend. It is unnecessary to consider the question, as the learned counsel for the appellant does not object to the decree for costs being passed against the next friend, if only the costs up to the stage when issues 1 and 3 were decided, are ordered to be paid. We accordingly direct that the next friend of the plaintiff do pay to the defendants Rs. 1,500 as costs within two months from this date, the money to be paid to Babu Priya Sankar Mozumdar, Vakil for defendants 1, 2, 4 and 5, and on payment of which the plaintiff will be allowed to apply for amendment within one month from the date of such payment. The payment will be notified to this Court by the pleaders on both sides, and the Court below will be informed of the payment by this Court. We make no order as to costs of this appeal.

N. R. CHATTERJEA AND RICHARDSON, JJ.—(*July* 18, 1917.)— The appellant having paid Rs. 1,500 on account of costs to Babu Priya Sankar Mozumdar vakil, for defendants 1, 2, 4 and 5 as ordered by the judgment of this Court dated 30th May 1917 and the said vakil having admitted the payment thereof the Court below will be informed of the said payment. The Court below will now proceed with the suit in accordance with the directions given in the judgment of this Court dated 30th May 1917. Let the record be sent down without delay.

N. R. CHATTERJEA AND SMITHER, JJ.—(*June* 1, 1917.)—Under S. 13, Court-fees Act, a certificate will be granted to the appellant authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 875

FLETCHER AND CHATTERJEA, JJ.

Roshan and *others*—Plaintiffs—Appellants.

v.

Atabali and *others*—Defendants—Respondents.

Appeals Nos. 3375 and 3376 of 1915, Decided on 16th August 1917, from appellate decrees of Sub-Judge, First Court, Dacca, D/- 3rd August 1915.

Partition—Suit between occupancy raiyat and permanent tenure-holder is maintainable.

A suit for partition is maintainable, although the interests of the parties in the property in suit though permanent are not of the same grade, e.g., one party is an occupancy raiyat and the other a permanent tenure-holder: 37 *Cal* 918 (*PC*), *Foll.* [P 875 C 2]

Such a suit cannot be defeated on the ground that the partition is likely to be a temporary one. [P 875 C 2]

Sarat Chunder Basak and *Bepin Chander Bose*—for Appellant.

Prokash Chunder Pakrashi—for Respondents.

Fletcher, J.—These two appeals are preferred by the plaintiffs against a decision of the learned Subordinate Judge of Dacca, dated 3rd August 1915, reversing the decision of the Munsif at Naraingunj. The suits were brought by the plaintiffs for partition. The plaintiffs originally brought two suits against defendants 7 and 8 for possession. In these suits, they succeeded. But, on attempting to enforce the decrees of the Court, they were resisted and fresh suits had to be instituted against defendants 1 to 6. In them, the plaintiffs succeeded with respect to a 14-anna share and they were put in joint possession with the 14 anna cosharer defendants. The plaintiffs have also taken a settlement of another one-anna share. So, they are entitled to a 15-anna share of the property. The right they have got is that of an occupancy raiyat. The defendants have got a settlement of one-anna from another cosharer landlord of the interest of a mirashdar, that is, the interest of a tenure-holder. It is a permanent interest. The learned Judge has dismissed the suits for partition on the ground that the interests, though both permanent, are not of the same grade, one being an occupancy raiyat and the other a permanent tenure-holder, there cannot be a partition of the property. That view is clearly opposed to the decision of the Judicial Committee in the case of *Bhagwat Sahai* v. *Bipin Behary Mitter* (1). Then the learned vakil for the defendants-respondents says that, though ordinarily these cases for partition ought to be decreed, yet in the present instance they ought not to be because the partition would be a temporary one. That argument has no foundation at all. His view of being temporary is

1. (1910) 37 Cal 918=7 I C 549=37 I A 198 (P C).

that perhaps at some date unknown the present cosharer landlords or their unknown descendants or representatives may apply to some Court or other to have a partition, when the property may not be able to be conveniently allotted if the present partition is effected. There is no foundation for that at all.

Then the other point that the defendants have raised is that they hold certain other plots in the taluq with other persons than the plaintiff and that, if these suits are allowed to proceed, they would not be able to get one compact piece of land in lieu of their undivided shares in the various plots they hold in this taluq. That is a view wholly from the defendants' point of view. The rights of the other parties have got to be considered too and, if the defendants hold these various plots in co ownership with other tenants of various other plots of land, they cannot expect the present plaintiffs to conduct their partition suits in such a way that the defendants may be benefited with reference to some other plots that they have in the taluq. Any grievance that the defendants have that can be remedied in the present suits must be put forward by applying to the learned Judge, when he actually partitions the property, to allot to them their shares as conveniently as possible. I think the decision of the learned Judge of the lower appellate Court is clearly wrong and we ought to set aside the same and restore the decrees of the Munsif. The respondents must pay to the appellants their costs in these appeals and also in Courts below.

Chatterjea, J.—I agree.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1918 Calcutta 876

SANDERSON, C. J. AND MOOKERJEE, J.

Ganga Narayan Dutta — Plaintiff—Appellant.

v.

Indra Narayan Saha and *others*—Defendants—Respondents.

Letters Patent Appeal No. 116 of 1913, Decided on 12th May 1916, against decree of Roy, J., in Appeal No. 3452 of 1911.

Hindu Law — Widow — Representation—Decree—Mortgage by widow and reversioners—Decree by competent Court binds the estate until it is set aside—Decree to be binding reversioners should be impleaded in suit and decree passed in their presence—Execution purchaser gets good title under the decree is set aside or for fraud or collusion:

A decree in a suit on a mortgage, executed by a Hindu widow and the then reversioner, made by a competent Court in their presence, binds the entire inheritance and as long as that decree stands and until it is set aside for good reason, the actual reversioner cannot get behind it and maintain a suit for recovery of possession of the mortgaged property from a third party auction-purchaser in execution of that decree. 42 *Cal.* 876; (*P.C*); *A. I. R.* 1914 *P.C.* 128 and 40 *Cal.* 721, *Ref.*; *Case law discussed* [P 876 C 2]

Per *Mookerjee, J.*—When a mortgagee from a Hindu widow seeks to obtain a decree which would bind not only merely the qualified interest of the widow, but the entire inheritance itself, the then next reversioner is a proper party to the suit; and when so impleaded the reversioner may well be deemed a party in a representative capacity and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow: 11 *M I.A.* 241 (*P.C.*); 17 *W R.* 422; 23 *W.R.* 174; 3 *C.W. N.* 637; *A.I. R.* 1914 *Cal.* 143; *A. I. R.* 1915 *Cal* 141; 4 *All.* 532; 34 *Mad.* 188; *Lloyd* v. *Jkones*, (1803) 9 *Ves.* 37 and 38 *Mad.* 406, (*P.C*), *Ref.* The title of the purchaser in such a case can be defeated only after the decree, which is the root of that title has been successfully impeached for fraud, collusion or other like reason. If this is established, the fact that parties had gone through the form of a suit and a decree cannot prejudice the right of the actual reversioners: 9 *M I A.* 539 (*P. C*), *Ref.* [P 877 C 1; P 878 C 1]

Bepin Behary Ghose—for Appellant.

Surendra Nath Ghosal—for Respondents.

Sanderson, C. J.—In this case I think this appeal must be dismissed, in spite of the interesting argument which has been presented to us by the learned vakil for the appellant, and the short ground is that there was a decree in the mortgage suit in which the defendants were not only the widow but also the then reversioner. The decree must, therefore be taken to bind the whole estate. Under that decree a sale was held and a third party purchased the estate, and it seems to me that as long as that decree stands, and until that is set aside for good grounds, the present plaintiff cannot get behind it and maintain the present suit. For this reason I think that the appeal should be dismissed with costs.

Mookerjee, J.—I agree that this appeal must be dismissed. The property in dispute belonged originally to one Ram Sankar Roy who died in 1887. He left a widow Brahmomoyi and a daughter's son Ram Gopal Sen. On 13th May 1896, Brahmomoyi and Ram Go-

pal executed, in favour of one Anant Lal Das, a mortgage of the land in suit to secure a loan of Rs. 499. In 1902, the mortgagee sued the widow and her daughter's son to enforce the security and obtained the usual mortgage-decree. In execution of that decree, the property was sold by the Court on 6th June 1905 and was purchased by the Shahas, now defendants-respondents. The grandson died in 1906, and the widow died on 21st July 1909.

The plaintiff is one of five persons who upon the death of the widow succeeded to the estate of Ram Sankar Roy as reversionary heirs in their character of his sister's sons. On 20th September 1909 he instituted the present suit to recover the property from the purchasers, on the allegation that there was no legal necessity for the loan and that the mortgage and sale took place under circumstances which do not make those transactions binding upon him as one of the actual reversioners. The Court of first instance decreed the suit. Upon appeal that decree was reversed by the District Judge, and a second appeal to this Court was dismissed by Roy, J. On the present appeal preferred under Cl. 15, Letters Patent, it has been argued by the plaintiff that the case has not been examined in the Courts below from the proper point of view. There is some force in this contention and the reason is not far to seek. The case was heard by the District Judge, as also by Roy, J., before the decisions of the Judicial Committee in *Hari Kishen Bhagat* v. *Kashi Parshad Singh* (1) and *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (2) and of the Full Bench in *Debi Prasad Choudhry* v. *Golap Bhagat* (3) as to the precise effect of an alienation by a Hindu widow with the concurrence of the then next reversioner. Prima facie, therefore, the appellant is entitled to claim a remand for re-consideration of the questions in controversy. But upon the admitted facts, I think, it is reasonably plain that the plaintiff cannot possibly succeed in this litigation and a remand would be of no avail to him. The mortgage, as we have seen, was executed by the widow and the then next reversioner; the suit was instituted and the decree was obtained against them. Neither at the time of the execution of the mortgage nor at the date of the institution of the suit had the plaintiff any present interest in the property; he was then not even the immediate reversioner; he was only a reversioner in the second degree. He was not a party to the mortgage transaction, nor was he a necessary party to the mortgage suit.

On the other hand, Ram Gopal Sen, the daughter's son of the original owner, and the then next reversioner, was joined as a party to the mortgage transaction and to the mortgage suit, with a view to bind the entire inheritance. We have, consequently, a decree made by a competent Court in the presence of the widow and the then next reversioner; the decree directed the sale of the entire inheritance; and at the sale, which was held by the Court, the respondents purchased the property. What then is the true position of the purchasers? In the first place, when a mortgagee from a Hindu widow seeks to obtain a decree which would bind not merely the qualified interest of the widow, but the entire inheritance itself, the then next reversioner is a proper party to the suit: *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (4), *Brij Bhookun Lall Awustee* v. *Mohadeo Dobey* (5), *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (6), *Srinath Doss* v. *Hari Pada Mitter* (7), *Bhagirathi Dass* v. *Baleswar Bhagirati* (8), *Rameswar Mandal* v. *Probabati Debi* (9), *Indra Kuar* v. *Lalta Prasad Singh* (10), *Veerabadra Aiyar* v. *Murudaga Nachiar* (11) and *Lloyd* v. *Jhones* (12); Story on Equity Pleadings, Art. 144; Daniell on Chancery Practice, Chap. 3, S. 3. In the second place, a reversioner so impleaded may well be deemed a party in a representative capacity: *Venkatanarayana Pillay* v. *Subbammal* (13), and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or someone else ultimately becomes the ac-

1. (1915) 42 Cal 870=27 I C 674=42 I A 64 (P C).
2. A I R 1914 P C 128=41 Cal 793=23 I C 162 (P C).
3. (1913) 40 Cal 721=19 I C 273.
4. (1866-67) 11 M I A 241=8 W R 17 (P C).
5. (1872) 17 W R 422.
6. (1875) 23 W R 174.
7. (1879) 3 C W N 637.
8. A I R 1914 Cal 143=41 Cal 69=19 I C 686.
9. A I R 1915 Cal 141=25 I C 84.
10. (1882) 4 All 532.
11. (1911) 34 Mad 188=8 I C 1072.
12. (1803) 9 Ves 37.
13. (1915) 38 Mad 406=29 I C 298=42 I A 125 (P C).

tual reversioner when the succession opens out on the death of the widow: Jones on Mortgage, S. 1439. The title of the purchasers in this case can consequently be defeated by the plaintiff, only after the decree, which is the root of that title, has been successfully impeached for fraud, collusion or other like reason. Assume, that the plaintiff might possibly have attacked the decree on the ground of fraud, for instance, on the allegation that at the time when the mortgage was executed there was really no legal necessity for the loan, and yet, the widow and the immediate reversioner colluded to raise the money and to charge the inheritance so as to enable the reversioner to embark upon a speculation for his personal benefit. If this were established, the fact that the parties had gone through the form of a suit and a decree could not justly be held to prejudice the right of the actual reversioner. [*Katama Natchiar* v. *Rajah of Sivaganga* (14)]. No such case of fraud, however, has been charged, much less proved and the mortgage and the decree thereon still stand unassailed; clearly so long as the decree stands, the plaintiff cannot successfully impeach the title of the defendants. In this view, the suit fails and has been rightly dismissed; consequently, the present appeal must be dismissed with costs.

V.B /R.K. *Appeal dismissed.*

14. (1861-63) 9 M I A 539=2 W R 31 (P C).

A I. R. 1918 Calcutta 878

SANDERSON, C. J. AND WOODROFFE, J.

Birendra Nath Roy and *others*—Petitioners.

v.

Nripendra Nath Roy and *others*—Opposite Parties.

Application to Privy Council No. 33 of 1917, Decided on 10th December 1917, against the judgment of Chatterjea and Smither, JJ., D/- 30th May 1917, reported in *A. I. R.* 1918 *Cal* 870.

Civil P. C. (1908), S. 109—Appeal to Privy Council—Order of remand held not final.

The High Court in appeal reversed decree of dismissal by the Court of first instance and remanded the case for trial, with the direction that some of the defendants to the suit should be sued personally as well as executors and that another defendant should be sued as a residuary legatee:

Held: Per *Sanderson, C. J.*, that the order of the High Court was not a final order within the meaning of S. 109. [P 878 C 2]

Per *Woodroffe, J.*—That there was neither a final decree nor an order within the meaning of the Code. [P 879 C 1]

Dwarka Nath Chakraburtty and *Priya Sankar Mojumdar*—for Petitioners.

Jitendra Nath Lahiry and *Sarat Chandra Khan*—for Opposite Parties.

Sanderson, C. J.—This is an application by defendants 1, 2, 4 and 5 for leave to appeal to His Majesty in Council. The suit was brought by the plaintiff for the recovery and possession of certain property and for a declaration of the plaintiffs' right thereto. The defendants were sued in their individual capacity. The first Court dismissed the suit, whereupon there was an appeal to the High Court and the matter came before Chatterjea and Smither, and the judgment hows that the learned Judges were inclined to think that the defendants ought not to have been sued in their personal capacity and the conclusion at which they arrived was this:

"We think that under these circumstances and in order effectually and completely to adjudicate all the questions involved in the case, the defendants 2 and 4 to 6 should be sued personally as well as executors and the defendant 1 sued as the residuary legatee and heir of Jogendra Nath."

Mr. Chakerbutty for the applicants argued that inasmuch as that judgment involved the setting aside of the decree of the first Court it was a judgment of reversal and as the property was of the requisite amount, his clients consequently had a right of appeal. The decree is as follows:

"It is ordered and decreed that the decree of the lower Court be and the same is hereby set aside and the case sent back to that Court to be dealt with in accordance with the directions contained in the judgment of this Court of this day's date in this appeal pronounced, a copy whereof is hereto annexed."

Now the question we have to consider is, whether this is a decree or final order within the meaning of para A, S. 109, Civil P. C. In form it may be said to be a judgment of reversal because the decree of the first Court is set aside. If we look, however, at the substance of it, it is not a decree or final order in any sense of the word. The effect of the decree and judgment is that the learned Judges have remanded the case and have directed that defendants 2 and 4 to 6 should be sued both in their personal capacity and as executors and that defendant, should be sued as the residuary legatee and heir and that after the amendment had been made all the questions between the parties should be adjudicated upon

In these circumstances it is not a final order within the meaning of the section. The judgment which I have just delivered is confirmed by a decision in *Krishna Chandra* v. *Ram Narain Singh* (1), It is a judgment of the late Chief Justice and is a case somewhat similar to the present. It was there contended that inasmuch as the decree of dismissal made by the Court of first instance had been set aside by the High Court, the order of the High Court, though it remanded the suit for trial on the merits, was a final order against which an appeal lay to the Judicial Committee. Sir Lawrence Jenkins said:

"It is suggested in this case, that there is a final order from which an appeal will lie. Having regard to the circumstances of the case, it appears to us that there is no order which is final within the meanig of S. 109, Civil P. C."

Having regard to all the circumstancos of the present case, it appears to me that there is no order which is final within the meaning of the section and consequently this application must be refused with costs, five gold mohurs. We make no order as to the costs of Babu Sarat Chunder Khan's client.

Woodroffe, J.—I agree. Neither in my opinion is it a final decree or order within the meaning of the Code.

V.B./R.K. *Application refused.*

1. (1913) 21 I C 430.

A. I. R. 1918 Calcutta 879

SANDERSON, C. J. AND MOOKERJEE, J.

Gour Sunder Bhoumik and *others*—Appellants—Petitioners.

v.

Rakhal Raj Bhoumik and *others*—Plaintiff and Defendants — Opposite Parties.

Rule Nisi No. 273 of 1916, Decided 3rd May 1916, against judgment of High Court, D/. 24th November 1915.

(a) Civil P. C. (1908), O. 47, R. 8—One of two Judges of Division Bench hearing appeal, retiring—Other Judge granting review of judgment—Judgment and decree amended—Judge moved to re-hear case passing same order—Order set aside on appeal—Appeal directed to be re-heard by Division Bench—Division Bench only considering point involved in review and passing same order—Application for review on ground that Bench ought to have heard whole case—*Held*: every other proceeding after amendment of decree was superfluous—Appeal was concluded by final decree made by order in review application—It was not incumbent on Division Bench to re-hear entire appeal.

After the retirement of one of the two Judges of a Division Bench of the High Court which heard an appeal, an application for review of judgment made to the other Judge was granted and the judgment and decree were amended, but subsequently the Judge on being moved to re-hear the case, heard it again and made an order which was the same as that made on the review application. On appeal this order was set aside on the ground that the Judge, sitting by himself had no jurisdiction to re-hear the case as he was not a Division Bench and the appeal was directed to be re-heard by a Division Bench. The Division Bench when hearing the appeal did not allow the whole case to be re-opened, but confining itself to the point involved in the review proceeding made an order which had already been made in that proceeding. An application for review of this order was made on the ground that the Division Bench ought to have heard the whole case :

Held : Per *Sanderson, C. J.* — That after the amendment of the decree in the review application, every other proceeding that took place was superfluous. [P 881 C 1]

Per *Mookerjee, J.*—That the appeal was concluded by the final decree made by the order in the review application and the judgment of the Division Bench need not be interfered with, as it merely repeated the decision of the Judge who granted the review. [P 881 C 2 ; P 882 C 1]

That it was not incumbent upon the Division Bench to re-hear the entire appeal [P 881 C 2]

(b) Civil P. C. (1908), O. 47, R. 1—Review—Grant of Extent.

A review may be granted either as to the entirety of the order assailed or as to a portion only thereof. [P 881 C 2 ; P 882 C 1]

(c) Civil P. C. (1908), O. 47, R. 8—Review—It is optional with Court to re-open case in part or in entirety.

Rule 8, O. 47, Civil P. C., clearly leaves it optional with the Court to determine whether, when a review is granted, the case should be re-opened in part or its entirety, so when a review of a decision has been admitted the whole case is not necessarily re-opened thereby : 11 *M. I. A.* 487 (*P. C*); (1864) *W R.* 141 ;24 *W. R.* 427 ; 5 *Cal* 86 ; 12 *C. L. R.* 64 ; 9 *Cal.* 209 and 11 *I. C.* 102, *Ref.* 10 *B. H. C. R.* 360 and 32 *Bom.* 111, *not Appr. A. I. R.* 1914 *Cal.* 146; 43 *Cal.* 178 ; 30 *Bom.* 56 and 31 *Mad.* 49, *Dist.* [P 882 C 1]

Asita Ranjan Ghose—for Petitioners.

Mohendra Nath Roy and *Manmotha Nath Roy*—for Opposite Parties.

Sanderson, C. J.—The learned vakil at the opening of his remarks for the purpose of showing cause stated that this was rather a peculiar matter. I entirely agree with him and I most sincerely hope that it is not only a peculiar matter, but also an exceptional matter, because the facts relating to the proceeding in this case are truly amazing—there is no other word for them. The action was brought in November 1906, very nearly ten years ago by the plaintiff for the recovery of certain land. The Court of first instance gave the plaintiff a judgment. Then

there was an appeal to the first appellate Court. That Court varied the judgment of the first Court by declaring that the plaintiff and the defendants were joint owners of the land. Then there was an appeal to the High Court, and the High Court, consisting of Brett and Richardson, JJ., allowed the appeal and restored the judgment of the Court of first instance, and thereby declared that the plaintiff was entitled to the possession of the land in question.

Unfortunately by mistake, it has not been made plain to me how the mistake arose—the decree gave the plaintiff something more than he asked for, inasmuch as it not only declared that the plaintiff was entitled to the possession of the land but it also declared that he was entitled to the possession of a building which was upon the land. That was a matter which was obviously an error—and which, in my opinion, ought to have been set right as soon as the parties saw the decree. If that had been brought to the attention of the learned Judges before the decree was signed, it could have been set right in five minutes.

Instead of that, in consequence of that mistake which was made in December 1912, proceedings have been going on in this Court from December 1912 down to May 1916. I think I am justified in saying that the proceedings in this case are nothing short of amazing. What happened then is this: An application was made to Richardson, J. the other learned Judge, Brett, J. having by this time left the Court. That was made in April 1913, and Richardson J. granted a rule limiting it to this particular point, and calling upon the opposite party to show cause why the judgment and decree of the Court, dated 12th December 1912, should not be set aside or amended or why such other order should not be made as to this Court might seem fit. on the ground that in giving the plaintiff a decree for the structures on the land this Court went beyond the reliefs claimed in the plaint. So that the rule was granted on that one point only. In June 1913, this Rule was argued before Richardson, J., and after argument he made the Rule absolute. I agree with what fell from my learned brother Mookerjee, J., during the course of the argument in the case, that there was an end of the matter as soon as the rule was made absolute, and in accordance with that rule the decree would, as a matter of fact, have been amended in respect of the point which was mentioned in the rule that was granted. For some reason or other Richardson, J., was persuaded to re-hear the case under O. 47, R. 8, Civil P. C., and after hearing the case he made the order which has been referred to and which is to this effect:

"The judgment will, therefore, be altered in this way, that for the words' 'with such structures as may be standing on the land" the following will be substituted, 'that the defendants do remove the structures from the land within two months from the date of this order. In the event of their failing to do so the plaintiff will be at liberty to remove them at the cost of the defendants to be realised in execution of the decree'. A corresponding alteration will be made in the decree."

Then he went on to say:

"I make no order as to costs. The mistake should have been brought to notice before the decree was signed."

Well, some ingenious person then thought of the point that Richardson, J., had no jurisdiction to re-hear the case sitting by himself, and although he had jurisdiction to grant the rule and to make the rule absolute and thereby to make an order by which the judgment would be amended, still he had no jurisdiction to re-hear the case in the proper sense of the word, as he by himself could not constitute a Division Bench. Therefore, this point was taken and an appeal from his decision was instituted and it was heard in this Court by the late Chief Justice and Nalini Ranjan Chatterjea, J., and they decided that he had no jurisdiction to re-hear the case, because he was not a Division Bench, and they directed that the appeal should be re-heard. As a result of that, two other learned Judges were called upon to hear this appeal, and Holmwood, J., and Mullick, J., heard it on 24th November 1915, some two years after the order which was made by Richardson, J., and having heard it they made an order identical in terms with the one that was made by Richardson, J., in the month of June 1913.

The parties were not satisfied even then, but some of the defendants came here and obtained a rule upon the ground that Holmwood and Mullick, JJ., had not re-heard the case. If I may say so with every respect to the learned Judges, I think they took a reasonable view of the matter. What they did was, they said that the whole of this matter arose

from an obvious error, upon which the Rule was granted for review by Richardson, J., and thay confined themselves to that error and declined to go any further and said they had discretion in the matter. It is argued by the learned vakil that they were wrong in so doing and he wishes us to make the Rule absolute, so that this case may be re-heard by two other learned Judges of this Court. All I can say, speaking for myself, is this; as far as I can understand the proceedings, when Richardson, J., made that Rule absolute in June 1913, by reason of which the judgment and the decree would as a matter of course, be amended in the way he intended them to be amended and in the way he inteded them to be drawn up, from that moment every other proceeding was superfluous. If we were to make this Rule absolute it would be a travesty of justice to which I will not be a party.

Therefore in my opinion, this Rule ought to be discharged with costs—hearing fee two gold mohurs.

Mookerjee, J.—I agree that the order we are invited to review is substantially correct, notwithstanding the extraordinary errors which have characterised the proceeding in its later stages. The suit was instituted so far back as 12th November 1906 for declaration of title to land and for recovery of possession thereof. It was decreed in the Court of first instance on 4th January 1908. On appeal by the defendants, the Subordinate Judge modified this decree. The result was that the present appeal was lodged in this Court on 6th February 1909 by some of the defendants. The plaintiff thereupon presented a petition of cross-objection. The appeal was heard in the first instance by Brett, J., and Richardson, J., on 12th December 1912; they dismissed the appeal and allowed the cross objection, so that the decree of the primary Court was restored. The decree of this Court however contained a provision for possession of the structures on the land in a manner not contemplated by the plaint. The defendants took avdantage of this error, and presented an application for review af judgment to Richardson, J., on 28th April 1913, after Brett, J., had ceased to be a member of the Court. Thereupon Richardson, J., issued a Rule calling upon the opposite party to show cause why the judgment and decree, dated 12th December 1912, should not be set aside, or amended or why such other order should not be made as might seem fit, on the ground that, in giving the plaintiff a decree for the structures on the land, the Court had gone beyond the reliefs claimed in the plaint. This Rule was heard by Richardson, J., on 5th June 1913, as he was obviously competent to do, and was made absolute, with the consequence that the judgment and decree stood amended in the manner stated in the order for issue of the Rule. Richardson, J., however not only made the Rule absolute, but proceeded to act under R. 8, O. 47, Civil P. C. That Rule provides that

"when an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

Richardson, J., apparently thought that it was incumbent upon him to re-hear the case under R. 8, O. 47. The result of the re-hearing was that the alteration aleady mentioned was made in the judgment and decree. The substance of the matter was that the order made on the re-hearing of the case was identical with the order whereby the Rule was made absolute. An appeal was then preferred under Cl. 15 of the Letters Patent against the judgment of Richardson, J., and was heard by Sir Lawrence Jenkins, C. J., and N. R. Chatterjea, J. They allowed the appeal on the ground that Richardson, J., had no jurisdiction to re-hear the case under R. 8, O. 47; but they not only cancelled that portion of his order, but proceeded to direct that the appeal should be re-heard. At the re-hearing which took place before Holmwood and Mullick, JJ., the question was raised, whether the appeal was to be re-heard in its entirety or whether the ground urged before Richardson, J., in support of the application for review was the only ground open for consideration. The Court came to the conclusion that the latter course should be pursued. The result was that Holmwood and Mullick, JJ. proceeded to make a decree identical with what had been made by Richardson J. when he made the Rule for review absolute. We are now invited to set aside on review the decree made by Holmwood and Mullick J. on the ground that it was incumbent upon them to re-hear the entire appeal. In my opinion there is no foundation for this contention. In the first place, it is indisputable that a revision may be granted either

as to the entirely of the order assailed or as to a portion only thereof. This was laid down by the Judicial Committee so far back as 1867 in the case of *Bhugwandeen Doobey* v. *Myna Bnee* (1), where Sir James Colvile observed that

"the Judges who might have made a final order, granting or rejecting the application in toto or in part, were not incompetent to make the qualified order which they did make, leaving in the Court, which was to review the decision, a discretion as to the extent to which the review should be carried.

This view has been adopted by this Court in 1864 in the case of *Hurro Chunder Chuckerbutty* v. *Ramkissore Chuckerbutty* (2) and has been consistently followed in a long series of decisions: *Byjnath Sahoy* v. *Wuzeer Narain* (3), *Dhuronidhur* v. *Agra Bank* (4), *Thacoor Prosad* v. *Baluck Ram* (5), *Hurban Sahye* v. *Thakoor Purshad* (6) and *Bhubaneshwari Koer* v. *Ajodhya Singh* (7). Reliance has been placed on behalf of the petitioner on the observation in the case of *Sainal Ranchod* v. *Dullabh Dvara* (8), that when a review of a decision has been admitted, the whole case is thereby re-opened—an observation quoted with approval in the case of *Emperor* v. *Narayan* (9). I am not prepared to accept this comprehensive statement as an accurate exposition of the law. R. 8, O. 47, which reproduces S. 630 of the Code of 1866, clearly leaves it optional with the Court to determine whether when a review is granted, the case should be re-opened in part or in its entirety. It is obvious that any other view might lead to grave inconvenience, if not injustice. It is conceivable that the different points in a case may be so inseparably connected with each other, that if the decision on one point is set aside it becomes essential in the interests of justice that the whole case should be re-opened. On the other hand, cases are equally conceivable in which the different points may be so distinct, that re-consideration of one of those points may not necessitate the re-examination of the other points. Consequently, the view cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be re-opened and re-considered.

This view is supported by the decisions in *Sadar-ud-din* v. *Ekram-di-udn* (10), *Janaki Nath* v. *Prabhasini Dasi* (11), *Vadilal* v. *Fulchand* (12) and *Gopala Aiyar* v. *Ramasami* (13). These cases show that the Court may, in its discretion, direct that the whole case be re-opened, if it is necessary, in the interests of justice, that such a course should be adopted, but they are not authorities for the proposition that whenever a review is granted on a particular point, the whole case must be re-opened. The facts of the case before us afford a good illustration, why the contention of the petitioner should not be accepted. The point whereon the review was sought and granted, was absolutely distinct from the other points in the case. The question was, whether the plaintiff should be allowed a decree for possession of the structures on the land or whether the defendants should be reserved liberty to remove them. The determination of this question did not, in any way, affect the other points in the case; it was also conceded that the erroneous order in the decree in this behalf had been made by an oversight. Clearly, it was not necessary in the interests of justice that if the decree were modified in this respect, the whole case should be re-opened. But I am also of opinion that the case was concluded when Richardson J. made the Rule absolute, and that there was nothing further to re-consider or re-hear. Although, therefore, in this view, the judgment now under review was passed by Holmwood, J. and Mullick, J. in an appeal which had been concluded by a final decree made by Richardson, J. still it is not necessary for us to interfere, as it merely repeats the decision of Richardson, J. This Rule must accordingly be discharged with costs.

V.B./R.K. *Rule discharged.*

1. (1866-67) 11 M I A 487=9 W R 23 (P C).
2. (1864) W R 141.
3. (1875) W R 427.
4. (1880) 5 Cal 86=4 C L R 434.
5. (1882) 12 C L R 64.
6. (1883) 9 Cal 209.
7. (1911) 11 I C 102.
8. (1873) 10 B H C R 360.
9. (1908) 32 Bom 111.
10. A I R 1914 Cal 146=20 I C 670.
11. (1915) 43 Cal 178=30 I C 898.
12. (1906) 30 Bom 56.
13. (1908) 31 Mad 49.

A. I. R. 1918 Calcutta 883 (1)

MOOKERJEE AND WALMSLEY, JJ.

Dharanidhar Aditya and *others*—Petitioners.

v.

Hemanga Chandra Jana — Opposite Party.

Rule Nisi No. 7 of 1917, Decided on 25th April 1917, against the order of Munsif, First Court, Midnapore, in Misc. Suit No. 151 of 1916.

Decree—Ex parte decree set aside by suit—Original Suit is revived and plaintiff may proceed with it.

When an ex parte decree is set aside by a suit, its effect is to relegate the parties to the position they previously occupied, with the result that the suit which terminated in the ex parte decree is revived and must be tried by the Court, if the plaintiff desires to proceed with it. 6 *I. C.* 13, *Diss. from*, 2 *Cal* 184 (*P. C.*), *Foll.* [P 883 C 2]

Debendra Nath Mondal — for Petitioners.

Amarendra Nath Bose—for Opposite Party.

Judgment.—We are invited in this Rule to consider the propriety of an order whereby the Court below has refused to revive a suit for arrears of rent and to try it in accordance with law. The suit was decreed ex parte on 15th December 1914. The defendant in the suit was an infant represented by his mother as guardian ad litem. After the ex parte decree had been made, a suit was instituted on behalf of the infant by another guardian to set aside the ex parte decree on the ground that the infant was not properly represented and that the decree in fact had been obtained by fraud. This suit was decreed on 30th June 1916 and the ex parte decree was set aside. On 11th September 1916, the plaintiff applied to the Court to revive the original suit and to try it in accordance with law. The Court refused the application on 20th November 1916. In support of this order, reliance has been placed upon the decision in *Kshetra Mohan* v. *Man Gobinda Pal* (1). It is not disputed, however, that this decision is contrary to the view taken by the Judicial Committee, in *Khajooronissa* v. *Rowshan Jehan* (2) which was not brought to the notice of the Court. The Judicial Committee has ruled that when a consent decree was set aside, the result was to relegate the parties to the position they previously occupied, with the result that the suit which had terminated in the consent decree had to be re-tried when the consent decree was vacated. The same course was followed by this Court in the case of *Raj Kumar Roy* v. *Hara Krishna Chakravarty* (3), where it was pointed out that a similar view had been adopted by the House of Lords in *Neale* v. *Gordon Lennox* (4), *Bibee Soloman* v. *Abdool Azeez* (5), *Sharat Chunder Ghose* v. *Kartik Chunder Mitter* (6), *Sarbesh Chandra Basu* v. *Hart Dayal Singh* (7), *Chatterjee Brahmin* v. *Durgadutt Agarwalla* (8), *Fateh Chand* v. *Narsingh Das* (9). No doubt, in the present case, the suit terminated in an ex parte decree and not a consent decree. That, however, makes no difference in point of principle. The suit was terminated by an ex parte decree. That decree has been set aside by a Court of competent jurisdiction. The effect is that the decree whereby the suit was terminated stands cancelled, and the suit remains on the file of the Court as an undisposed of suit. In these circumstances, it is incumbent upon the Court to proceed with the trial of the suit. If the plaintiff does not wish to proceed with the trial of the suit, the Court must dismiss it. But if the plaintiff desires to proceed with the suit, it must be tried in accordance with law. The result is that the Rule is made absolute and the order of the Court below discharged. The suit for rent will stand revived and will now be tried in accordance with law. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at one gold mohur.

V.B./R.K. *Rule made absolute.*

1. (1910) 6 I C 13
2. (1876-77) 2 Cal 184=3 I A 291. (P C).
3. (1911) 10 I C 355.
4. (1902) A C 465.
5. (1881) 6 Cal 687.
6. (1883) 9 Cal 810.
7. (1910) 5 I C 236.
8. (1916) 34 I C 394.
9. (1912) 16 I C 988.

A. I. R. 1918 Calcutta 883 (2)

MOOKERJEE AND CUMING, JJ.

Sasi Bhushan Bose—Plaintiff—Applicant.

v.

Manindra Chandra Nandy and *others*—Defendants—Opposite Parties.

Civil Rule No. 372 of 1916, Decided on 29th August 1916, against order of Sub Judge, 24-Parganahs, D/- 6 April 1916.

(a) Administration—Suit for—Administration suit by creditor is action for account

within Court-fees Act (1870), S. 7 (4) (f)—Suits Valuation Act (1887), S. 8.

An administration suit by a creditor is an action for an account within the meaning of S. 7, (4) (f). [P 886 C 1]

In such a suit, the plaintiff is entitled to place his own valuation on the relief claimed, for the purposes of court-fees, which valuation is identical with the valuation for purposes of jurisdiction under S. 8, Suits Valuation Act: *Coory* v. *Triest*, (unreported and *Worraker* v. *Priyer* (1876) 2 *Ch. D.* 109, *Ref* [P 886 C 1]

(b) Administration—Suit for—Administration suit by creditor—Plaintiff cannot be called upon to ascertain in advance all creditors of his debtor.

In an administration suit by a creditor the plaintiff cannot be called upon to ascertain in advance all the creditors of his debtor and their dues and value the suit accordingly. That is the fundamental point for determination in the suit itself and cannot be decided by the plaintiff before trial. [P 886 C 1]

(c) Administration—Suit for—Administration suit is in essence for account and application of estate of debtor for satisfaction of dues of all creditors.

An administration suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors. Creditors other than the plaintiff may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and under such circumstances, they are treated as parties to the suit. If they decline so to come in they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done uuder the authority of the Court. [P 885 C 2]

(d) Administration—Suit for—Suit by creditor—Claimants already obtaining decrees should not be joined as plaintiffs unless their interests are in danger.

In an administration suit by a creditor claimants who have already obtained decrees on their claims, should not be formally joined as plaintiffs, unless it is alleged and proved that their interests would be in serious jeopardy, if the plaintiff has the conduct of the proceedings. 34 *Bom.* 420, *Ref.* [P 886 C 2]

(e) Administration—Suit for—Suit by one creditor on behalf of himself and others—Defendants can get action dismissed on payment of plaintiff's debts.

Where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action: *Pemborton* v. *Topham*, (1838) 1 *Beav.* 316, *Holden* v. *Kynaston*, (1840) 2 *Beav.* 204, and *Manton* v. *Roe*, (1844) 14 *Sim.* 353, *Ref.* [P 885 C 2; P 806 C 1]

(f) Administration—Suit for—Preliminary decree made—Each claimant whose claim is not transformed into judgment-debt may be required to pay court-fee advalorem—Court-fees Act (1870), S. 11—Obiter.

Obiter.—After a preliminary decree has been made and creditors have been invited to establish their claims, if any against the debtor, each creditor, who puts forward a claim not already transformed into a judgment debt, may well be required to pay court-fees ad valorem on his application, as if it were a plaint in a suit for the recovery of the sum he claims. Such a procedure can be sustained on the analogy of S. 11, Court-fees Act. [P 886 C 1]

Jogesh Chandra Roy, Gobinda Chunder Dey Roy and *Upendra Kumar Roy*—for Petitioner.

Dwarka Nath Mitter—for Opposite Parties.

Ram Charan Mitra—for the Crown.

Judgment.—We are invited in this rule to set aside an interlocutory order in an administration suit instituted by a creditor. The order in question calls upon the plaintiff to amend his plaint in the manner following, namely, to ascertain all the creditors of his debtor and the sums payable to them, to alter the valuation of the claims by the addition of the amount so ascertained to the amount due to himself, and to pay court-fees ad valorem on the amended valuation. The plaint recites that defendant, 1 Amarnath Bose, on 4th April 1911, borrowed from the plaintiff a sum of Rs. 1,000 on a promissory note repayable on demand with interest at 18 per cent. per annum that he has neither paid the principal, nor the interest and that on 23rd September 1911, he executed a trust deed in favour of defendant 2 the Maharaja of Cossimbazar, whereby he transferred all his immovable properties to the trustee with direction to pay up all his creditors inclusive of the plaintiff. The plaint further recites that the trustee has taken possession of the trust properties, but has not paid the plaintiff his dues, and so far as the plaintiff can ascertain, the trustee has not paid up the other creditors of defendant 1. The plaintiff, accordingly, prays that the estate may be administered that an account may be taken of the trust properties and their income, that a receiver may be appointed for the purpose, that the creditors may be ascertained by issue of public notice, and that their debts may be determined and paid. The plaintiff also asks for leave to conduct the suit on behalf of all the creditors with liberty to the other creditors to join as co-plaintiffs, should they so desire. The plaintiff alleges that the sum due to him on the date of the commencement of the suit was Rs. 1,540, and that the sums payable to the other

creditors would exceed Rs. 5,000. He valued the suit for purposes of jurisdiction at Rs. 6,540 but paid court-fee on his own claim only, viz., Rs. 105 on a valuation of Rs. 1,540. He paid an additional sum of Rs. 10 apparently on the ground that the claim for administration could not be estimated at a money value within the meaning of Sch. 2, Art. 17 (6,) Court-fees Act, 1870. The suit was instituted on 3rd April 1914, and after it had advanced considerably it came up for hearing on 6th April 1916 when a preliminary objeetion was taken on the question of court-fees payable on the plaint. It may be stated that defendant 1, the debtor, had died meanwhile, and his infant heirs had been brought on the record on 29th March 1915. The Subordinate Judge took up the question of court-fees and made the order we are now called upon to revise. The question raised is one of first impression and we have had the advantage of arguments not only on behalf of the plaintiff and the trustee defendant, but also by the Senior Government Pleader who appeared on behalf of the Secretary of State as a question of the revenues of the Crown was concerned.

It is plain that the Court-fees Act, 1870, does not in express terms provide for an administration suit. We must consequently consider the nature of an administration suit which is explained in Standard Treatises on Equity Pleading and Chancery Pratice. Lord Redesdale (Pleadings in Chancery, p. 167) points out that as early as 1766, in *Corrh* v. *Triest* (unreported) some of a number of creditors, parties to a trust deed for payment of debts were permitted to sue, on behalf of themselves and the other creditors named in the deed, for execution of the trust, although one of those creditors could not in that case have sued for a single demand without bringing the other creditors before the Court: *Worraker* v. *Pryer* (1). This seems to have been permitted purely to save expenses and delay; if a great number of creditors, thus especially provided for by a deed of trust, were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements; and if many were made defendants, the same inconvenience might happen and additional expense would unavoidably be incurred. Reference may, in this connexion, be made to the decisions in *Routh* v. *Kinder* (2), *Boddy* v. *Kent* (3), *Weld* v. *Bonham* (4); *Dauglas* v. *Horsfall* (5); *Hauford* v. *Storie* (6); *Peacock* v. *Monk* (7); *Newton* v. *Egmont* (*Earl*) (8); *Atherton* v. *Worth* (9); *Richardson* v. *Hastings* (10); *Smart* v. *Bradstock* (11): *Powell* v. *Wright* (12). Reference may also be made to an instructive exposition given by Story in his work on Equity Pleadings (S. 99-103 (a) and 216-218 where it is pointed out that the suit must be framed as on behalf of all the creditors, as otherwise accounts may have to be taken de novo in separate suits by different claimants: *Leigh* v. *Thomas* (13). The suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and settlement of the estate are assumed by the Court, the assests are marshalled, and the decree is made for the benefit of all the creditors: see Civil P. C., 1908, O. 20, R. 13; Appx A 41; Appx. D. 17-20; *Good* v. *Blewitt* (14), *Adair* v. *New River Company* (15); *Cockburn* v. *Thompson* (16). Creditors other than the plaintiff may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and, under such circumstances they are treated as parties to the suit.

If they decline so to come in, they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done under the authority of the Court. *Hallet* v. *Hallett* (17), where Chancellor Walworth expounds the whole doctrine with great clearness. But although such is the nature of the suit, it is well settled that where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may, at any time before judgment, have the

1. (1876) 2 Ch D 109.
2. (1789) 3 Swans 158=36 E R 810.
3. (1816) 1 Mer 361=35 E R 707.
4. (1824) 2 Sim & St 91=57 E R 280.
5. (1825) 2 Sim & St 184=57 E R 315.
6. (1825) 2 Sim & St 196=3 L J (o s) Ch 110 =57 E R 320.
7. (1748) 1 Ves Sen 127=27 E R 934.
8. (1831) 4 Sim 574=5 Sim 130.
9. (1674) Dic 375=21 E R 315.
10. (1844) 7 Beav 323=13 L J Ch 142.
11. (1844) 7 Beav 500=49 E R 1159.
12. (1844) 7 Beav 444=49 E R 1137.
13. (1751) 2 Ves Sen 312=28 E R 201.
14. (1815) 19 Ves Jun 336=34 E R 542.
15. (1805) 11 Ves Jun 429=32 E R 1153
16. (1809) 16 Ves Jun 321=33 E R 1005.
17. (1829) 2 Paige 19.

action dismissed on payment of the plaintiff's debt and all the costs of the action *Pemberton* v. *Topham* (18); *Holden* v. *Kynaston* (19); *Manton* v. *Roe* (20), and this principle was recently applied in the case of *Athalur Malakondiah* v. *Thatha Lakshminarasimhulu Chetty* (21). An administration suit by a creditor is, consequently, an action for an account within the meaning of S. 7 (4) (f), Court-fees Act and this was the view adopted in *Khatijo* v. *Adam Husenally Vasi* (22). In such a suit, the plaintiff is entitled to place his own valuation on the relief claimed: *Ma Ma* v. *Ma Hmon* (23). In the present instance, he values the relief at Rs. 1,540 and that valuation is neither arbitrary nor fictitious. We are not able to appreciate on what principle the plaintiff can be called upon to ascertain in advance all the creditors of his debtors and their dues and value the suit accordingly. That in essence is the fundamental point for determination in the suit itself, and it is inconceivable how it can be decided by the plaintiff before trial.

We do not feel pressed by the argument of the Senior Government Pleader that if the plaintiff is allowed to value the suit according to the relief he seeks, the revenues of the Crown will suffer because the other creditors of the debtor will obtain relief without payment of court-fees. There need not, in our opinion, be room for such apprehension. When, after the preliminary decree has been made, and creditors have been invited to establish their claims, if any, against the debtor, each creditor, who puts forward a claim not already transformed into a judgment debt, may well be required to pay court-fees ad valorem on his application, as if it were a plaint in a suit for the recovery of the sum he claims. Such a procedure can be sustained on the analogy of S. 11, Court-fees Act. The only real difficulty in connection with the matter is the question of jurisdiction. If the suit is, as we think it must be, treated, as a suit for "account" within the meaning of S. 7 (4) (f), Court-fees Act, the valuation for purposes of jurisdiction must be identical, under S. 8, Suits Valuation Act, with the valuation for purposes of court-fees. It is thus conceivable that the suit so valued on the basis of the claim of the plaintiff, may be instituted in the Court of the lowest grade of pecuniary jurisdiction, and a claim may thereafter be preferred by a creditor who could, in respect of his claim, institute a suit only in a Court of higher grade. The remedy in such a case would be the transfer of the suit at that stage from the Court of lowest grade to the Court competent to try a claim of enhanced value. This course was in fact adopted in a somewhat similar case: see the decision in *Bhupendra Kumar Chakravati* v. *Purna Chandra Bose* (24). The view we take thus obviously avoids all anomaly and at the same time removes all hardship. In the case before us, there is in reality no difficulty, actual or potential.

Since the institution of the suit, several creditors of defendant 1 have put forward claims of a value such as can be tried only by a Subordinate Judge. The suit is, therefore, properly triable by a Subordinate Judge, and as the aggregate value of the claims already put forward exceed Rs. 10,000, the appeal against the decree will lie, not to the District Judge but to this Court. We may here point out that the claimants, who subsequently appeared, should not have been formally joined as plaintiffs, specially as some of them are said to have already obtained decrees on their claims, unless, indeed, it was alleged and proved that their interests would be in serious jeopardy if the plaintiff had the conduct of the proceedings: *Vasonji Tricamji & Co.* v. *Ismailbhai Shivaji* (25). The proper course would have been to allow them an opportunity to prove their claims and to participate in the distribution of the assets of the estate. Our conclusion is that it was not obligatory upon the plaintiff to pay court-fees on a higher valuation than the amount claimed by him, and that the plaint is not open to objection on the ground that it is insufficiently stamped. The result is that this rule is made absolute and the order of the Court below discharged. The records will be returned to the Subordinate Judge, so that he may proceed with the trial of the suit on the merits on as early a date as practicable. The petitioner will have his costs of this rule

18. (1838) 1 Beav 316=48 E R 962.
19. (1840) 2 Beav 204=9 L J Ch 198.
20. (1844) 14 Sim 353=60 E R 394.
21. A I R 1914 Mad 646=23 I C 134.
22. (1915) 39 Bom. 545=29 I C 949.
23. (1907-08) 4 L B R 279.
24. (1916) 43 Cal 650=8 I C 94.
25. (1910) 34 Bom 420=4 I C 130.

from the estate of his debtor in the hands of the trustee defendant. We assess the hearing fee at two gold mohurs.

V.B./R.K. *Rule made absolute.*

A. I. R 1918 Calcutta 887

TEUNON AND SHAMSUL HUDA, JJ.

Reshu Kabiraj—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 674 of 1917. Decided on 10th July 1917.

(a) Criminal P. C. (1898), Ss. 109 and 118—Petitioner by profession Kaviraj found at midnight in lane with two others who had in possession house breaking implements—Petitioner running away on being discovered and remaining silent on arrest and giving false explanation—Facts found did not bring petitioner within either Cl. (a) or Cl. (b) of S. 109.

The petitioner was required to give security for good behaviour under the provisions of S. 118 read with S. 109, Criminal P. C., on the following facts, viz., that on a certain night the petitioner, who was by profession a kaviraj, was found at about midnight in a lane in a town in association with two others, who had in their possession house breaking-implements, that on being discovered he fled, that when arrested he remained silent and that the explanation subsequently offered to the Magistrate of his presence at the time and place in question was false:

Held (*Teunon, J.*, hesitating), that the facts found did not bring the petitioner within either Cl. (a) or Cl. (b), S. 109, as the petitioner's presence or residence within the Magistrate's jurisdiction was well known. [P 887 C 2]

(b) Criminal P. C. (1898), S. 109 (a)—S. 109 (a) refers to continuous act.

Per *Shamsul Huda, J.*—Clause (a), S 109, refers to a continuous act and does not, therefore, apply to a case where there is a momentary effort at concealment to avoid detection or arrest. [P 888 C 1]

Monmotha Nath Mukherjee and *Charu Chandra Mitra*—for petitioner.

Camell—for the Crown.

Teunon, J.—In this case the petitioner has been required to give security for his good behaviour under the provisions of S. 118 read with S. 109, Criminal P. C. The facts found are that on the night of 28th February last, the petitioner, who is by profession a kaviraj and a dealer in cocoons, was found at about midnight in a lane in the town of Raghunathgunje in association with two others who had in their possession house-breaking implements, that on being discovered he fled, that when arrested he remained silent, and that the explanation subsequently offered to the Magistrate of his presence at the time and place in question is false. The Magistrate has, therefore, held that the petitioner was concealing himself with the object presumably of committing the offence of house-breaking. In this application we are invited to set aside the order against which the Rule is directed, on the ground that the facts found do not bring the petitioner within the provisions of either Cl. (a) on whih the Magistrate has relied or of Cl. (b), S. 109. With regard to Cl. (a) it is urged that the petitioner's presence or residence within the Magistrate's jurisdiction was well known, that there was no attempt to conceal the same, and that the petitioner's attempt to conceal his presence at a particular spot at a particular time (even if it were with the object of assisting in the commission of house-breaking) does not bring him within the mischief of the clause.

Similarly with regard to Cl. (b) it is urged that inasmuch as his name, residence, description, business and profession are known and his possession of means has been found he has given a satisfactory account of himself, within the meaning of Cl. (b), and that it is not necessary that he should be able to give a satisfactory explanation of what he was doing at a particular place at a particular time. It is further urged that inasmuch as the Magistrate has proceeded under and relied on Cl. (a), the order cannot be supported in this Court under Cl. (b). Inasmuch as the petitioner had a full opportunity of meeting the facts alleged against him, this last contention, we think, cannot be sustained but in view of the conclusion at which we have arrived it need not be discussed at length. In support of the two main contentions we have been referred to the cases of *Sharif Ahmad* v. *Emperor* (1) and *Satish Chandra Sarkar* v. *Emperor* (2), while the Deputy Legal Remembrancer appearing for the Crown has cited *Narendra Mohan Ghose Chowdhury* v. *Emperor* (3). The case last cited was that of a young man found associating with political conspirators in a district in which he was a stranger and the decision therefore, on the facts of the case is not opposed to the view taken in the two cases first mentioned. On the whole, though speaking for myself with some hesitation, we have arrived at the conclusion that the facts found do not bring the petitioner within either clause of S. 109 of the Code

1. (1911) 12 I C 304.
2. (1912) 39 Cal 456=13 I C. 913.
3. (1912) 14 I C 431.

and in further support of this view we may refer to the case of *Reg* v. *Bhuja* (4) decided in Bombay in 1872, and also to the provisions of the Calcutta Police Act, S. 32. That section appears to be based on and largely to reproduce the provisions of the Vagrancy Act in respect of suspected persons. It would doubtless cover a case such as the present, but the language therein used by the legislature is very different from that used in S. 109, Criminal P. C. In the result we make this Rule absolute and set aside the order complained of. The petitioner will now be set at liberty.

Shamsul Huda, J.—I would like to add that in my opinion Cl. (a) S. 109, Criminal P. C. refers to a continuous act like and does not, therefore apply to a case like the present where there is a momentary effort at concealment to avoid detection or arrest. I also think that the provisions of Cl. (a) cannot apply to the case of a person brought under arrest as the accused was for it cannot be said of such a person that he is taking precautions to conceal his presence.

V.B./R.K. *Rule made absolute.*

4. (1872) Rat Un Cr C 63.

A. I. R. 1918 Calcutta 888

MOOKERJEE AND CUMING, JJ.

Chandra Kanta Bhattacharjya and *others*—Plaintiffs—Appellants.

v.

Lakshan Chandra Chakrabartty and *others*—Defendants—Respondents.

Appeal No. 222 of 1914, Decided on 7th July 1916, from order of Sub-Judge, 1st Court, Jessore, D/- 23rd March 1914.

(a) Civil P. C. (5 of 1908), O. 47, R. 4 (b)—Strict proof in Cl. (b) meaning explained.

The expression "strict proof" in Cl. (b) of the proviso to R. 4, O. 47, Civil P. C., means proof according to the formalities of law and does not refer to sufficiency of proof in securing a particular conviction of the judicial mind. It means anything which may serve directly or indirectly to convince a Court and which has been brought before the Court in legal form and in compliance with the requirements of the law of evidence: 42 *Cal* 830, *Ref.* [P 888 C 2]

(b) Civil P. C. (5 of 1908), O. 47, Rr. 4 and 7—Limitation for application—If after 90 days it must be shortly after discovery—Limitation Act (9 of 1908), S. 5 and Art. 173.

An application for review of judgment based on the discovery of new evidence made more than 90 days after the date of the decree but shortly after the discovery of the new evidence, which was not within the applicant's knowledge and could not have been adduced by him when the judgment was passed, is not barred under the law of limitation. [P 889 C 1]

Brojolal Chakrabutty—for Appellants.

Sarat Chandra Roy Chowdhury, Satya Chandra Sinha and *Panchanan Ghose* for *Hara Prasad Chatterjee*—for Respondents.

Judgment. — This appeal, preferred under O. 47, R. 7 (1), Civil P. C. 1908, against an order granting an application for review of judgment on the ground of discovery of new evidence, is based on reasons mentioned in Cls. (b) and (c), namely, first, that the application was in contravention of Cl. (b) of the proviso to R. 4, and secondly, that the application was made after the expiration of the period of limitation prescribed therefor and without sufficient cause. In our opinion, there is no force in either of these contentions. Cl. (b) of the proviso to R. 4, requires that no application for review, on the ground of discovery of new matter of evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made, shall be granted without strict proof of such allegation. The appellants contended that the requirement of "strict proof," just mentioned, has not been fulfilled; their argument, in substance, is that the evidence does not conclusively prove that the new evidence, on the discovery whereof the respondents based their application for review, was not within their knowledge and could not have been adduced by them when the judgment under review was passed. This contention is, in our opinion, based upon a misapprehension of the true meaning of the expression "strict proof" in Cl. (b) of the proviso to R. 4. The decision in *Abed Khondkar* v. *Mohendra Lal De* (1) shows that "strict proof" means proof according to the formalities of law and does not refer to sufficiency of proof in securing a particular conviction. As Jenkins, C. J., observed, "proof" means either conviction of the judicial mind on a certain fact or the means which may help towards arriving at that conviction; the word "strict" in connection with the term "proof" points to the second of these two meanings. Consequently "strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence; it is formality that is

1. (1915) 42 Cal 830=29 I C 282.

prescribed and not the result that is described.

In the case before us, the respondents, in support of their application for review, brought forward witnesses to depose that they did not and could not have become aware of the existence of the new evidence till 9th December 1913. No attempt was made by the appellants to challenge the truth of this allegation by cross-examination, and it is not for us to indicate the class of questions which might have been appropriately put to the witnesses to test their veracity. The decision sought to be reviewed was pronounced on 23rd May 1913. According to the respondents the new evidence, which forms the basis of the application for review, did not come to their knowledge till 9th December 1913, and the application for review was actually lodged in Court on 18th December 1913. In these circumstances, it is plain that there was strict proof of the allegation that the new evidence was not within the knowledge of the petitioners and could not have been adduced by them when the decree was passed. The first objection consequently fails. The second objection taken is that the application was made after the expiration of the period of limitation prescribed therefor and without sufficient cause. The judgment was pronounced on 23rd May 1913; but the decree was not signed till 30th May 1913. The application for review should have been made within 90 days from that date, that is, on or before 28th August 1913. But the new evidence was not available till 9th December 1913; consequently, there was sufficient cause for not making the application for review before the expiry of the period of limitation prescribed therefor. The second ground cannot accordingly be sustained. The result is that the appeal fails and is dismissed with costs. We assess the hearing-free at one gold mohur.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 889

MOOKERJEE AND WALMSLEY, JJ.

Shama Charan Kotal — Defendant — Appellant.

v.

Kumed Dasi—Plaintiff—Respondent.

Appeal No. 491 of 1915, Decided on 25th May 1917, from appellate decree of Dist. Judge, Bankura, D/- 4th December 1914.

Specific Relief Act (1877), S. 14—Contract to sell share of joint family property by one member — Specific performance should be decreed against his share.

The defendant, a member of a joint family, contracted to sell a share of the family property to the plaintiff and the latter accepted the contract on the faith of his assurance that he was competent to transfer the property held by himself and his cosharers. In a suit for specific performance of the contract by the purchaser:

Held: that though the defendant was not in a position to bind his cosharers, still as his own share was large enough for the purposes of the completion of the contract: specific performance should be decreed against him as it would be wrong to hold that the defendant could escape from his obligation under the contract merely because he acted in excess of his authority and was not in a position to bind his cosharers.

[P 890 C 2]

Bejoy Kumar Bhattacharjee—for Appellant.

Asi Ranjan Chatterjee — for Respondent.

Judgment.—This is an appeal by defendant 1 in a suit for specific performance of a contract for sale of land. The contract is embodied in a petition of compromise, presented to the Court in a previous litigation between the parties, which related to a different subject-matter. The settlement was made on the assumption that the defendants would convey to the plaintiffs one-fourth share of the property in dispute. The decree was made accordingly but the defendants have declined to execute the conveyance. On 7th May 1913 the plaintiffs instituted this suit for specific performance of this contract. Defendant 1, the appellant before us, did not enter appearance. The other three defendants contested the claim principally on the allegation that they had not signed the petition of compromise and were in no way bound to sell the property. The Courts below have concurrently found that the negotiations were carried on by defendant 1, that at the time the petition of compromise was executed the other defendants were not present and that defendant 1, who is the head of the joint family composed of all the defendants, put down his own signature as also the names of the other defendants. On these findings the Courts have concurrently held that as defendant 1 had no authority to enter into an agreement with the plaintiffs for the sale of the shares of the other defendants, the latter cannot be held bound by the decree and specific performance cannot be decreed as against them. The propriety of

this view has not been challenged before us. The Courts below, however, have disagreed upon one fundamental point.

The first Court held that although defendant 1 was a party to the contract, it could not be specifically enforced against him, because the contract was alleged to have been made with all the four defendants, as regards three of whom it was clearly unenforceable. On appeal, the District Judge has held that as defendant 1 is prima facie entitled to a four-annas share of the property, and is in a position to perform the agreement to that extent, there should be a decree for specific performance in respect of that share. The District Judge has further directed an inquiry as to the extent of the share of defendant 1 and the steps to be taken, if the share should turn out to be less than four annas. Defendant 1 has now appealed to this Court and has urged, first, that the suit should be dismissed as against him, and, secondly, that at any rate a decree for specific performance cannot be made against him to a larger extent than one-anna share of the property in dispute. In our opinion, there is no foundation for either of these contentions. On behalf of the appellant reliance has been placed upon the case of *Price* v. *Griffith* (1), where Knight Bruce, L. J., laid down the law as follows:

"Cases may be conceived where a person, who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey."

He explained and added that such a decree could not be made in the case before him, because, in that case, there was no evidence of improper conduct or misrepresentation or of the defendant's having held himself out as capable of contracting for the whole, or in fact, any other circumstance constituting a ground for a decree as to one undivided share alone. This case was followed in *Surbesh Chandra Basu* v. *Hari Dayal Singh* (2), where the law was summarised in these terms:

"No rule of universal application however can be laid down in cases of this description, *Hexter* v. *Pearce* (3), but in the absence of misrepresentation or misconduct the general rule is that where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share: *Lumley* v. *Ravenscroft* (4). The case of course will be different if nothing more than partial performance is possible by reason only of the default of the defendant, because no man ought to be allowed to take advantage of his own wrong."

The case before us clearly falls, not within the general rule, but within the exception. Defendant 1 professed to enter into a contract on his own behalf as also on behalf of the other defendants. They were members of a joint family of which defendant 1 was the head. Assume that defendant 1 acted honestly and believed that he had authority to bind his cosharers by this agreement. But the result has proved otherwise. This however cannot affect the rights of the plaintiffs. They accepted the contract on the faith of the assurance that defendant 1 was competent to bind the property held by himself and his cosharers. Defendant 1, it turns out, is not in a position to bind his cosharers, but his own share is large enough for the purposes of completion of the contract made by him with the plaintiffs. In such circumstances, it would be wrong to hold that defendant 1 can escape from his obligation merely because he has acted in excess of his authority and is not in a position to bind his cosharers. Reference has been made to the decisions of the Madras High Court in *Govinda Naickan* v. *Apathsahay Iyer* (5) and *Juturi Nagiah* v. *Ariparala Venkatrama Sastrulu* (6). These cases are, however, clearly distinguishable. They were cases of contract by members of a joint Mitakshara family and specific performance was refused, not merely as to the whole but also in respect of a share, on the obvious ground that if specific performance were decreed, the result would be a violation of law.

The same doctrine was applied by this Court in the case of *Surbesh Chandra Basu* v. *Hari Dayal Singh* (3), where specific performance was refused as against the guardian of an infant, because the result of the decree for specific performance would be that the guardian would be obliged to act in contravention of the authority of the Court which had appointed him; on the other hand if he refused to act, he would be guilty of con-

1. (1851) 1 De G M & G 80=21 L J Ch 78.
2. (1911) 5 I C 236.
3. (1900) 1 Ch 341=69 L J Ch 146.
4. (1895) 1 Q B 683=64 L J Q B 441.
5. A I R 1915 Mad 305=13 I C 471=37 Mad 403.
6. A I R 1914 Mad 456=15 I C 628=37 Mad 387.

tempt of the Court which made the decree for specific performance. Such considerations have no application to the circumstances of this case. We hold accordingly that the decree made by the Court below is just and proper. We direct however, that so much of the decree as directs an inquiry in execution as to the extent of the share of defendant 1 and a possible refund of a proportionate amount of the consideration to the plaintiffs be expunged. The decree will direct specific performance of the contract for sale to the plaintiffs in respect of the one-fourth share of the property in suit. Subject to this variation, the decree of the Court below is affirmed and this appeal dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 891

FLETCHER AND TEUNON, JJ.

Hem Chandra Biswas—Defendant — Appellant.

v.

Purna Chandra Mookerjee and *anothers* —Plaintiffs and Defendants — Respondents.

Appeal No. 1018 of 1915, Decided on 26th June 1916, from appellate decree of Dist. Judge, Burdwan, D/- 30th January 1915.

Limitation Act (9 of 1908), S. 20—Payment not proved to be for interest as such if appearing in debtor's handwriting can be considered as one for principal and can extend period.

A payment on a mortgage-bond, which cannot be taken as payment of interest under S. 20, Limitation Act, by reason of not being proved to have been expressly made as such, will be considered as payment towards the principal under the section (so as to give a fresh start to limitation), if the fact of payment appears from a document in the handwriting of the debtor making the same. [P 891 C 2]

Monmath Nath Roy—for Appellant.

Sarat Kumar Mitter — for Respondants.

Fletcher, J.—This is an appeal by defendant 1 from the judgment of the learned District Judge of Burdwan, dated 30th January 1915. The suit was brought to enforce a mortgage security and the only question that has been raised in this appeal is one of limitation. The morgage was dated 3rd July 1895 and the present suit was instituted on 20th June 1913. Both the lower Courts have found that three payments were made, namely, Rs. 10 on 18th August 1900, Rs. 80 on 25th October 1900 and Rs. 10 on 3rd February 1903. It is common ground that the plaintiff must succeed, if at all, on proving the payment of 3rd February 1903, which would save the suit from being barred by limitation. The view that has been taken by the learned District Judge is this: First of all, he says:

"Was this payment of 3rd February 1903 a payment on account of interest as such within the meaning of S. 20, Limitation Act?'

The learned Judge appearently came to the conclusion that the payment not having been expressly made as such, the evidence did not establish that it was made on account of interest as such. He then said that the case did not end there because admittedly there was a payment and there was also a document (from which the fact of the payment appeared) in the handwriting of the person making the same. The learned Judge said:

"If I am wrong in the conclusion that I have arrived at as to the payment being a payment of interest as such, then the payment being proved and there being admittedly a document in the handwriting of the defendant from which the fact of the payment appears, the payment must be taken to be a payment on account of principal."

That view, I think, is right. In none of the cases, where a different view has been taken, was there a document in writing to satisfy the second part of S. 20, Limitation Act. In this case, there is a distinct finding by both the Courts below as regards the payment- If the Judge was right that the evidence did not establish that the payment was made on account of interest as such, still there was evidence establishing the payment plus the document in writing proving the fact of payment. On that evidence, the learned Judge was entitled to come to the conclusion that the payment was a part-payment on account of principal. As a matter of fact, although not expressed in happy language, the learned Judge has found that this payment was on account of principal, because he uses these words:

"The payment of Rs. 10 made on 20th Magh 1309 B. S. being in the handwriting of the debtor will be considered as payment towards the principal."

When the first Court of appeal in fact says that the payment will be considered that way, it must be considered that way and considered so for all purposes. It seems to me that the learned Judge, on the materials before him was entitled to come to the conclusion as he did that this

payment was a payment towards the principal coming within the meaning of S. 20, of the Limitation Act. The present appeal, therefore, fails and must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 892 (1)

TEUNON AND SHAMSUL HUDA, JJ.

Rakhal Mandal and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 732 of 1917, Decided on 13th July 1917, against the order of Dist. Magistrate, Bankura.

Criminal P. C. (1898), S. 107 (2)—Proceedings under S. 107 (2) can be transferred by District Magistrate to his subordinate.

Proceedings initiated by the District Magistrate under the special powers conferred upon him by S. 107 (2), need not be continued to the end in his Court but may be transferred by him to the Court of some subordinate Magistrate otherwise competent to deal with the matter.

[P 892 C 1]

Dasarathi Sanyal and *Kalikinkar Chakerbutty*—for Petitioners.

Surendra Nath Ghosal—for the Crown.

Judgment.—In these two rules the only question involved is, whether proceedings initiated by the District Magistrate under the special powers conferred upon him by S 107 (2), Criminal P. C., must be continued to the end in his Court or whether they may be transferred by him to the Court of some subordinate Magistrate otherwise competent to deal with the matter. This question does not now come before this Court for the first time. In the case of *Surjya Kanta Roy Chowdhry* v. *Emperor* (1), the question was argued at the Bar and discussed at length, and the learned Judges who heard that case took the view that it was sufficient that the District Magistrate should initiate the proceedings. In taking that view they further relied upon the case decided in the High Court of Allahabad in *Emperor* v. *Munna* (2). In a subsequent case in this Court in 1909 a Divisional Bench took the contrary view. But from the report of that case, *Nirbikar Chandra Mukherji* v. *Emperor* (3), it is clear that that was a case not argued at the Bar and that consequently the prior decision of this Court in *Surjya Kanta Roy Chowdhry* v. *Emperor* (1) was not brought to the attention of the learned Judges. Under these circumstances we think that we ought to follow the earlier case: *Surjya Kanta Roy Chowdhry* v. *Emperor* (1) decided in this Court in 1904. For these reasons we discharge these Rules.

V.B./R.K. *Rules discharged.*

1. (1904) 31 Cal 350.
2. (1902) 24 All 151.
3. (1909) 1 I C 78.

A. I. R. 1918 Calcutta 892 (2)

MOOKERJEE AND CUMING, JJ.

Surendra Lal Chowdhury and *another*—Plaintiffs—Appellants.

v.

Secy. of State — Defendant — Respondent.

Appeals Nos. 28 and 125 of 1912, Decided on 29th August 1916, from original decrees of Sub-Judge, 2nd Court, 24 Pergannahs, D/- 20th September 1911.

(a) Railways Act (1890), S. 72—Goods lost—Responsibility of Railway is that of bailee—Loss due to act of God—Railway is not liable for loss—Goods not delivered to consignee at place of destination—Burden is on Railway to prove existence of circumstances exonerating it from liability—Contract Act (1872), Ss. 151, 152 and 161.

The responsibility of a Railway Administration for the loss or destruction of goods delivered to the Administration for carriage is, by virtue of S. 72, Railways Act, that of a bailee under Ss. 152 and 161, Contract Act. [P 893 C 2]

There is no foundation for the contention that a Railway Administration, when it accepts goods for transmission, is in the position of an insurer or a common carrier. [P 894 C 2]

Where goods delivered to a Railway for carriage are lost through an act of God and not owing to any negligence on the part of the Railway, the latter cannot be held liable for the loss. [P 894 C 2]

Where goods are not delivered to the consignee at the place of destination, he need not prove how the loss occurred; the burden lies upon the Railway to prove the existence of circumstances which exonerate it from liability for the loss. [P 894 C 2]

(b) Railways Act (1890), S. 72—Loss—Proximate cause act of God—Railway though negligent is not liable—*Obiter*.

Obiter.—Where the proximate cause of the loss is an act of God, the Railway Company cannot be held responsible for the loss even if it was guilty of negligence. [P 895 C 1]

C. R. Das and *Probodh Chandra Roy*—for Appellants.

Ram Charan Mitter—for Respondent.

Judgment.—This is an appeal by the plaintiff in a suit for the recovery of value of goods made over to a Railway Administration for transmission but not delivered at the destination. The case for the plaintiff is that the Secretary of State for India in Council owns the Eastern Bengal State Railway, that on 12th

October 1909, the plaintiff made over to the Railway authorities at Rungpur 250 bundles of tobacco, worth Rs. 15,335, for despatch and carriage to Calcutta, but that the goods have never been delivered to him. The defendant pleaded in substance that the goods were destroyed while in course of transmission on 17th October 1909 by an act of God, namely, a severe cyclone, and that he is consequently not liable for the value of the goods. The Subordinate Judge has held that the loss of the goods was caused by an act of God beyond the control of the defendant, and that this furnishes a complete answer to the claim. The plaintiff has now appealed to this Court and has invited us to hold that the decree of the Subordinate Judge is contrary to law.

The evidence shows that the goods were received by the Railway Authorities at Rungpur on 12th October 1909, and were in ordinary course of business, loaded into wagons an that very day. They were despatched from Rungpur on 14th October by a goods train that runs from Lalmanir Hat through Rungpur to Parbatipur. They could not be despatched on 13th October as there were goods received earlier, which were despatched on that date, as also a fish van and two foreign empty wagons. The Station Master explains that preference is given in ordinary course of business to empty wagons which are the property of foreign Railways and have to be speedily returned to them, as also to vans which contain perishable goods. There was consequently no unusual delay or nnnecessary detention of the goods at Rungpur. The train reached Parbatipur on the evening of 14th October in due course. The evidence shows that Parbatipur is a junction station where several lines of Railway meet, and that the trains from the several lines are dissolved, remarshalled and made into new trains. This was done in the present instance in the usual course of business in the way described by the trains clerk at Parbatipur, who has been examined as a witness. The goods were sent on by a train which left Parbatipur on the morning of 15th October. They could not be sent earlier, as precedence had to be given to wagons previously received. The train arrived at Sara at about 8 o'clock in the evening of 15th October, and the wagons were mada over to the transhipment department on the morninig of 16th October (the order for transfer was actually made on the evening of 15th October immediately after the arrival of the train at Sara).

Sara, it may be stated, is on the bank of the river Padma and here goods have to be carried across the river in flats to the station on the Calcutta side, named Goalbathan. The goods were loaded into one of the flats on 16th October along with a considerable quantity of other goods brought down by various trains. On 17th October, the steamer which carried the flats, left Sara and reached Goalbathan late in the afternoon. The flats were not unloaded that day, and the goods remained thereon. A severe cyclone passed over the locality in the evening and the result was that the steamer and the flats sank in the river. The question arises, whether, in these circumstances, the railway authorities can be called upon to make good the loss sustained by the plaintiff. Sub-S. (1), S. 72, Railways Act 1890,—we quote only so much of the section as is applicable to this case—provides that the responsibility of a Railway Administration for the loss or destruction of goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under Ss. 152 and 161, Contract Act 1872. S. 152, Contract Act, provides that the bailee, in the absence of any special contract, is not responsible for the loss, destrution or deterioration of the thing bailed, if he has taken the amount of care of it described in S. 151, that is, as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Section 161, Contract Act, provides that if by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. It is worthy of note that S. 72, Railways Act 1890, effects a substantial alteration in the law as contained in S. 10, Railways Act 1879. It is further worthy of note that S. 2, Act 9 of 1890, repeals Ss. 7 and 10, Carriers Act (3 of 1865). As Lord Macnaghten pointed out in *Irrawaddy Flotilla Co* v. *Bugwandas* (1), the Act of 1890

1. (1891) 18 Cal 620=18 I A 121 (PC).

reduces the responsibility of carriers by railway to that of bailees under the Contract Act 1872; it also declares in S. 72 (3) that nothing in the Common law of England or in the Carriers Act 1865, regarding the responsibility of common carries with respect to the carriage of animals or goods shall affect the responsibility of a Railway Administration as defined in the section. The object of the legislature, when Act 9 of 1890 was enacted, was obviously to depart from the law as enunciated by this Court in *Moothora Kant Shaw* v. *India General Steam Navigation Co.* (2), subsequently approved in *Chogemul* v. *Commissioners, Port of Calcutta* (3) and *Irrawaddy Flotilla Co.* v. *Bugwandas* (1), in cases of liability under the Railways Act 1879. It is plain that, in the case before us, the liability of the defendant must be measured solely by the test formulated in Ss. 151 and 152, Contract Act. This view accords with the decisions in *Sesham Patter* v. *Moss* (4), *Lakhichand* v. *G. I. P. Ry. Co* (5) and *Hirji Khetsey* v. *B. B. & C. I. Ry Co* (6).

It is also clear that when goods have not been delivered to the consignee at the place of destination, the plaintiff need not prove how the loss occurred; the burden lies upon the bailee to prove the existence of circumstances which exonerate him from liability for the loss: *Trustees of the Harbour, Madras* v. *Best* and *Co.* (7) *Sesham Patter* v. *Moss* (4). In our opinon the defendant has discharged this burden. The Railway Authorities acted at every step in the ordinary course of business, they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods, of the same bulk, quality and value as the goods bailed. There was no unusual or unnecessary delay or detention in course of transit. The case for the plaintiff was put before the Court on the hypothesis that whenever goods are delivered to a Railway Administration for transmission, they must be despatched by the very next train available and if the goods have to be carried over several lines or across rivers, they must have precedence at every stage and this must be done regardless of other demands on the Railway. If the theory, which underlies this assumption, were to prevail, it would be manifestly impossible to run a Railway on business lines. We feel no doubt that in the present case there was no negligence whatever on the part of the Railway authorities, and whatever took place was done in the usual course of business.

It has finally been argued that a Railway Administation, when it accepts goods for transmission, is in the position of insurers as common carriers. There is no foundation for this contention. Even uuder the Common Law of England a common carrier is not responsible for the consequences of an act of God. It is sufficient to refer to the celebrated judgment of Holt, C.J., in *Coggs* v. *Brenard* (8), where with reference to bailees who exercise a public employment for a reward he makes the following observation :

"The law charges this person, thus entrusted, to carry goods against all events but acts of God and of the enemies of the King" *Nugent* v. *Smith* (9) *Lloyd* v. *Guibert* (10).

Even upon this view, the claim is unfounded. We may add that even if it was established that there was avoidable delay in the transmission of the goods, it is at least doubtful whether the plaintiff would have any remedy against the defendant. Assume that the conduct of the defendant has been negligent within the definition formulated by Baron Alderson in *Blyth* v. *Birmingham Waterworks Co.* (11):

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do;"

still, the question arises, whether the act of God is not the proximate cause of the loss and the alleged lack of diligence of the defendant nothing more than the remote cause. Beven in his work on Negligence (1908), Vol. 1 p. 81, states the law in the following terms:

"where the negligence of a person concurs with some ordinary cause and the conjunction produces an effect injurious to some other person the operation of such an ordinary cause, extraneous to the negligent person, will not excuse his liability for the whole of the joint effect. The

2. (1884) 10 Cal 166=13 C L R 342 (PC).
3. (1891) 18 Cal 427.
4. (1894) 17 Mad 445.
5. (1913) 37 Bom 1=14 I C 793.
6. A I R 1914 Bom 154=39 Bom 191=25 I C 241.
7. (1899) 22 Mad 524.
8. (1795) 2 Ld. Raym 909.
9. (1876) 1 C P D 423=45 L J C P 697.
10. (1865) 1 Q B 115=6 B & S 100.
11. (1856) 11 Ex 781.

law is otherwise where an extraordinary cause is the primary means of setting in motion an injurious agency and by co-operating with the negligence of a person produces injury to some other person. In this case, the negligent person is not liable, for not only would his negligence alone fail to produce the injurious effect (this circumstance, however is common to the two cases, and notwithstanding this in the former, there is no immunity from liability), but the exciting cause, being an extraordinary occurrence or or an act of God, was not reasonable to be anticipated nor guarded against. The negligent act is not followed by injurious results in natural and probable sequence but only by the occurrence of something abnormal and not to be anticipated."

This exposition of the law receives support from the unanimous judgment of the Supreme Ccurt of the United States in *Memphis Railroad Co.*, v. *Reeves* (12), where the facts were very similar to those of the case before us. The goods (tobacco) were delivered to a Railway Company for transmission, there was delay in transit which was not satisfactorily explained, while in transit, the goods were destroyed by sudden violent and extraordinary flood and storm. It was proved that but for the delay in the course of transit, the goods would have escaped the flood. The Court ruled that the Railway Company was not liable and added that the flood was the proximate cause of the injury and the delay in transportation the remote one. It was also observed that although there was some divergence of judicial opinion on the subject in the Courts of the various States, the balance of authority and reason was on the side of the conclusion unanimously accepted by the Supreme Court of the Unaited States. It follows that from whatever point of view the present case is examined, the claim cannot be sustained. The result is that the appeal is dismissed with costs. It is conceded that this judgment will govern the other appeal, which also is accordingly dismissed with costs.

V.B./R.K. *Appeal dismissed.*

12. (1870) 10 Wallace 176.

A I. R. 1918 Calcutta 895

MOOKERJEE AND WALMSLEY, JJ

Surajubala Dassi and *others*—Plaintiffs—Appellants.

v.

Jageswar Rai and *others*—Defendants—Respondents.

Appeal No. 515 of 1914. Decided on 21st June 1917, from original decree of Offg. Sub-Judge, Second Court, Hooghly, D/- 24th June 1914.

Court-fees Act (1870), S. 7 (4) (f)—Suit for administration and accounts—Court-fee on approximate nature of claim and not ad valorem court-fees should be paid.

A suit for administration and accounts in respect of an estate is in essence a suit for accounts within the meaning of S. 7, Cl. 4 (f), Court-fees Act, 1870. So the plaintiff in such a suit is competent to value the claim for accounts approximately and to pay court-fee thereon but is not bound to pay ad valorem court-fee on the value of the estate.

[P 895 C 2]

Brojo Lal Chakraberty and *Biraj Mohan Mojumdur*—for Appellants.

Mon Mohon Bose—for Respondents.

Judgment.—This is an appeal by the plaintiff against an order of rejection of the plaint, in a suit instituted by her against the executors of the estate of her father-in-law for administration, for accounts and for other incidental reliefs. She stated that the value of the estate left by her father-in-law was Rs. 30,000, but she valued the claim for accounts at Rs. 100. She paid court-fees ad valorem on this sum of Rs. 100 and also paid an additional sum of Rs. 10 apparently on the ground that the claim for administration was incapable of accurate valuation, at least at that stage. The defendants contended that the court-fees paid by the plaintiff was inadequate and that the suit could not consequently proceed. Their argument in substance was that, as for purposes of jurisdiction, the plaintiff had valued the suit at Rs. 30,000, she was bound to pay court-fees upon that valuation. The Subordinate Judge thereupon framed an issue to the following effect: "Has the plaint been insufficiently stamped?" On the trial of this issue, he held that the plaint was insufficiently stamped and called upon the plaintiff to pay additional court-fees of Rs. 965. This order was not carried out, with the consequence that the plaint was rejected. In our opinion the view taken by the Subordinate Judge cannot be supported.

The decision of the Bombay High Court in the case of *Khatija* v. *Adam Husenally Vasi* (1) shows that a suit for administrations and account is in essence a suit for accounts within the meaning of S. 7, Cl. 4 (f), Court-fees Act, 1870 and that in a suit of this description the plaintiff is competent to value the claim for accounts approximately and to pay court-fees thereon. Sir Basil Scott, C. J.,

1. A I R 1915 Bom 59=29 I C 949=39 Bom 545.

pointed out that if ultimately a decree should be passed in favour of the plaintiff for a larger amount than that covered by the court-fees already paid the plaintiff would be precluded by the provisions of S. 11, Court-fees Act, from executing such decree until the fee payable on the whole amount of the decree had been paid. This view is confirmed by a refsrence to Form 43, Sch. 1, Civil P. C., 1908 and was adopted by this Court in *Sasi Bhushan Bose* v. *Manindra Chandra* (2) which arose out of a suit for administration and accounts brought by one of the creditors of a debtor against the trustee of his estate. A similar position had been accepted as sound in the earlier case of *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (3). We are clearly of opinion that adequate court-fees had been paid upon the plaint, which could not consequently have been rejected. The result is that this appeal is allowed, the order of the Court below set aside and the case remitted to the Subordinate Judge in order that it may be tried on the merits. An order will be made in favour of the plaintiff-appellant under S. 13 Court-fees Act, entitling her to obtain a return of the court-fees paid on the memorandum of appeal presented to this Court. The appellant is entitled to her costs both here and in the Court below. We assess the hearing fee in each Court at two gold mohurs.

V.B./R.K. *Appeal allowed.*

2. A I R 1918 Cal 883=38 I C 835.
3. (1909) 3 I C 247.

A. I. R. 1918 Calcutta 896

CHITTY AND BEACHCROFT, JJ.

River Steam Navigation Co. Ltd. and *another*—Defendants—Petitioners.

v.

Hazarimal Multan Mal—Plaintiff—Opposite Party.

Rule Nisi No. 522 of 1917, Decided on 24th July 1917, against order of Sub-Judge, Darrang, in Appeal No. 8 of 1916.

(a) Carriers Act (7 of 1865), S. 10—Notice—Suit for damages for short delivery—Notice of claim is necessary though carrier came to know of claim aliunde within six months' time and had no difficulty in tracing goods.

To maintain a suit for damages for short delivery against a common carrier, a notice of claim under S. 10, Carriers Act, must be given to the defendant, even though the carrier came to know of the claim aliunde within six months' time and had no difficulty in tracing the goods. [P 897 C 1]

(b) Carriers Act (7 of 1865), S. 10—Notice—Clause in bill of lading stating that no claim was to be valid unless notice be given and delivered at Companies Officer at Calcutta within six months of date of default—Clause does not limit requirements of S. 10.

Where a clause in a bill of lading ran as follows: "No claim of any kind whatsoever in respect of the contract shall be valid, unless notice in writing shall be given and delivered at the office of the Company at Calcutta within six months from the date of any defaut, loss or damage, in respect of which such claim arises:

Held: that the clause did not in any way limit the requirements of S. 10, Carriers Act, and was entirely consistent with it. [P 897 C 1]

(c) Civil P. C. (1908), S. 115—Erroneous decision in law does not warrant High Ceurt's interference.

A Subordinate Court decreed the suit of a consignee against a Steam Navigation Company for damages on account of short delivery, erroneously holding that a notice of claim given to the sub-agent of the Company was a good notice in the circumstances of the case:

Held: that the decision being merely erroneous in law, it did not warrant the High Court's interference under S. 115, Civil P. C. [P 897 C 1]

Monmatha Nath Mukerjee—for Petitioners.

Mohendra Nath Roy and *Hamendra Kumar Das*—for Opposite Party,

Judgment.—This is a Rule issued at the instance of the defendants calling upon the plaintiffs to show cause why the decree passed against them by the Munsif of Tezpur and modified on appeal by the Subordinate Judge of the Assam Valley Districts should not be set aside on the ground that condition No. 17 of the bill of lading requiring service of notice of claim at the defendant's office in Calcutta was perfectly legal, and that the Courts below had no jurisdiction to entertain the suit without strict compliance therewith being proved. The clause in question runs as follows:

"No claim of any kind whatsoever in respect of the contract shall be valid, unless notice in writing shall be given and delivered at the office of the Company at Calcutta within six months from the date of any default, loss or damage in respect of which such claim arises."

The facts are that on 16th August 1914 goods were shipped by the defendant Companies' steamer at Calcutta consigned to the plaintiffs at Bishwanath Ghat. There was short delivery, and on 21st September 1914 a notice of claim was delivered to the defendant's sub-agent at Bishwanath Ghat. He is described as joint agent, as he represented the two steamship companies. On 19th October, 13th November, and 10th December 1914 three more letters were deli-

vered to him. On 27th January 1915 he wrote repudiating the claim. On 29th January 1915 the plaintiffs wrote to the defendant Company's head office asking for a copy of the Bill of Lading which was supplied on 3rd February 1915. The plaintiffs then filed this suit. The learned Subordinate Judge held that the defendants had no power to restrict the manner of service of notice by limitting the service at the Calcutta office of the company. He thought that the notice served in this case on the sub-agent at Bishwanath Ghat was a good notice in the circumstances of the case, especially as he found that the defendant companies came to know of the claim in less than six month's time and had no difficulty in tracing the goods.

This decision of the learned Subordinate Judge appears to be erroneous. In the first place Cl. 17 does not in any way limit the requirements of S. 10, Carriers Act, 1865. It is entirely consistent with that section. Secondly, it has been held by this Court in *British and Foreign Marine Insurance Co.* v. *India General Steam Navigation and Railway Company* (1) that notice under S. 10, Carriers Act must be given. It is not enough to say that the company had knowledge aliunde of the loss. But we are met with the objection that this is merely a decision erroneous in law, that there is nothing in the procedure of the Courts below which warrants our interference under S. 115, Civil P. C. In the petition for the rule the question of jurisdiction was ingeniously introduced, but it is really not a question of jurisdiction at all. The cases of *Amir Hassan Khan* v. *Sheo Baksh Singh* and *Shew Prasad Bunjhidhur* v. *Ram Chunder Haribux* (3) make this clear. We must therefore decline to interfere in revision. The rule is discharged but in the circumstances without costs.

V.B./R.K. *Rule discharged.*

1. (1911) 38 Cal 50=9 I C 960.
2. (1895) 11 Cal 6=11 I A 237 (P C).
3. A I R 1914 Cal 333=41 Cal 323=23 I C 977.

1918 C/113 & 114

A. I. R. 1918 Calcutta 897

MOOKERJEE AND WALMSLEY, JJ.

Surendra Nath Ghose — Defendant — Appellant.

v.

Kaligopal Mozoomdar — Plaintiff — Respondent.

Letters Patent Appeals Nos 18 and 22 of 1916, Decided on 3rd July 1917, against the decree of Roe, J., D/- 21st December 1915, in Appeal No. 570 of 1914.

(a) Practice—Fraud—Fraudulent and collusive proceeding may be passed by, as availing nothing to party setting it up

A proceeding in a Court of Law, which is collusive and fraudulent, cannot be treated as a judicial proceeding but may be passed by as availing nothing to the party who sets it up.

[P 898 C 2]

The plaintiff brought a suit for recovery of possession of land from the defendants on a declaration of his title by virtue of an auction-purchase at a sale in execution of a decree against his sister. It was found that the suit against the sister was based on an imaginary claim and that the decree and the sale thereunder were collusive and fraudulent:

Held: that the plaintiff could not maintain the suit, even though the decision in the suit might be operative against the true owner, as Courts of Justice should not be permitted to be utilized for the purpose of creating fictitious titles. [P 898 C 2]

An application made on behalf of the sister to be added as a plaintiff was refused by the High Court on the ground that if the application were granted the allegations in the plaint would require to be completely recast and also on the ground that the period of limitation for a suit by the real owner had not run out.

[P 899 C 1]

(b) Benami—Right to sue.

A suit for possession of land cannot be maintained by a benamidar. [P 899 C 1]

Surendra Chandra Sen and *Hamendra Chandra Sen*—for Appellant.

Jogesh Chandra Roy, *Biraj Mohan Mojumdar* and *Surendra Nath Das Gupta*—for Respondent.

Judgment—These appeals have been preferred under Cl. 15, of the Letters Patent against a judgment of Roe, J., in a suit for recovery of possession of land on establishment of title. The case for the plaintiff is that the property in dispute is comprised within his estate, which originally belonged to the husband of his sister Kadambini, that he sued her for recovery of the money due from her husband, that he obtained a decree and that in execution thereof he purchased the property at a sale held by the Court. The case for the defendant is that the plaintiff has no title to the estate men-

tioned, because the proceeding against his sister were collusive and fraudulent. The defendant further pleads that the disputed land is comprised within his estate, and not within the estate claimed by the plaintiff. The Trial Court found against the defendant and decreed the suit. Upon appeal, the Subordinate Judge reversed that decision and dismissed the suit. He held that as the proceedings taken by the plaintiff against his sister were fraudulent and collusive, he had not acquired title to the disputed property. Upon appeal to this Court, Roe, J., has reversed the decision of the Subordinate Judge and has remanded the case for re-trial upon the question, whether the disputed land is comprised within the estate claimed by the plaintiff or that owned by the defendant. He has held, upon the authority of the decision in *Ram Bhurosee Singh* v. *Bissessur Narain Mahata* (1), that the plaintiff is entitled to maintain this suit although the proceedings taken by him against his sister may have been collusive The plaintiff and defendant are both dissatisfied with the order of remand. The defendant has accordingly appealed on the ground that, on the facts found, the plaintiff has acquired no title and is not competent to maintain this action. The plaintiff has, on the other hand, appealed on the ground that the order of remand is unnecessary, as, upon the facts found, a decree should have been made in his favour on the merits. We must consider the appeal of the defendant (Letters Patent Appeal No. 18 of 1916) first, because if his contention is well founded, the suit must be dismissed.

The argument of the defendant is based upon the findings of the Subordinate Judge as to the unreality of the proceedings taken by the plaintiff against his sister. The plaintiff, no doubt, sued his sister for recovery of money alleged to have been advanced to her husband But the Subordinate Judge has found that there was no foundation for this claim, as there was in reality no debt due to the plaintiff from his brother-in-law. Consequeutly, the suit instituted by the plaintiff against his sister was based upon an imaginary claim. There was no defence to that action and an ex parte decree was made. The decree was nominally put into execution. A collusive sale was held and title was supposed to have passed to the plaintiff from his sister by virtue of the proceedings taken in Court. The defendant urges that, in in these circumstances, the plaintiff acquired no title whatsoever to the property of his sister. We are of opinion that this contention is well founded.

Suits of this character are not altogether unknown and their effect is vividly described by Lord Brougham in a celebrated passage in the judgment of the House of Lords in *Bandon* v. *Becher* (2):

"A sentence is a judicial determination of a cause, agitated between real parties, upon which real interest has been settled;—in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence and a real decision; of all the requisties, not one takes place in the case of collusive and fraudulent suits; there is no Judge, but a person, invested with the ensigns of the judicial office, is misemployed in listening to a fictitious cause proposed to him. There is no party litigating, there is no party defendant, and there is no real interest brought into question . . . . The whole proceeding is collusive and fraudulent. It cannot, therefore, be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

But the plaintiff-respondent contends that as the decision in this litigation would be operative as against the real owner [*Rash Behary Sarkar* v. *Mahendra Nath Ghose* (3)] the suit should be allowed to proceed at his instance. We are emphatically of opinion that we should not accede to this argument Courts of Justice should not be permitted to be utilized for the purpose of creating fictitious titles, which must inevitably tend to weaken the sanctity which justly attaches to judicial transactions. It is no doubt open to a party to impeach the reality of a transaction between two private individuals; it is equally open to him to impeach the reality of a judicial proceeding. But the Court should certainly be slow to encourage the creation of fictitious titles in the matter disclosed by the proceedings placed before us.

Reference was made to the decision of Sir Richard Couch, C. J., in *Ram Bhurosee Singh* v. *Bissessur Narain Mahata* (1), where a suit for possession of land by a benamidar was allowed to be maintained. That decision, however, is not in conformity with a long series of cases in this Court both anterior and

1. (1872) 18 W R 454.

2. (1835) 3 Cl. & Fin. 479.

3. A I R 1914 Cal 352=21 I C 979.

subsequent to it, which will be found reviewed in *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (4) and *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (5). We must take it now as well settled in this Court that in suits for land, an action cannot be maintained by a benamidar: *Atrabannessa Bibi* v. *Safatullah Mia* (6). But, in our opinion, the case now before us is much stronger than any of the cases just mentioned. This is a suit by a person who has deliberately sought to utilize the machinery of the Courts for a purpose for which Courts of justice do not exist: viz., for the purpose of creation of fictitious titles, and we fail to appreciate how a Court can be invited, by a person who has so acted, to recognize and enforce such an unreal title. Considerations which may be applicable to bona fide purchasers clearly do not arise here: *Radha Madhab. Paikara* v. *Kalpataru Roy* (7), *Akhil Prodhan* v. *Manmatha Nath Kar* (8), *Gore* v. *Stacpoole* (9).

It has finally been suggested that we should direct that the real owner be joined as a plaintiff in this suit. No doubt a step of this character has been commended in some of the cases found in the books: *Sita Nath Shaha* v. *Nobin Chunder Roy* (10), *Ranee Bhobosoonduree Dossee* v. *Issur Chunder Dutt* (11) and *Bhola Pershad* v. *Ram Lall* (12), but the course has not been adopted in others: *Hari Gobind Adhikari* v. *Ashoy Kumar Mozumdar* (4). It is obvious that the real owner here could not be joined as a party except upon an application by herself. But even if such an application were made we could not possibly grant it, because if the application were granted, the allegations in the plaint would require to be completely recast. It has further been stated to us that the suit by the real owner, if instituted now, will be in time; consequently, there is no substantial reason why we should grant this belated application for addition of the real owner, contrary to the allegations in the plaint and the evidence. The result is that the appeal preferred by the defendant (Letters Patent Appeal No. 18 of 1916) is allowed and that by the plaintiff (Letters Patent Appeal No. 22 of 1916) is dismissed. The suit will stand dismissed with costs in all the Courts, but there will be no separate order for costs in the appeal by the plaintiff.

V.B./R.K. *Order accordingly.*

4. (1889) 16 Cal 364.
5. (1898) 25 Cal 874.
6. (1916) 43 Cal 504=31 I C 189.
7. (1912) 16 I C 811.
8. (1914) 22 I C 86.
9. (1813) 1 Dow 18=14 R R 1.
10. (1880) 5 C L R 102.
11. (1873) 11 B L R 86=18 W R 140.
12. (1897) 24 Cal 84.

A. I. R. 1918 Calcutta 899

MOOKERJEE AND WALMSLEY, JJ.

Kunjo Behari Bardhan — Plaintiff—Petitioner.

v.

Gosto Behari Bardhan—Defendant — Opposite Party.

Rule Nisi No. 8 of 1917, Decided on 26th April 1917, against order of Small Cause Court Judge, Howrah.

(a) Provincial Small Cause Courts Act (1887), Sch. 2, Arts. 15 and 24—Suit to enforce award is not cognizable by Small Cause Court.

A suit to enforce an award is in essence a suit for specific performance of a contract, and is not, therefore, cognizable by a Court of Small Causes. [P 900 C 2]

(b) Provincial Small Cause Courts Act (1887), Sch. 2, Arts. 15 and 24—Scope.

Articles 15 and 24 should be read together. [P 900 C 2]

(c) Arbitration—Award — Part of award cannot be specifically enforced.

A plaintiff who has not carried out what he has directed to perform under an award cannot sue to enforce that part of the award which is favourable to him. [P 901 C 1]

Haradhan Chatterjee—for Petitioner.

D. N. Bose and *Gour Mohun Dutt*—for Opposite Party.

Judgment.—We are invited in the Rule to set aside a decree of dismissal made by the Judge of a Court of Small Causes in a suit for recovery of money due under an award. The petitioner and the opposite party are brothers. On 24th September 1912, the petitioner instituted a suit against his brother for contribution, in respect of sums alleged to have been paid as municipal rates on account of joint properties. During the pendency of this suit, the parties agreed to refer the matters in dispute to arbitrators. On 14th March 1913 they filed their submission in Court, whereby three men were nominated arbitrators to settle all disputes between them as regards their joint properties and to effect a partition thereof. On 30th June 1913 the arbitrators made an elaborate award, which contained a scheme for division of the joint pro-

perties, and gave directions for payment of sums of money by one of the parties to the other. On 14th July 1913 the Court proceeded to make a decree on the basis of the award, to the effect that the suit be dismissed in accordance therewith. There was also a clause that the award be treated as part of the decree, but it is plain that the Court did not enforce the terms relating to immovable property beyond its jurisdiction. The true effect of the order was that the award was recited in the decree, which thereupon became judicial evidence of its terms On 23rd June 1916 the petitioner instituted the present suit in the Court of Small Causes for recovery of a sum of money from the defendant in accordance with the award. Objection was forthwith taken that the award could not be enforced piecemeal. The Small Cause Court Judge has dismissed the suit and we are now invited to hold that his view is erroneous in law.

The first question for consideration is, whether a suit of this description for enforcement of an award is cognizable in a Court of Small Causes. The petitioner has argued on the authority of the decisions in *Simson* v. *McMaster* (1) and *Sukar Hajam* v. *Ali Mohammad* (2), that the answer should be in the affirmative; but we are not prepared to accept this contention as sound in principle Sch. 2, Small Cause Courts Act, specifies the classes of suits which are excluded from the cognizance of a Court of Small Causes. Art. 15 and Art. 24 exclude respectively suits for specific performance of contracts and suits to contest awards The petitioner argues that as Art. 24 excludes specifically a suit to contest an award, the implication is that a suit to enforce an award is cognizable by a Court of Small Causes. We are of opinion that this contention is not well founded, because a suit to enforce an award is in essence a suit for specific performance of a contract. The nature of an award of arbitrators which has not been enforced judicially was explained by this Court in the case of *Bhajahari Saha Banikya* v. *Behari Lal Bisak* (3). A suit for specific performance of an award is in essence a suit for specific performance of a contract, for as the parties have contracted to do what the arbitrator should direct, when the latter has given his decision, the award may be considered in equity as an agreement by the parties, on the terms set out by him and may be enforced against a party as his own agreement. This view is supported by the opinion of Lord Eldon, L. C., in *Wood* v. *Griffith* (4).

"That a bill will lie for specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then the bill calls only for a specific performance of an agreement in another shape."

Thus when *X* and *Y* refer matters in dispute between them to the arbitration of *A* and agree to abide by his decision as soon as the award has been given, there is a contract between the parties to abide by its terms, in other words, from that moment, there is an agreement between the parties that their rights and liabilities would be regulated by the terms previously ascertained by the arbitrator. If, in these circumstances, one of the parties seeks enforcement of the terms of the award, he seeks in reality the enforcement of a contract between the parties. If this view were not taken, the position would be obviously anomalous. *A* brings a suit against *B* to enforce an award. According to the petitioner the suit is cognizable in a Court of Small Causes, although *B* may contest the validity of the award and urge that it was made under circumstances which render its enforcement impossible in a Court of Justice. On the other hand, if *B* comes into Court first and sues to contest the award, the suit is admittedly not cognizable by a Court of Small Causes. This shows clearly that Arts. 15 and 24 should be read together and if they are so interpreted, a suit for enforcement of an award is excluded from the cognizance of a Court of Small Causes because it is in its essence a suit for specific performance of a contract. We are not unmindful that a contrary view was taken in the cases of *Simson* v. *McMaster* (1), *Chimandas* v. *Manghoomal Hemraj* (5) and *Sukar Hajam* v. *Ali Mohammad* (2), where, however, the question does not appear to have been fully argued in its various aspects. We hold accordingly that this suit was not maintainable in a Court of Small Causes. We are further of opinion that the suit

1. (1890) 13 Mad 314.
2. A I R 1915 Cal 129=25 I C 826.
3. (1906) 33 Cal 881.
4. (1818) 1 Swans. 43=1 Wills. Ch. 34.
5. (1912) 6 S L R 85=16 I C 868.

as framed must fail on the merits. The plaintiff seeks in essence to enforce a "part of an award," in fact that part alone which is favourable to him. He has not carried out what he is directed to perform under the award, which cannot be enforced in its entirety in a Small Cause Court, as it involves the partition of immovable property. In such circumstances, the plaintiff should not be allowed to proceed with the suit and obtain relief against the defendant, thereby to compel the latter to bring another suit in a Court of competent jurisdiction to enforce the award so far as it benefits him. The result is that this Rule is discharged with costs—one gold mohur.

V.B./R.K. *Rule discharged.*

A. I. R. 1918 Calcutta 901

CHATTERJEA AND RICHARDSON, JJ.

Yar Mohammad Saha—Plaintiff—Appellant.

v.

Hayat Mohammad Saha and *others*—Defendants—Respondents.

Appeal No. 923 of 1914, Decided on 27th July 1917, from appellate decree of Dist. Judge, Dinajpur, D/- 17th January 1914.

(a) Limitation Act (1908), Art. 47—Suit for possession of lands declared in possession of defendant by order under Criminal P. C. S. 145 is barred if brought 3 years after Magistrate's order to recover possession—Final order under S 145 (b), Criminal P. C.—Omission to take evidence on behalf of party in whose favour order is made is curable—Criminal P. C. (1898), Ss. 145 and 537.

A proceeding under S. 145, having been initiated by the plaintiff, the Magistrate made a proper preliminary order under the section, upon which the parties came before the Magistrate and filed their written statements After the plaintiff had examined three witnesses on his behalf, he filed a petition before the Magistrate praying that he might be allowed to withdraw the case, saying that he would not enter upon the land until the matter in dispute had been settled by a civil Court. Thereupon the Magistrate recorded an order declaring the defendants to be in possession of the lands in dispute and directing the plaintiff "not to enter upon the lands and not to disturb the second party's possession thereof till the latter be evicted therefrom by due process of law." In a suit brought by the plaintiff more than three years after the Magistrate's order to recover possession of the land:

Held: (1) that the suit was barred by limitation under Art. 47, Limitation Act, inasmuch as the Magistrate's order must be taken as deciding the question of possession in favour of the defendant; (2) that the omission of the Magistrate to take evidence on behalf of the second party and to record an order that the second party was in possession at the date of the preliminary order under S. 145, did not make his final order under that section ultra vires and without jurisdiction. [P 902 C 1,2; P 904 C 2]

Per *Richardson, J.*—That the order of the Magistrate was in sufficient compliance with the terms of Cl 6, S. 145, although it did not follow precisely the terms of Form 22 to be found in Sch. 5, Criminal P. C., as the forms of the schedule are not obligatory. [P 903 C 1]

That the defect in the final order of the Magistrate made under Cl. 6, by reason of his not adding the words "that the second party was in possession at the date of the preliminary order," was curable under the provisions of S. 537 of the Code. [P 904 C 1]

Per *Chatterjea, J.*—The provisions of S. 145, Criminal P. C., must be complied with in order to make the final order under that section a valid order. [P 902 C 1]

(b) Criminal P. C. (1898), S. 145—Final order—*Quaere.*

Quaere—Whether a final order under S. 145 can be made by consent of the parties. [P 903 C 1]

Dasarathi Sanyal and *Grija Prosonno Sanyal*—for Appellant.

B. Chakraburtty, Monmotho Nath Mukherjee, Jogesh Chandra Roy, Panna Lal Chatterjee, Biraj Mohan Mazoomdar and *Satinara Nath Mukherjee*—for Respondents.

Chatterjea, J.—The question involved in this appeal is, whether the suit out of which it arises is barred by limitation under Art. 47, Limitation Act. It appears that the plaintiff was the first party, and the defendants were the second party, in a proceeding under S. 145. Criminal P. C. with respect to the land in dispute in this suit, the proceeding having been initiated by the plaintiff himself. The Magistrate made a preliminary order under sub-S. 1 of that section and the parties filed their respective written statements. The plaintiff examined three witnesses before the Magistrate and then put in a petition in which he stated:

"I beg respectfully to state that I have instituted a case under the aforesaid section. I shall not prosecute that case under the said section I shall conduct the case in civil Court and I shall not enter upon the said land until the matter shall have been settled by the civil Court. I, therefore, pray that the said case may be allowed to be withdrawn."

The Magistrate thereupon made the following order on 24th August 1906:

"Examined three witnesses for the first party. Yar Muhammad (1st party) then filed a petition, stating that he would not proceed with the case here and that he would not enter upon the land till the matter is decided in a civil Court. The second party is declared to be in possession of the lands in dispute and the first party is

directed not to enter upon the lands and not to disturb the second party's possession thereof till the latter be evicted therefrom by due process of law. Each party to bear his own costs."

The present suit was instituted on 27th January 1912 and both the Courts below have held that the suit was barred under Art. 47, Lim. Act. It is contended on behalf of the appellant that the Magistrate had no jurisdiction to make the order under that section, without taking evidence on behalf of the second party and without coming to a finding that the latter was in possession at the time mentioned in the section and that, therefore, Art. 47 did not bar the suit. There is no doubt that under sub-S. 4, S. 145, the Magistrate is bound to receive the evidence produced by the parties, consider the effect of such evidence and, if possible, decide whether any and which of the parties was at the time mentioned in the section in possession of the subject of dispute, and I think that the provisions of the section must be complied with in order to make it a valid order. In the present case, however, the first party adduced evidence. The evidence is not before us, but it was presumably unfavourable to him. He then gave up his case (so far as those proceedings were concerned) completely, and there was, therefore, no further dispute as to which of the two parties was in actual possession. The order under sub S. (1) was not cancelled, there was no suggestion that any third party was in possession, and in the circumstances, the petition amounted to an admission that the defendants (the second party) were in actual possession at the time, and the Magistrate's order may be taken as deciding the question of possession in favour of the defendants. The omission to record a formal finding on the point under the circumstances, I think, does not render the order ineffectual for the purpose of the present case, in which the question of its validity is raised collaterally. I am accordingly of opinion that the suit is barred by limitation. The appeal is dismissed with costs.

Richardson, J.—The question for decision in this second appeal is whether the suit instituted by the plaintiff-appellant is, as both the Courts below have held, barred by limitation under Art. 47, of the Schedule to the Limitation Act. The land, which the plaintiff is seeking to recover, was the subject of proceedings under S. 145, Criminal P. C. In those proceedings initiated by the plaintiff himself, the Magistrate made an order on 24th August 1906, declaring the second party, the present defendants, to be in possession, and directing the first party, the plaintiff, not to enter upon the land or to disturb the second party's possession till they were evicted therefrom in due course of law. The suit was instituted on 27th January 1912, more than three years after that order. Art. 47 applies to a suit by any person bound by an order respecting the possession of immovable property, made under the Code of Criminal Procedure . . . or by any one claiming under such person to recover possession of the property comprised in such order.

The period of limitation is three years "from the date of the final order in the case." It is conceded that if the Magistrate's order was a good and valid order the suit is barred, but it is contended that the order was without jurisdiction and ultra vires. It is said that the Magistrate did not expressly find in accordance with sub-S. (4), S. 145 that the second party were in actual possession of the disputed land at the date of his preliminary order made under sub-S. (1), requiring the parties to appear before him and to put in written statements of their respective claims as respects the fact of actual possession. What happened was this: As I have said, the plaintiff set the Magistrate in motion. The Magistrate made a proper preliminary order and the parties came before him and filed their written statements. The plaintiff went into evidence and three witnesses were examined on his behalf. Then, on 24th August 1906, the plaintiff filed the following petition:

"I beg respectfully to state that I have instituted a case under the aforesaid section. I shall not prosecute that case under the said section. I shall conduct the case in the civil Court and I shall not enter upon the said land until the matter shall have been settled by the civil Court. I therefore pray that the said case may be allowed to be withdrawn."

Upon that the Magistrate made this order:

"Examined three witnesses for the first party. Yar Muhammad (first party) then filed a petition stating that he would not proceed with the case here and that he would not enter upon the land till the matter is decided in a civil Court. The second party is declared to be in possession of the lands in dispute and the first party is directed not to enter upon the lands and not to disturb the second party's possession thereof till the

latter be evicted therefrom by due process of law. Each party to bear its own costs."

Now, I agree that even if an order could be made under S. 145 by consent, the plaintiff did not by his petition consent to the order made. But the petition did not deprive the Magistrate of jurisdiction. The Magistrate was not obliged merely by reason of the undertaking it contained to stay his hand. Nor was this suggested. The Magistrate was not asked to cancel his preliminary order, and not having been cancelled, the order under Cl. (5) was final. It was open to the Magistrate therefore to make an order under Cl. (6). The depositions of the plaintiff's witnesses have not been placed before us, but the natural inference is that their evidence was unfavourable to the plaintiff. At any rate, it cannot be said on the materials before us that the Magistrate was not justified in treating the petition as an admission by the plaintiff that he could not prove possession at the critical time. In the circumstances, the plaintiff having retired from the field and there being no question of possession by any third party, it was unnecessary for the Magistrate to examine any more witnesses. His order made in those circumstances is capable of being construed and, in my opinion, should be construed as a declaration that the second party were in possession at all material times. But apart from that, the order appears to be in sufficient compliance with the terms of Cl. (6). A form for such an order will be found in Sch. 5 (No. 22). The forms in the schedule are not obligatory. S. 555 provides that they "may be used," "with such variation as the circumstances of each case may require," and it further provides that "if used" they "shall be sufficient." The Magistrate's order does not follow precisely the terms of Form 22, but the objection now taken applies equally to both. In the declaration of possession set out in the form no reference is made to the date of the preliminary order. It can hardly be contended that objection which would apply equally to the statutory form should prevail.

I agree with the Courts below that there is no substance in the contention that the Magistrate's order is invalid for want of jurisdiction and therefore not binding on the plaintiff. The observations are sufficient to dispose of the appeal, but it may be added in view of the argument addressed to us that even assuming that the Magistrate's order was defective in form, the question would still arise whether the defect was such as to vitiate the whole proceedings. This is not a case of the violation of a condition precedent. It is admitted that the Magistrate properly entered upon the inquiry in which the order was made. The case of *Nasserwanjee Pestonjee Meer* v. *Mynoodeen Khan* (1) which was cited has, therefore, no application. There a deed of submission to arbitration was defective and it was held (with reference to Bombay Regn. 7 of 1827) that the defect was fatal. The arbitrator's credentials, so to speak, were not in order and he had no authority to enter upon the arbitration. No doubt even proceedings before a competent Tribunal may have an invalid result. In the case of *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (2), decided under the Civil Proceedure Code of 1882, the objection taken to the terms of the order of reference to arbitration was not sustained, but it was held that the award was invalid because it was not delivered within the time allowed and enlarged by the Court, and S. 521 of the Code expressly declared that no award should be valid unless made within a period allowed by the Court.

Nevertheless, where an inquiry has been properly entered upon, it is not every error which makes the result invalid. The distinction must not be neglected between things done "wholly without jurisdiction," and things done within jurisdiction though erroneously and irregularly done. The words are those of Baron Parke in *Caldar* v. *Halket* (3), and by way of illustration reference may be made to *Rajah Bommarauze Bahadur* v. *Rangasamy Mudaly* (4). Numerous other cases might be cited, but it is sufficient to say that before want of jurisdiction can be predicated in this class of cases, a vice must be clearly established which infects the whole proceedings. There must be an illegality as opposed to an irregularity: *Subrahmania Ayyar* v. *King-Emperor* (5). The question of jurisdiction in relation to S 145, Criminal P. C.,

1. (1854-57) 6 M I A 134=19 E R 50.
2. (1891) 13 All 300=18 I A 55 (P C).
3. (1837-41) 2 M I A 293=81 E R 211 (P C).
4. (1854-55) 6 M I A 232 (P C).
5. (1902) 25 Mad 61=28 I A 257 (P C).

was much discussed by the learned Judges (Rampini and Mookerjee, JJ.) who made the references to a Full Bench in *Sukh Lal Sheikh* v. *Tara Chand Ta* (6) and *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (7). Proceedings under S. 145 of the Code are excluded from the revisional jurisdiction conferred on the High Court under S. 435 and the following sections of the Criminal Procedure Code. But it has long been the practice of the Court to exercise in this class of cases its revisional powers as a Court of superintendence under the High Courts Act (now S. 107, Government of India Act, 1915).

It is always said that the Court will only interfere under those powers when the Magistrate has acted without jurisdiction or in excess of his jurisdiction. There may, however, have been a tendency for this purpose to apply the term "jurisdiction" somewhat loosely or to give it a wider meaning than it legitimately or strictly bears. The reported cases are so multitudinous that it would be an entirely unprofitable task to examine them or to attempt to extract from them any common principle, and it is possible that the decisions of the Full Bench have had the effect of checking the tendency to which I have referred. However that may be, when the Court has interfered in revision in this way, it has interfered in the case itself and the object has been to secure some uniformity and order in the administration of the law. But when the Magistrate's order is attached in collateral proceedings on the ground of want of jurisdiction, very different considerations arise. In such a case the plea must, of course, be strictly established. In the present case the defect suggested is in in the final order made under Cl. (6). All that can be said is that the Magistrate, when he declared possession to be with the second party, did not add the words "at the date of the preliminary order." It is true that Cl. (4) requires the Magistrate to determine possession at the date of the preliminary order. But the omission in the order does not show that the Magistrate did not in fact decide the question of possession correctly. Such an admission is clearly subject to the provisions of S. 537 of the Code, and would not justify the interference even of an appellate Court (supposing an appeal lay) unless it was made to appear that the omission had in fact occasioned a failure of justice. An omission of this character does not entitle the plaintiff to impeach the Magistrate's order in collateral proceedings.

In this suit the burden was on the plaintiff under S. 44, Evidence Act, to show that the order from which he desires to escape "was delivered by a Court not competent to deliver it." This is only saying again that no mere irregularity will suffice. At the most nothing more is established. This view is supported by the decision of the Madras High Court in *Paladugu Parasuramayya* v. *Valli Ramchandradu* (8). The case of *Sardhari Lal* v. *Ambika Pershad* (9) was also cited by the learned pleader for the defendants. Though not strictly in point, it illustrates the meaning of the term jurisdiction when the question of jurisdiction or no jurisdiction is raised collaterally. The remedy which the plaintiff had, if he was aggrieved by the Magistrate's order, was to institute a suit in the Civil Court. He did not avail himself of this remady within the time limited by law. In my opinion, the appeal fails and should be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

6. (1906) 33 Cal 68.
7. (1906) 33 Cal 352.
8. (1915) 38 Mad 432=21 I C 564.
9. (1888) 15 Cal 521=15 I A 123. (P C)

A. I. R. 1918 Calcutta 904

FLETCHER AND SHAMSUL HUDA, JJ.

Girish Chandra Mitra—Plaintiff—Appellant.

v.

Giribala Debi and *others*—Defendants—Respondents.

Appeal No. 1181 of 1916, Decided on 16th April 1918, from appellate decree of Dist. Judge, Birbhoom, D/-16th February 1916.

Bengal Tenancy Act (1885), Sch. 3 Art. 3—Dispossession of raiyat by cosharer landlord—Right to redeem holding recognised in mortgage suit by another landlord—Such recognition held not to extend period of limitation for suit for recovery of possession.

After the dispossession of a riayat by some of the cosharer landlords, his right to redeem the holding was recognised by the Court in a mortgage suit by another of the cosharer landlords:

Held: that such recognition by the Court did not extend the period of two years' limitation which the raiyat had under Art. 3, Sch. 3, for bringing a suit for recovery of possession of the holding. [P 905 C 1]

Samatul Chunder Dutt and *Jyotish Chunder Sirkar*—for Appellant.

Biraj Mohan Mozumdar, *Bankim Chander Mukerjee* for *Manmatha Nath Mukerjee* and *Debendra Nath Mandal* for *Sarat Chunder De*—for Respondents.

Judgment.—This is an appeal by the plaintiff against the decision of the learned District Judge of Birbhum dated the 16th February 1916 reversing the decision of the Munsif at Suri. The plaintiff sued to recover possession on the ground that he had the right as a tenant. The story of the title is a complicated one. Amongst the defendants-landlords are the defendants 2 and 3, and it has been found as a fact in this case that the defendants 2 and 3 dispossessed the plaintiff more than two years prior to the institution of the suit. Therefore, the suit is barred by limitation under Art. 3, Sch. 3, Ben. Ten. Act. It is said that that is not so, because in this case the landlords recognized the interest of the plaintiff as being a subsisting interest, and the manner in which it is said that the landlords recognized the interest of the plaintiff is this: That, in a mortgage suit by one Rajabala, another of the cosharer landlords, the Court recognized that the plaintiff had a right to redeem the property. That is not a recognition by the landlord. You may call it a recognition by the Judge. It is not suggested that a recognition by the Judge extends the period of limitation under the provisions of the Bengal Tenancy Act. The case is clearly concluded by the finding of fact that the plaintiff, even if he had the right as a tenant, was out of time in bringing the present action. The present appeal, therefore, fails and is dismissed with costs. The two sets of respondents who have appeared are entitled each to a separate set of costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 905

MOOKERJEE AND WALMSLEY, JJ.

Brajendra Lal Das and *others*—Defendants—Appellants.

v.

Deb Narain Tewari and *another*—Plaintiffs—Defendants—Respondents.

Appeal No. 963 of 1913, Decided on 22nd May 1917, from appellate decree of Sub-Judge, First Court, Burdwan, D/- 29th November 1912.

(a) Chowkidari Chakran Lands—Resumption of - Zamindar on resumption and transfer does not acquire new estate but estate taken by him is in confirmation and continuance of original estate.

Chowkidari chakran lands form part of the original revenue paying estate and when they are resumed and transferred to the zamindar, the latter does not acquire thereby a new estate but the estate taken by him under the order of transfer is in confirmation and by way of continuance of his pre-existing estate. [P 906 C 1]

(b) Bengal Village Chowkidari Act (1870) —Chowkidari chakran lands resumed and transferred to zamindar—Parent estate put to sale exclusive of these lands by Collector under Act 11 of 1859—Purchaser acquires no title to the chowkidari chakran lands.

Nevertheless a purchaser of the parent estate at a revenue sale under Act 11 of 1859 acquires no title to the chowkidari chakran lands that have been resumed and transferred to the defaulting zamindar under the Chowkidari Act, where the Collector, treating the enfranchised chowkidari chakran lands as constituting by themselves a separate estate subject to the pyament of a separate assessment made under the Chowkidari Act, puts up to sale the original parent estate, exclusive of those lands, for realization of the arrears of revenue due therefrom. [P 906 C 1]

Ram Chandra Majumdar—for Appellants.

Dwarkanath Chakrabarty and *Gopal Chandra Chakrabarty*—for Respondents.

Judgment.—This is an appeal by the defendants in a suit for recovery of possession of immovable property on declaration of title. The lands in dispute were originally chowkidari chakran lands, which were resumed under the provisions of the Village Chowkidari Act 1870, and were transferred to the plaintiffs on 2nd February 1900. Since then the proprietors of the estate have defaulted to pay Government revenue, with the result that the parent estate was sold on 27th March 1907 when it was purchased by the appellants. The plaintiffs contend that their title to the chowkidari chakran lands was not affected by the sale of the parent estate and that they are consequently entitled to recover possession thereof. The defendants on the other hand maintain that the sale under the provisions of Act 11 of 1859 transferred to them, not merely the lands comprised in the parent estate, but also the resumed chowkidari chakran lands. The Courts below have concurrently negatived this contention on the authority of the decision in *Kashim Sheik* v. *Prosanna Kumar Mukerjeee* (1). The correctness of that decision however has been called in

1. (1906) 33 Cal 596.

question, and our attention has been drawn to the cases of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2), *Harak Chand* v. *Charu Chandra Singha* (3), and *Rakhal Das* v. *Madhab Chandra* (4). In our opinion there is no room for controversy upon one fundamental question decided by the Judicial Committee in the case of *Ranjit Singh* v. *Kali Dasi Debi* (5), namely, that chowkidari chakran lands form part of original estate, and when they are resumed and transferred to the zamindar, the latter does not acquire thereby a new estate, as was erroneously laid down in *Kashim Sheik* v. *Prosanna Kumar Mukerjee* (1). The Village Chowkidaris Act recognizes the existing title of the zamindar to the lands resumed, and the estate taken by him under the order of transfer is in confirmation and by way of continuance of his existing estate. This proposition however is of no real assistance to the appellants, for, as purchasers, they can claim title only to what has been actually exposed for sale by the Collector. In the case before us, it is clear that the chowkidari chakran lands have not been sold by the Collector; consequently the appellants have acquired no title to such lands by their purchase. Indeed the state of facts here is indentical with what was foreshadowed in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (2). The Revenue Authorities have treated the parent estate as divided into two, namely, one comprising all the lands of the parent estate except the chowkidari chakran lands and the other including the chowkidari chakran lands: *Rakhal Das* v. *Madhab Chandra* (4). The Revenue Authorities have thus substituted two, distinct estates in place of what originally constituted one integral estate. Whether this was or was not the necessary consequence of the provisions of the Village Chowkidari Act, we need not discuss on the present occasion; we are concerned only with the legal effect of what has actually taken place. The Collector has treated the enfranchised chowkidari chakran lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Village Chowkidari Act 1870. The residue of the original estate as created at the time of the Permanent Settlement has been treated as a separate estate and that alone was exposed for sale for recovery of the arrears due therefrom. The sale was not held for the recovery of the amalgamated revenue, namely, the revenue assessed at the time of the Permaent Settlement and the subsequent assessment made at the time of the resumption under the Village Chowkidari Act, nor was the amalgamated estate brought to sale. In these circumstances it is clearly impossible to maintain the position that the purchaser at the revenue sale has acquired title to the chowkidari chakran lands which were never put up to sale for realization of the arrears due from the remainder of the estate. We hold accordingly that the decree made by the Subordinate Judge is correct but not on the grounds set out in his judgment.

The result is that this appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed*

2. (1907) 34 Cal 109.
3. (1910) 8 I C 766.
4. (1910) 8 I C 828
5. A I R 1917 P C 8=40 I C 981 (P C).

A. I. R. 1918 Calcutta 906

SANDERSON, C. J. AND MOOKERJEE, J.

Sarat Chundra Dutta—Defendant—Appellant.

v.

Jadab Chundra Goswami—Plaintiff—Respondent.

Letters Patent Appeal No. 27 of 1915, Decided on 23rd May 1916 against decree of Mullick, J., D/- 1st February 1915, in Appeal No. 2885 of 1912.

(a) Transfer of Property Act (1882), S. 107—Para. 1 is restricted in its terms to three specified classes—Registration is necessary in all three cases.

The first paragraph of S. 107 is restricted in its terms only to the three specified classes of leases enumerated therein, viz., (1) a tenancy from year to year, (2) a lease for any term exceeding one year and (3) a lease reserving an annual rent. In these three cases registration is necessary. [P 907 C 1]

(b) Transfer of Property Act (1882), S. 107—Annual tenancy—Proof of.

An agreement to pay a specified rent every year is not conclusive proof that the tenancy is from year to year: *A. I. R.* 1915 *Cal.* 64 and *A. I. R.* 1915 *Cal.* 313, *Foll.* [P 907 C 2]

(c) Transfer of Property Act (1882), S. 107—Tenancy-at-will can be created verbally—Leases not coming within first para. can be proved by oral evidence.

A tenancy-at-will can be created verbally and leases which do not come within Para. 1 of S. 107 can be proved by oral evidence: 1 *C. W. N.* 248; 6 *C. W. N.* 916; 8 *C. W. N.* 434 and 9 *Mad.* 142, *Ref.* [P 907 C 2]

Mohini Mohan Chukravartty and *Abinas Chandra Chakravartty* — for Appellant.

D. N. Mitter and *Baikunthnath Mitter* —for Respondent.

Sanderson, C. J.—In this case I think this appeal should be dismissed. It is clear that on the merits the defendant has no case whatever. The learned Munsif in the Court below found that the story which the defendant set up was a shamelessly false one. Now the defendant tries to defend this action on a technicality based upon S. 107, T. P. Act. In my judgment his defence is without foundation. That section deals with certain classes of tenancy which are therein mentioned, namely, a tenancy from year to year, or for any term exceeding one year or reserving a yearly rent, and which can be made only by a registered instrument. It has not be shown in this case that the tenancy in question which must now admittedly be taken to exist was one of those mentioned in the section. On the other hand, the facts are as set out by the learned Munsif in this judgment. He said:

"The defendant entered into the land as a tenant of the plaintiff, paid rent for it for a number of years, allowed a decree to be passed against him without any contest and admitted the tenancy in the defence he raised in Mahananda's suit. The parties have so long conducted themselves as landlord and tenant I think that the defendant is estopped from questioning the validity of the settlement which has been acquiesced in and acted upon."

These being the facts of the case, I think the judgment of Mullick, J., was right, and there is no reason for disturbing the judgment and this appeal should be dismissed with costs.

Mookerjee, J.—I agree that the judgment of Mullick, J., must be affirmed. The contention of the appellant is based upon a misapprehension of the provisions of S. 107, T. P. Act. That section does not lay down that a lease of immovable property can be made only by a registered instrument, but the legislature has provided that a lease of immovable property in three specified cases can be made only by a registered instrument. These cases are, first, a lease from year to year, secondly, a lease for any term exceeding one year, and thirdly, a lease reserving a yearly rent. In the case before us, the plaintiff alleged that the defendant was a tenant-at-will, that his holding was of a temporary character, was non-transferable and was liable to be terminated by notice to quit. The plaintiff also stated that the defendant had entered upon the land on these conditions and had agreed to pay rent at the rate of Rs. 6 a year. It is now contended that because there was an agreement to pay rent at the rate of Rs. 6 a year the tenancy must be regarded as a tenancy from year to year. In my opinion, there is no foundation for this contention. As explained in *Durgi Nikarini* v. *Goberdhan Bose* (1) and *Gobinda Chandra Saha* v. *Dwarka Nath Patita* (2), the fact that the rent is reserved at so much a year does not conclusively show that the tenancy is from year to year. It is not the case of the plaintiff that the defendant holds under a tenancy from year to year; his case is that the defendant is a tenant-at-will, and a tenancy-at will undoubtedly can be created verbally, notwithstanding the provisions of S. 107, T. P. Act. It was finally suggested that even if the defendant be a tenant-at-will, the terms of the tenancy can be established only by means of a written lease and the amount of rent payable in respect of it cannot be proved by oral evidence. There is no foundation for this argument. Numerous cases may be found in the books, where it has been held that the terms of a tenancy which does not come within S. 107, T. P. Act, can be proved by oral evidence: *Surabh Narain Lal* v. *Catherine Sophia* (3), *Fazel Sheikh* v. *Keramuddi Sheikh* (4), *Sita Nath Pal* v. *Kartick Gharmi* (5) and *Venkatagiri Zamindar* v. *Raghava* (6).

V.B /R.K. *Appeal dismissed.*

1. A I R 1915 Cal 64=24 I C 183.
2. A I R 1915 Cal 313=26 I C 962.
3. (1897) 1 C W N 248.
4. (1902) 6 C W N 916.
5. (1904) 8 C W N 433.
6. (1886) 9 Mad 142.

A. I R. 1918 Calcutta 907

TEUNON AND NEWBOULD, JJ.

Kenaram Mondal—Defendant — Appellant.

v.

Asimaddi Mallakarikar and *others*—Plaintiffs—Defendants—Respondents.

Appeal No. 572 of 1913, Decided on 21st November 1917, from appellate order of Addl. Sub-Judge, Khulna, D/- 17th September 1913.

Civil P. C. (1908), O. 41, R. 23—Order of remand—Local investigation not applied for

in original Court cannot be directed by appellate Court.

Where in a suit for recovery of possession on declaration of title the lower appellate Court made an order of remand under O. 41, R. 23, framing additional issues and directing local investigation for determination of the boundary line of the lands in suit :

Held : that the order of remand was unnecessary and vexatious as the additional issues framed were covered by some of the issues decided in the judgment of the original Court, and that the plaintiffs having refrained from applying for local investigation in the first Court should not be given another opportunity of establishing their case. [P 908 C 2]

Surendra Chandra Sen and *Sarat Chandra Dutt*—for Appellant.

Jadunath Kanjilal—for Respondents.

Judgment.—This is an appeal by the defendant in a suit for possession of certain lands on declaration of title. The appeal is against an order of remand made or purporting to be made under O. 41, R. 23, Civil P. C. The learned Subordinate Judge in the Court of appeal below has made the order complained of on the ground that the parties to the proceedings had misunderstood the proper issue in the suit and that such proper issue had not been framed. The plaintiffs rested their case on two kabuliyats alleged to have been executed by them in favour of the landlords in the years 1302 and 1304 and accepted by the said landlords. The case of the defendants was that the lands in suit were originally or had become part of their holding under the same landlords held by them at a juma of Rs. 22. Thus the essential questions that arose for consideration of the Courts below were whether the documents of title relied on by the plaintiffs, that is to say, the two kabuliyats, had been in fact executed by the plaintiffs and accepted by the landlords, whether those documents covered or included the lands in suit and, if so, whether they conferred title upon the plaintiffs, that to say, whether the lands were lands of which the landlords had a right to dispose. The second essential question was one of limitation. Having carefully read the judgment of the original Court, we can find no reason sufficient for the Subordinate Judge's conclusion that the parties in the first Court or the first Court itself had misunderstood these essential issues.

On the contrary, we find that the additional issues, which the Subordinate Judge considered it necessary to frame, were all covered by issue 4 raised in the first Court and that the questions raised in those issues have all been discussed and some of them decided in the course of the judgment on issues 1 and 4. Both parties had full opportunities of adducing evidence and if, as seems to be the opinion of the learned Subordinate Jude, a local inquiry to determine the nature of the land in dispute and to ascertain a certain boundary line was necessary or desirable, it was open to the plaintiffs, if they thought it necessary, to apply for that investigation. But in the exercise of their own judgment or relying on the advice of the learned pleader who assisted them in the first Court, they refrained from doing so. That is no reason for giving them a second opportunity of establishing the case which they tried to make out as against the present defendant-appellant. We look upon this order of remand as not merely not justified by the provisions of the law as contained in O. 41, R. 23, Civil P. C., but as wholly unnecessary; and indeed we may go so far as to say vexatious. For these reasons we set aside the order of remand and return the appeal to the Court of the Subordinate Judge to be heard and determined by him in accordance with law. The costs of this hearing will abide the result. We assess the hearing fee at one gold mohur.

V.B /R.K. *Order set aside.*

A. I. R. 1918 Calcutta 908

RICHARDSON AND BEACHCROFT, JJ.

Pulin Behary Roy and *others*—Plaintiffs—Petitioners.

v.

Abdul Majid and *others*—Defendants—Opposite Parties.

Rule Nisi No 754 of 1917, Decided on 8th February 1918, against order of Subordinate Judge, Second Court, Chittagong.

Succession Certificate Act (1889), S. 4—Succession certificate is not necessary where one member of plaintiff firm dies—Civil P. C. (1908), O 30, R. 4.

In a suit on a hand note executed in favour of a firm, the full amount of the claim should be decreed even where one of the members of the firm dies during the pendency of the suit and his legal representative who is added as a plaintiff does not produce any succession certificate to the deceased partner. 18 *Cal* 86 and 21 *I C* 509, *Foll.* [P 909 C 1]

Dwarka Nath Mitter and *Debendra Nath Mandal*—for Petitioners.

Judgment.—The question for consideration in this rule is whether the rule

laid down by this Court in the case of *Ram Narain Narsing Doss* v. *Ram Chunder Jankee Loll* (1) has been superseded by R. 4, O. 30. The point came before Fletcher, J., in the case of *Bal Kissen Das Daga* v. *Kanhaya Lal* (2). We agree with the view taken by Fletcher, J., that the rule laid down in the case cited no longer applies in view of the provisions embodied in R. 4, O. 30. Rule is therefore, made absolute in this way. The name of the added plaintiff Pulin Behary Roy will be struck out of the category of the plaintiffs and he will be dismissed from the suit. The claim will be decreed in full and the decree of the Court below will be modified accordingly.

V.B./R.K. *Rule made absolute.*

1. (1891) 18 Cal 56.
2. (1913) 21 I C 509.

A. I. R. 1918 Calcutta 909

TEUNON AND NEWBOULD, JJ.

Jugal Krishna Mullick—Petitioner.

v

Phul Kumari Dassi and *others*—Plaintiff and Defendants—Opposite Parties.

Rule Nisi No. 578 of 1917, Decided on 19th December 1917, against the order of Sub-Judge, 2nd Court. 24-Parganahs, in Title Suit No 6 of 1915.

(a) Civil P C. (1908), O. 1, R. 10 (2)—Suit instituted by administratrix of deceased—Adopted son claiming to be made co-plaintiff—Administratrix admitting factum of adoption in another suit but pleading want of authority from husband—Son having made out prima facie case was entitled to be made party.

P as administratrix to the estate of her deceased husband instituted a suit against *X. J.* claiming to be a son adopted by her to her deceased husband, on coming of age, applied to be made a co-plaintiff with *P.* on the ground that *P.* was not prosecuting the suit with due diligence. In another suit pending between *P*, and *J*, *P* admitted the factum of *J's* adoption by her but pleaded that she had no authority from her husband to adopt. The trial Court rejected *J's.* application to be added as a party to the suit:

Held: (1) that although *J's.* title might not be finally adjudicated in the suit, *J*, having made out a prima facie case, was entitled to be made a party. [P 909 C 2; P 910 C 1]

(b) Civil P C. (1908) O. 1, R. 10 (2) and S. 115—Addition or substitution of parties—High Court can interfere under S. 115 or of Government of India Act (1915) S. 107.

In the matter of addition or substitution of parties the High Court has power to interfere under S. 115, Civil P. C. or S. 107, Government of India Act: 6 *I. C.* 549 *Foll.* [P 909 C 2]

Surendra Madhab Mullick and *Satyendra Kumar Roy Chowdhury*—for Petitioner.

Bepin Chandra Mullick, *Dhirendra Nath Bagchi* and *Panna Lal Dutt*—for Opposite Parties.

Judgment.—In this case one Phul Kumari Dassi has sued as the administratrix to the estate of her deceased husband for the purpose of having a sale of part of the estate for arrears of revenue set aside. The petitioner before us, one Jugal Kishore Mullick, claiming to be a son adopted to her deceased husband by Phul Kumari and being now of full age, applied to be made a party plaintiff in the suit. The application was refused by the Subordinate Judge of Alipore in whose Court the suit is pending, on the ground that the administratrix fully represented the estate and that there was nothing to show that she had interests adverse to the interests of the petitioner. Here there can be no doubt that the Subordinate Judge has fallen into error. In the new current year the petitioner in fact brought a suit (No. 212 of 1917) on the Original Side of this Court to recover possession from Phul Kumari and for accounts. In that suit Phul Kumari has entered appearance and while apparently admitting the factum of the adoption has pleaded that she had no valid authority from her husband to make it. Further, on the record of the present suit there are many indications going to show that she is not prosecuting the suit with due diligence.

But on behalf of the opposite party it is contended that neither under S. 115, Civil P. C nor S. 107, Government of India Act, 1915, are we empowered to interfere in a matter of addition or substitution of parties. To that contention the case reported as *Dwarka Nath Sen* v. *Kisori Lal* (1), is a sufficient answer. It is next contended that O. 31, R 1, applies only when the interest of the claimant as a beneficiary is admitted or not disputed. No authority has been adduced in support of this proposition. It may be that the petitioner's title cannot be finally adjudicated in the present suit but, having regard to the registered deed of 4th July 1902 and the admissions made by the plaintiff Phul Kumari from time to time, we are satisfied that the petitioner has made out a

1. (1910) 6 I C 549.

prima facie case sufficient to entitle him to be made a party to the suit. We, therefore, set aside the order complained of and direct that the petitioner be added as a party plaintiff. The rule is accordingly made absolute with costs against the plaintiff-opposite party, hearing fee three gold mohurs.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 910

TEUNON AND RICHARDSON, JJ.

Nibaran Chandra Chakravarty and *others*—Petitioners.

v.

Akshoy Kumar Banerjee — Opposite Party.

Criminal Revn No. 8 of 1917, Decided on 7th May 1917

Criminal P. C. (1898), S. 195 (7) (c)—Provincial Small Cause Court is subordinate to District Magistrate.

A Provincial Small Cause Court is under sub-Cl. (c) Cl. (7), S. 195, to be deemed subordinate, for the purposes of that section, to the Court of the District Judge and the latter has, therefore, jurisdiction to entertain an appeal or application under Cl. (6) S. 195 against an order of a Provincial Small Cause Court granting or refusing sanction for prosecution. [P 910 C 2]

Taradas Chatterjee—for Petitioners.

Khetra Mohan Ghose—for Opposite Party.

Judgment.—The short question which arises upon this Rule is whether a Provincial Small Cause Court is, under sub-Cl. (c) Cl. (7) S. 195, Criminal P. C., to be deemed to the subordinate for the purposes of that section to the Court of the District Judge. Our attention was drawn to three cases in which this question was answered in the negative, the case of *Ajodhia Parshad* v. *Ram Lal* (1) decided by the Allahabad High Court and the cases of *Amlica Tewari* v. *Emperor* (2) and *Sukhdeo Singh* v. *District Magistrate of Muzofarpur* (3) decided by the Patna High Court. The last two cases depend upon the first mentioned case, in which it was held that the words "Where no appeal lies" in Cl. 7 (c) refer to cases, in which no appeal lies, decided by a Court from which appeals ordinarly lie to some other Court and not to Courts from which no appeal lies in any case. There the original proceedings were in Revenue Court, the Court of an Assistant Collector, but in the course of his judgment, Chamier, J., incidentally observed (p. 201 and 202 of 34 *All.*)

"The result of this construction is possibly that the legislature has made no provision in S. 195 for an appeal against an order of a Small Cause Court giving or refusing sanction and it may be that the only Court which can interfere with such an order is the High Court. The result may not have been contemplated. . . "

In *Ambia's* case (2) where the original proceedings were in a Small Cause Court, Chamier, C. J., adhered to this expression of opinion and the Court held that the District Judge had no jurisdiction to entertain an appeal or application under Cl. (6), S. 195. The construction so adopted is founded upon the fact that sub-Cl. (c) must be read, not as a separate clause, but along with the opening words of Cl. (7), which runs:

"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie,"

that is to say: When these words are read with sub-Cl. (c), undoubtedly a difficulty does arise. Nevertheless, where there are Presidency Towns, the accepted view seems to be that a Presidency Small Cause Court is subordinate to the High Court within the limits of whose original jurisdiction it is situate: *Ramdin Bania* v. *Sew Baksh Singh* (4), *Jamana Das* v. *Sabapathy Chetti* (5), and if that be so, it would appear to follow that a Provincial Small Cause Court is similarly subordinate for the purposes of S. 195 to the Court of the District Judge. This view, moreover is in accordance with the prevailing practice in this Province, where the jurisdiction of the District Judge in such cases has never been doubted: *cf. Ram Prosad Malla* v. *Raghubor Malla* (6). I am not prepared to say that that practice ought now to be disturbed or that the language is incapable of a construction consistent therewith. During the course of the argument it was pointed out that under S. 24, Provincial Small Cause Courts Act, certain appeals do lie to the District Court. Though this provision may not be sufficient to make the latter Court the Court to which appeals from a Small Cause Court ordinarily lie, it is not perhaps without a bearing on the construction of S. 195 (7), Criminal P. C. In the view indicated this Rule must be made absolute. The application in question, which the

1. (1912) 34 All 195=13 I C 284.
2. (1916) 1 P L J 206=34 I C 320.
3. (1917) 2 P L J 1=38 I C 754.
4. (1910) 37 Cal 714= 6 I C 479.
5. (1913) 36 Mad 38=12 I C 521.
6. (1910) 37 Cal 3=4 I C 6.

learned District Judge, following *Ambica's* case (2), has held that he had no jurisdiction to entertain, will be heard and determined by him as an application under S. 195 (6), Criminal P. C.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 911

MOOKERJEE AND CUMING, JJ.

Surendra Nath Goswami and *others*—Petitioners.

v.

Bansi Badan Goswami and *others*—Opposite Parties.

Rule Nisi No. 641 of 1916, Decided on 30th August 1916, against the order of Sub-Judge, Nadia, in Case No. 12 of 1916.

(a) Civil P. C. (1908), O. 38, R. 5—Scope.

It is not competent to a Court to make an ad interim order for attachment, under Cl. (3), R. 5, O. 38, Civil P. C., of a debt payable to the defendant outside its jurisdiction by a person not resident within its jurisdiction: 39 *Cal.* 104: *Ref.* [P 912 C 2]

(b) Civil P. C. (1908), O. 38, R. 5—Court illegally obtaining money payable outside jurisdiction by person not resident within its jurisdiction—Money paid on arrival to decree-holder—Decree-holder must pay small money.

When a Court has manifestly usurped jurisdiction and has illegally secured possession of a fund which should not have come under its control, its illegal orders for the payment of the fund must be discharged; and should not be allowed to stand on the plea that possibly similar orders could have been made by a Court of competent jurisdiction. *Farquharson* v. *Morgan* (1894) 1 Q. B 552; *Burder* v. *Veley*, and 12 *Ad.* & E 233; *De Haber* v. *Queen of Portuyal*, (1851) 17 Q. B. 171. *London Corporation* v. *Cox*, (1867) 2 H. L. 239 *Ref*, [P 912 C 2]

Where a Court illegally and without jurisidiction attached before judgment a sum of money, which was payable outside its jurisdiction to the defendant by a person not resident within its jurisdiction, and on the transmission of the money to the Court by that person it paid it out to the plaintiff-decree-holders on their application:

Held: that the decree-holders must bring back into Court the sums they had withdrawn together with interest thereon at 3½ per cent. per annum, and on their failure to do so the sums should be realised by the Court by attachment and sale of the moveable and immovable properties of the decree holders and by attachment of their persons. [P 912 C 1; P 913 C 1]

Asirjanan Chatterjee and *Norendra Nath Choudhury*—for Petitioners.

Provash Chandra Mitter and *Tarakeswar Pal Chowdhury*—for Opposite Parties.

Judgment.—We are invited in this Rule to examine the legality of an order made by the Court below for the payment of a sum of money to the decree-holder, opposite party. The facts material for the determination of the questions in controversy may be shortly stated. On 30th June 1914, the plaintiffs instituted a suit for recovery of money against the defendant in the Court of the Subordinate Judge of Nadia. On the next day, they applied for an order for attachment before judgment in respect of a sum of Rs. 4,200 due to the defendant from the East India Railway authorities for work executed under a contract. The Subordinate Judge, on that date, made a preliminary order on the application under R. 5, O. 38 of the Code. The order called upon the defendant to show cause why he should not furnish security for the sum mentioned and why, on his failure to do so, an order for attachment of the sum before judgment should not be made. The Court also proceeded to make an ad interim order for attachment under Cl. (3), R. 5. This ad interim order was communicated to the officer of the East India Railway who had the money at his disposal. It is inexplicable how the Subordinate Judge came to pass this order, as the officer resided beyond his jurisdiction and the debt, due to the defendant, was not payable within his jurisdiction. On service of notice upon the officer, the mony was, however, transmitted to the Subordinate Judge on 8th March 1916 by means of a cheque on the Bank of Bengal. Thereafter, for fome unexplained reason, the application for attachment before judgment was not further considered, although the case came before the Subordinate Judge on many occasions. Ultimately, an ex parte decree was made in favour of the plaintiffs on 23rd November 1914. The position, consequently, on that date was, that the application for attachment before judgment lapsed; but a large sum of money later on came into the custody of the Court, placed at its disposal by the Railway authorities.

The petitioners, who have obtained this Rule, then appeared before the Subordinate Judge and raised objection to the payment of this money to the decree-holders, on the allegation that they had acquired a valid title to the same, while it was still in the hands of the Railway authorities, by virtue of an assignment in their favour by the defendant-debtor on 22nd August 1915. The Subordinate

Judge overruled the objection, and on 8th and 27th March 1916 the money was paid out to the decree-holders in two instalments on the basis of an application for execution presented on 4th February 1916, but not followed by an order for attachment, obviously on the erroneous assumption that a valid order for attachment before judgment had been previously made, and was still in operation; no such order, as we have seen, had ever been made, none could have been, indeed, legally made, and none was in force in fact or in law. It is obvious that the action taken by the Subordinate Judge in this matter has been illegal from beginning to end, although, even on review, he has declined to re-call his order on 3rd July 1916.

As pointed out by this Court in the case of *Begg, Dunlop & Co.* v. *Jagannath Marwari* (1), it is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court. Consequently, in the case before us, the application for attachment before judgment of the money in the hands of the Railway Authorities should never have been entertained by the Subordinate Judge. The ad interim order was thus entirely without jurisdiction. The ultimate order contemplated by the Court was, as we have seen, never passed The position consequently, was that the Court had, in its hands, money which could not have been in law and had never been in fact duly attached, which had been in reality obtained by usurpation of jurisdiction. There is thus no escape from the conclusion that the money was obtained, and was paid out to the decree holders, wholly without authority. In these circumstances, there can be no serious controversy that the illegal orders must be cancelled and the parties restored to the position they respectively occupied before the illegal intervention of the lower Court. We have been, however, pressed by the decree-holders to stay our hands on the ground that the merits as they allege are in their favour. It cannot be overlooked, however, that the merits, assuming them to have been investigated at all have been determined by a Court which had usurped jurisdiction and was not competent to discuss the matter in controversy. In our opinion, when a Court has manifestly usurped jurisdiction and has illegally secured possession of a fund which should not have come under its control its orders must be discharged; it would be lamentable to allow such illegal orders to stand on the plea that possibly similar orders could have been made by a Court of competent jurisdiction. In this connexion the weighty words of Lord Halsbury in *Farquharson* v. *Morgan* (2) may be usefully recalled:

"It has been long settled that where an objection to the jurisdiction of an inferior Court appears from the face of the proceedings it is immaterial by what means and by whom the Court is informed of such objection. The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction. The objection to the jurisdiction does not in such a case depend on some matter of fact as to which the inferior Court may have been deceived or misled or which it may have unconsciously neglected to observe, and the Judge of such Court, therefore, must or ought to have known that he was acting beyond his jurisdiction."

Lord Davey in the same case referred to the decision in *Worthington* v. *Jeffries* (3) and observed that it has always been the policy of the law as a question of public order to keep inferior Courts strictly within their proper sphere of jurisdiction: see also *Burder* v. *Veley* (4), *De Haber* v. *Queen of Portugal* (5); *London Corporation* v. *Cox* (6) We are clearly of opinion that the proceedings in the Court below have been ultra vires throughout and that the orders of the Subordinate Judge for payment of the fund in his hands made on 8th and 27th March 1916, must be cancelled. The result is that the rule is made absolute and all the orders of the Subordinate Judge in this matter discharged. The decree-holders are directed to bring back into the lower Court, on or before the 15th November next, the sums they have withdrawn from that Court together with interest thereon at 3½ per cent per annum. The sum must be refunded in the Court of the Subordinate Judge of Nadia, because it was from that Court that the money was withdrawn under an order made without jurisdiction. If the money

1. (1912) 39 Cal 104=11 I C 417.

2. (1891) 1 Q B 552.
3. (1875) 10 C P 379.
4. (1840) 12 Ad E 233.
5. (1851) 17 Q B 171,
6. (1867) 2 H L 239.

is not refunded on or before 15th November next as now directed the Subordinate Judge will forthwith proceed to execute the order of this Court and realize the money by attachment and sale of the moveable and immovable properties of of the decree holders and by attachment of their persons, if necessary. This procedure must be adopted, whether the petitioners take any steps in that behalf or not as it is imperative that the money which has been paid out of Court under an illegal order made without jurisidiction must be brought back into Court.

We hope however, that it will not be necessary for the Subordinate Judge to to take a step of this character and that the decree-holders will bring back the money into Court on or before the 15th November next as directed. As soon as the money has been refunded it will be transmitted by the Subordinate Judge to the Court of the Subordinate Judge of Hooghly, which is the Court of competent jurisdiction in this matter; at the same time the application made by the decree-holders on 4th February 1916, for execution of their decree against their judgment-debtor will be transmitted to that Court. The Subordinate Judge of Hooghly will keep the money in his Court suitably invested if necessary, and will proceed to deal with the application for execution. He will along therewith, take up for determination the objection of the present petitioners, namely, that they had acquired a vaild title to this fund under an assignment made in their favour on 22nd August 1915 by the debtor of the decree-holders. They have in this Court produced the deed of assignment, which will be received here and marked as an exhibit and will be transmitted to the Court of the Subordinate Judge of Nadia, to be transmitted by that officer to the Court of the Subordinate Judge of Hooghly along with the application or execution of the decree-holders. The decree-holders will be at liberty to amend their application for execution after notice to judgment-debtor and the objectors. The Subordinate Judge will receive such evidence as may be adduced by the parties for the ellucidation of the questions in controversy; but we may add that we hold that there was no valid attachment of this fund on 22nd August 1915, so that if it is established that the assignment related to this fund and was valid and operative the decree-holders are not entitled to proceed against it. There will be no order for costs in these proceedings.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 913

SANDERSON, C. J. AND MOOKERJEE, J.

Maharaj Bahadur Singh—Appellant.

v.

Inder Chand Bothra—Respondent.

Appeal No. 104 of 1916. Decided on 10th January 1917, from original order of Chitty, J., D/. 29th August 1916.

(a) Civil P. C. (14 of 1882), S. 248—Notice—Where notice is necessary under S. 248 order for execution without it is nullity.

Where a notice is necessary to be issued under S. 248, Civil P. C., 1882, any order for execution made without such notice is without jurisdiction and consequently a nullity. [P 915 C 2, P 916 C 2]

(b) Civil P. C. (14 of 1882), S 248—Previous execution—Order granting application for transmission of decree is not order passed in previous execution.

Per *Sanderson, C J.*—An order granting an application of a decree-holder for transmission of the decree to another Court for execution is not an order passed on a previous application for execution within the meaning of S. 248, Civil P. C. 1882 [P 915 C 1]

Per *Mookerjee, J.*—A notice, given to the representatives of a judgment-debtor, of the decree-holder's application for transmission of the decree for execution to another Court cannot be treated as a notice given upon a previous application for execution within the meaning of S. 248 of the Code of 1882. [P 916 C 1, 2]

S. P. Sinha, N. Sirkar and *B. L. Mitter*—for Appellant.

S. K Chakrabarty—for Respondent.

Sanderson, C. J.—This is an appeal from the judgment of Chitty, J., whereby he allowed the application of Inder Chandra Bothra to be at liberty to proceed with the sale of premises No. 58 Burtolla Street in the town of Calcutta, attached in execution of the decree in question. In order to state the point it is necessary to examine the facts. It appears that on 19th June 1896 one Kapoor Chand Kharar obtained a decree against Maharaj Bahadur Dhunput Singh for Rs. 13,150. The application in this case was made by the holder of the assignment from the sons of the original creditor and the opposite parties are the sons of the original debtor. On 18th May 1907, an application was made by the son of the decree-holder for transmission of the decree to the District Court of Murshidabad for the purpose of having the decree

executed. On 28th August 1907, an order for transmission was made by Harington, J. The matter came before Harington, J., in this way. It appears that the matter having come before the Registrar, an objection was taken that no succession certificate had been produced by the applicant, and the Registrar consequently referred the matter to Court, and Harington, J., was the learned Judge who disposed of it. The facts are stated by Chitty, J., in his judgment. Having stated that notice was duly served and that a question arose as to whether Surajmull required a succession certificate before he could be allowed to execute the decree, he says:

"The matter was referred to the Judge in Chambers by consent of both parties and on 23rd August 1907 Harington, J., pas ed an order under S. 248 against Maharaj Bahadur Dhunpat Singh as the legal representative of the deceased judgment-debtor."

That decree was not transmitted, and on 4th September 1907 an application was made by the same parties for the attachment and sale of certain premises in Calcutta, namely, No. 58, Burtolla Street. In the application it was stated that the property was inherited by Maharaj Bahadur Singh as the sole heir under the Mitakshara law from the deceased defendant Rai Dhunput Singh Bahadur. In respect of that application no notice was issued to the representatives of the deceased judgment-debtor, the Registrar in his order expressing the view that no notice was necessary either under S. 232, Civil P. C., or under S. 248 (a), Civil P. C., the decree having been transferred to the applicants by operation of law and the Court having in a previous application ordered execution against the same person as legal representative of the deceased judgment-debtor. On 17th of September an attachment was made of the property in Calcutta, and on 29th July 1908 an order for sale was made. Both these orders, as I understand, were made without notice to the representatives of the deceased judgment-debtor. After that, apparently, the holders of the decree changed their mind; they did not proceed with the order for sale, but another application was made for transmission of the decree, and that was made on 25th August 1908. The master, dealing with this application in the ordinary course, made an order that the decree should be transmitted. On 17th May 1909 the learned District Judge of Berhampur returned the decree to the High Court with a note that the matter had been dismissed for want of prosecution. Then on 12th March 1910 the holder of the decree applied to proceed with the order of 29th July 1908 which, it will be remembered, was the order for the sale of the premises in Calcutta. Then on 21st April 1910 the Master made an order for the sale of the premises, and it will be noted that that order was made when the Master was acting under the old rules of the Code, the new rules, as pointed out by the learned Advocate-General, not having come into force until 15th April 1914. I might incidentally mention here—although I do not think it is necessary for my judgment in this case as at present advised—that that order of the Master would be without jurisdiction.

The property was advertised for sale and a date was finally fixed for the sale of the property on 25th August 1914. Then the representative of the judgment-debtor came upon the scene again and applied to have the attachment of September 1917 set aside on the ground that the property was trust property: and—as I understand—the application was made in his capacity as trustee. Then the holder of the decree came upon the scene again, and upon his application the sale was adjourned sine die. That was in August 1914. Nothing happened then until two years later, when on 29th August 1916 the present applicant, Inder Chand Bothra, having obtained an assignment of the decree from the sons of the decree-holder made this application to the Court, and, as I have already stated, that was an application for leave that he might be allowed to proceed with the sale of the said attached property in terms of the order of 29th July 1914. Now, those are all the facts—which I think necessary to state for the purpose of my judgment. The matter really is within a narrow compass. The learned Advocate-General argued first of all that inasmuch as there was no notice of the application dated 4th September 1907, which was for the attachment of the premises in Calcutta, served upon the representatives of the judgment-debtor, the subsequent proceedings in respect of that application, namely, the attachment of 17th September 1907, and the order for sale of 29th July 1908, were both invalid, inasmuch as they were

made without jurisdiction. That depends upon S. 248, Civil P. C., which was then in force. That section says as follows:

"The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him (a) if more than one year has elapsed between the date of the decree and the application for its execution, or (b) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made."

(b) certainly applies to this case; (a) also applies to this case. There is a proviso to the section which runs as follows:

"Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution."

If the order for transmission which was made by Harington, J., on 23rd of August 1907, was an order passed on a previous application for execution, then no notice under the proviso to the section would be necessary in respect of the application of 4th September 1907. On the other hand, if the order of 23rd August 1907 of Harington, J., was not an order passed on a previous application for execution, then notice in respect of the application of 4th September 1907 ought to have been given, and if such notice was necessary and if it was not in fact given then the attachment and the order for sale were made without jurisdiction. Therefore, the question to be considered is whether the order made by Harington, J., was passed on a previous application for execution.

In my judgment it was not such an order. Having regard to the decision of a Full Bench of this Court in *Chutterput Singh* v. *Sait Sumari Mal* (1) it is necessary for us to look at the substance of the application and the order that was made on it. There is no doubt that the application was merely an application that the decree should be transmitted by this Court to the District Court of Murshidabad, and whatever form may have been used in the course of the proceedings, the learned Judge in effect was deciding that the order asked for, namely, that the decree should be transmitted to the District Court, should be made. Having regard to the Full Bench decision, that was not an order passed on a previous application for execution, and, consequently, I am of opinion that notice of the application of 4th September 1907 was necessary under S. 248, Civil P. C., then in force, and inasmuch as no notice was in fact given the attachment and the order for sale of 29th July 1908 were made without jurisdiction, and it was made ex parte. Therefore, when the applicant in this case, Inder Chand Bothra, comes to the Court and asks for leave to carry out the order of 29th July 1908, he is asking this Court to carry out out an order which was made without jurisdiction. That application therefore ought to be refused.

There is one other matter which I may mention. I say nothing as to whether the application of 4th September 1907 still is one, of which applicant in this case can avail himself. It may be that he can avail himself of the proceedings which were started by that application, or it may be that he cannot avail himself of the proceedings started by that application; and, I say nothing to intimate what view ought to be taken by a Court, supposing any further application were to be made by the applicant in this case in respect of such proceedings. For these reasons, I think, the appeal ought to be allowed and the learned Judge's order set aside and the application dismissed with costs both in the Court of Appeal and the Court of first instance.

Mookerjee, J.—I agree that the order of Chitty, J., cannot be supported. On 1st September 1914 the respondent took assignment, from the representatives of Kapur Chand Kharar, of a decree for money made on 19th June 1896 on the Original Side of this Court against Rai Dhanpat Singh Bahadur, the predecessor-in interest of the appellant. On 29th August 1916, the respondent, as such assignee, applied to this Court to carry out an order for sale of immovable property made so long ago as 29th July 1908 after attachment had been effected ex parte on 17th September 1907, on the basis of an application for execution dated 4th September 1907. Chitty, J., has granted this prayer, and the question for determination is, whether this order can be supported. On behalf of the judgment-debtor appellant, the Advocate-General has argued that the order for sale, as also the an-

1. (1916) 43 Cal 903=36 I C 602.

tecedent order for attachment, were made without jurisdiction and no further proceedings can be taken on the basis thereof. The reason assigned for this contention is that the attachment and the consequent order for sale were made without requisite notice to the judgment-debtor under Cls. (a) and (b), S. 248, Civil P. C. of 1882, then in force.

The argument in substance is that if a notice was requisite the order for execution made without notice must be deemed to be a nullity, as is shown by the decision of the Judicial Committee in *Raghunath Das* v. *Sundar Das Khetri* (2) which confirms the view taken in a long series of cases in India reviewed in *Desoo Venkatesa* v. *Srinivasa Ranga Row* (3). and *Syam Mandal* v. *Sati Nath Banerjee* (4). The question consequently arises, whether notice under S. 248 was requisite in the circumstances of this case. The decree holder was dead; so also was the judgment debtor; and more than one year had elapsed from the date of the decree when the application for execution was made on the 4th September 1907. Consequently, prima facie, notice under S. 248 was requisite; but no such notice would be essential, if the requisite notice had been given upon a previous application for execution. The only previous notice to which reference has been made was a notice given upon an application made on the 18th May 1907, for transmission of the decree, and granted by Harington, J., on the 23rd August 1907. This, however, is plainly not a notice as contemplated by S. 248, Civil P. C. The fundamental distinction between an application for transmission of a decree and an application for execution of a decree was fully analysed and examined in the case of *Sripati Charn* v. *Belchambers* (5), and was also incidentally explained by the Full Bench in *Chutterput Singh* v. *Sait Sumari Mal* (1). That view has now been confirmed by the decision of the Judicial Committee in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (6). Consequently, the notice given to the representatives of the judgment-debtor of the application for transmission of the decree cannot rightly be treated as notice given upon a previous application for execution within the meaning of S. 248 of the Code of 1882. The true position then is that notice under S. 248 was requisite upon the application of the 4th September 1907, that such notice admittedly was not given, that the orders of the 7th September 1907 and the 29th July 1908, were made without jurisdiction, and that consequently, no legal proceedings can be taken on the basis thereof.

It has been argued however that this contention is not open to the appellant by reason of certain proceedings which took place in 1910, and may be briefly described. On 12th March 1910 the decree-holder made an application for sale. The usual order was made by the Master on the 21st April 1910. No further action appears to have been taken on the basis of this application. But on the 27th August 1914, the appellant, in his character as trustee of the estate of his grandfather, appeared in Court and contended that the property sought to be sold was trust property and was not liable to be seized in execution of a decree obtained against his father. Chitty, J., on the 27th August 1914 overruled this objection. The contention of the respondent is that this order attracts the operation of the rule laid down by the Judicial Committee in *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (7). That case however can have no possible application to the circumstances of the present litigation, for there was no determination by Chitty, J., directly or by implication, on the 27th August 1914, that the order for attachment made on the 27th September 1907 and the order for sale made on the 29th July 1908 were valid and legal orders. In my opinion the point taken by the appellant is open to him and really concludes the matter. In these circumstances I need not express an opinion upon the question whether the application for execution made on the 4th September 1907 may be deemed as still pending and whether an application to revive it and to carry on proceedings on the basis thereof may still be entertained by this Court on the principle recognized by the Judicial Committee in *Qamar-ud-din Ahmad* v. *Jawahir Lal* (8), or is liable

2. A I R 1914 P C 129=42 Cal 72=41 I A 251 24 I C 304 (P C).
3. (1910) 4 I C 306=33 Mad 187.
4. (1917) 38 I C 493.
5. (1910) 8 I C 22.
6. (1916) A I R 1916 P C 16=39 Mad 640=36 I C 682 (P. C.)
7. (1882) 8 Cal 51=8 I A 123 (P.C.)
8. (1905) 32 I A 102=27 All 334. (P. C.)

to be refused as an abuse of the process of the Court. I agree that this appeal must be allowed and the application dismissed with costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 917

MOOKERJEE AND BEACHCROFT, JJ.

Chandi Charan Nath — Defendant — Appellant.

v.

Somla Bibi— Plaintiff — Respondent.

Letters Patent Appeal No. 85 of 1916, Decided on 31st August 1917, against decree of Newbould, J., D/- 27th March 1916, in Appeal No. 3069 of 1914.

(a) Bengal Tenancy Act (1885), S. 49— Under-raiyati lease — Grantor claiming raiyati right—Grantee alleged to be granted barsana right — Lease held terminable by notice to quit.

In 1891 plaintiff granted an under-raiyati lease to the defendant, The lease was not for any specified term, but was described as as a harsana patta (yearly lease). The plaintiff stated that she had a raiyati interest in the land and the defendant was enjoined to have an entry made in the Survey and Settlement Record that the grantor possessed a raiyati right and the grantee himself a harsana right :

Held: that the lease was terminable by a notice to quit under S. 49 (b). [P 918 C 2]

(b) Lease—Annual tenancy— Termination.

Per *Mookerjee, J.*—It is of the very essence of an annual tenancy that it is terminable by the landlord on notice to quit. [P 918 C 1]

(c) Bengal Tenancy Act (1885), S. 49 — S. 49 does not prescribe any form of notice —Under-raiyat is protected from ejectment till end of agricultural year.

Per *Mookerjee, J.*—S. 49, Ben. Ten. Act, prescribes no form of notice, nor does it give any indication as to the length of notice. An under-raiyat is protected from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord, and this indicates the time when it becomes obligatory upon him to leave. [P 918 C 1 ,2]

(d) Bengal Tenancy Act (1885), Ss. 49 and 85 — Sub-lease by raiyat for period exceeding nine years is void.

Per *Beachcroft, J.*—A sub-lease by a raiyat for a period exceeding nine years, whether registered or not, is void, and can be questioned by the grantor or a person claiming through him. *Case-law discussed.* [P 923 C 1]

(e) Estoppel — Represention must be of fact.

Estoppel by representation only arises where the representation is as to a matter of fact. [P 920 C 2]

(f) Civil P. C. (1908), O. 6, R. 4—Estoppel.

It is absolutely necessary to plead estoppel if it is intended to rely upon it. [P 920 C 1]

(g) Bengal Tenancy Act (1885), S. 85 (2) — Raiyat giving sub lease in contravention of S. 85 (2) on false representation as to his status — Suit by raiyat against sub-lease — Raiyat cannot deny status alleged by him.

Where a raiyat giving a permanent sub-lease in contravention of the provisions of S. 85 (2), induces his lessee to accept it on the faith of a representation that his own status is such as to validate such a sub lease, he cannot afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be. [P 920 C 1]

Probodh Kumar Das — for Appellant.

Chandra Sekhar Sen—for Respondent.

Mookerjee, J.—This is an appeal under Cl. 15, Letters Patent, from the judgment of Newbould, J., in a suit for ejectment. On 20th February 1891 the plaintiff granted an under-raiyati lease to the defendant. The lease was not for any specified term, but was described as a harsana patta (yearly lease). The grantor stated that she had a raiyati interest in the land under a grant from her superior landlord, dated 26th November 1888 ; and the grantee was enjoined to have an entry made in the Survey and Settlement Record that the grantor possessed a raiyati right and the grantee himself a harsana right. On 12th April 1911 the plaintiff served a notice upon the defendant calling upon him to quit the land at the end of six months. On 14th August 1911, she instituted the present suit to eject the defendant who had not left the land in spite of the notice to quit. The Court of first instance dismissed the suit on the ground that the tenancy was permanent and was valid and operative as between grantor and grantee. Upon appeal, the Subordinate Judge held that a permanent lease registered in contravention of S. 85 (2), Ben. Ten. Act, was of no effect, and that the defendant was consequently liable to be ejected on service of notice to quit. The suit was accordingly decreed and that decree has been affirmed by Newbould, J.

On a perusal of the lease, it is obvious to me that it was not intended to be and is in no sense a permanent lease. It is throughout described as a lease from year to year. The case appears to have been argued in the Courts below on the erroneous assumption that it was a permanent lease, because the interest was treated as heritable. No question, consequently, arises whether a permanent lease registered in contravention of S. 85 (2), Ben. Ten. Act, is ineffectual for all purposes between grantor and grantee, a question which has led to some divergence of judicial opinion in this

Court, nor is it necessary to consider the question of the applicability of the doctrine of estoppel to this case, for here both the parties knew and stated explicitly that the grantor was a raiyat: *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (1). If then, we assume that the lease was operative between lessor and lessee, obviously this furnishes no answer to the claim for ejectment, for it is of the very essence of an annual tenancy that it is terminable by the landlord on notice to quit. Ordinarily the landlord has to give six months notice ending with a year of the tenancy, but in the case of agricultural tenancies of the description now before me, the provision for notice is to be found in S. 49, Ben. Ten. Act. That section contemplates two classes of cases, namely, first where an under-raiyat holds under a written lease for a specified term, and, secondly, where an under-raiyat holds either without a written lease or under a written lease which is not for a specified term: *Raj Kumari Debi* v. *Barkatulla Mandal* (2). The defendant is an under-raiyat of the second description: *Mohendra Nath Sepai* v. *Parbutty Charan Dass* (3), *Komaruddi* v. *Sreenath Choudhuri* (4) and *Inaugazi Doctor* v. *Chandra Kali Sundrani* (5). The landlord has complied with the requirements of S. 49 (b).

The notice was served just before the expiry of 1272 M. S., the tenant was bound to quit by the end of 1273, that is on 13th April 1912, and the suit was instituted some months later. The only possible objection which can be taken to the notice is that it called upon the tenant to quit at the end of six months from the date of its service, but as pointed out by Jenkins, C. J., in *Harifulla Gain* v. *Benode Behary Mondol* (6), S. 49 prescribes no form of notice nor has it given any indication as to the length of notice, and the Chief Justice added that it would be deplorable to introduce into matters of this kind the intricacies of Engligh law as prevailing in the Presidency towns. The under-raiyat is protected from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord, and this indicates the time when it becomes obligatory upon him to leave. I am of opinion that the tenancy in this case was terminable, was, in fact and in law, validly terminated by a notice under S. 49 (b), and the plaintiff was at the date of the institution of the suit, entitled to recover possession of the land from the defendant. The appeal must accordingly be dismissed with costs.

Beachcroft, J.—The plaintiff in this suit sued to eject the defendant from certain land. She alleged that her status was that of a raiyat, that she gave the defendant a lease of the land in suit, that the lease could not confer a permanent right on defendant or, in fact, any right for a period exceeding nine years, and that on the expiry of the nine years, she served defendant with a notice to quit. The defence was that the lease was a permanent one, that the Bengal Tenancy Act did not apply and that no notice was served. The Munsif held that the Bengal Tenancy Act applied and that notice was served. But as the lease contained provisions for devolution by inheritance, he considered it would be inequitable to allow the plaintiff to recede from the terms of the contract made by her and dismissed the suit. On appeal the findings of the Munsif as to service of notice and as to the applicability of the Bengal Tenancy Act were not disputed. The Subordinate Judge also upheld the view that the patta in terms created a permanent tenancy. But he considered himself bound by certain decisions of this Court to hold that the patta could not be given in evidence and that the lease could not be proved by oral evidence. He therefore decreed the suit.

It may here be noted that even if there had been a finding as to a tenancy created otherwise than by the patta, it would have been of no avail to the defendant in view of the finding as to the service of notice. On appeal to this Court the decree of the Subordinate Judge was upheld by Newbould, J., and the present appeal is against that learned Judge's decision. Before Newbould, J., the appeal appears to have been argued on the footing that the sub-lease granted by the plaintiff was a permanent one and before us also it was argued by both sides on that supposition. That being so, I propose to deal with the matter as if the sub-lease

1. (1917) 44 Cal 771=35 I C 754.
2. (1912) 39 Cal 278=12 I C 161.
3. (1904) 8 C W N 136.
4. (1904) 8 C W N 136.
5. (1904) 8 C W N 139.
6. (1913) 19 I C 557.

in terms purported to create a permanent tenancy. The position then is that the plaintiff, who is a raiyat, having given the defendant a sub-lease for a period exceeding nine years, has succeeded in ejecting him on the plea that the lease cannot be valid for a period exceeding nine years.

The main argument that has been addressed to us is that the plaintiff was estopped from denying that her status was such as to make her competent to grant the lease. A second point taken is that S. 85 (2), Ben. Ten. Act, was enacted for the benefit of the landlord and, therefore no one else but the landlord of the raiyat could question the validity of the sub-lease. It will therefore be necessary to deal with the two questions of estoppel and of the scope of S. 85 (2). In regard to S. 85 (2) two views have been taken, one, that it was enacted for the benefit of the superior landlord and therefore no one else can question the validity of a lease for a period exceeding nine years, and certainly not the raiyat who has granted the lease, will be estopped from doing so; the other, that whether the intention of the legislature was to protect only the landlord or not, and the view has been expressed that it was intended also to protect the raiyat, the section is framed in such wide terms as to make a lease for a period exceeding nine years absolutely invalid. That the raiyat is not estopped from denying the validity of such a lease has been held in more than one case in this Court. In the case of *Fazel Sheikh* v. *Keramuddi Sheikh* (7) the question was directly raised and answered in the negative. That was a case between the purchaser in execution of a money decree of the right, title and interest of the raiyat and the sub-lessee.

The purchaser would be bound by the same estoppel as the original raiyat. It was held that no question of estoppel arose, because the plaintiff (the purchaser) was not bound by a sub-lease void in law and which his predecessor-in-interest was not empowered to grant. The report does not set out the nature of the arguments advanced on the question of estoppel, but the decision would appear to rest on the principle that there can be no estoppel against a statute, which was the ground on which the argument of estoppel was again rejected in the case of *Telam Paramanik* v. *Adu Shaikh* (8). This was a case between two persons both of whom had permanent sub-leases from the same raiyat, the defendants being later in point of time. The defendant was in possession and pleaded the invalidity of plaintiff's title under the permanent lease. If the doctrine of estoppel would have prevented this plea from the raiyat who granted the sub-lease to defendant, it would also have prevented the defendant from raising the plea, and it was accordingly argued that the raiyat could not have raised the plea. This argument was rejected. In the case *Manik Borai* v. *Bani Charan Mondal* (9) it was hinted, though it was not necessary to decide the point, that the principle that there could be no estoppel against a Statute might defeat a plea of estoppel as between the grantor and grantee.

In the case of *Telam Paramanik* v. *Adu Shaikh* (8) the question of estoppel was certainly not argued in the form in which it is now put forward, and possibly in the earlier case cited it may have been based on the principle that a grantor may not derogate from his own grant. The argument in the present case is based on the doctrine of estoppel by representation. It is that the plaintiff having represented herself to hold a status which would enable her to grant a permanent lease, she cannot be allowed to turn round and say that her status was other than that represented. In support of the argument reliance was placed on the case of *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (1). In that case the lessee endeavoured to establish the position that his lessor was not a tenure-holder as the lease indicated, but an occupancy raiyat and, therefore, that the lease was void under S. 85, Ben. Ten. Act. That is the converse case to the present. It was held that the lessee having got possession from his lessor was estopped from denying the validity of his lessor's title. That decision cannot help the appellant in the present case. Landlord's estoppel and tentant's estoppel are based on entirely different considerations. It is also open to question whether the rest of the judgment can be regarded as an authority in favour

7. (1902) 6 C W N 916.

8. (1913) 18 I C 791.
9. (1911) 10 I C 469.

of the appellant. For having decided the question of estoppel, which was enough to dispose of the appeal, except as regard the question of damage, the learned Judges proceeded to support their conclusion by an argument based on the converse case, in which they assumed the very point which is now under discussion. They then referred to a number of cases dealing with the construction of S. 85, Ben. Ten. Act, and remarked that as between the grantor and grantee the rule of estoppel applies when the elements essential to attract its operation are proved to exist. At the proposition expressed in those terms it is impossible to cavil; no authority is required to support it. The question is what are the elements essential to attract its operation.

It was not, however, necessary in my opinion for the appellant to invoke the support of this case to establish a well-settled proposition. If he required an authority it would have been sufficient to quote the words of Lord Selborne, L. C, in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (10) as to representations being treated as true if another person relying on them has altered his situation. And subject to any question as to admissibility in evidence by reason of the registration law, I have no doubt that if it be found as a fact that a raiyat giving a permanent sub-lease in contravention of the provisions of S. 85 (2) has induced his lessee to accept it on the faith of a representation that his own status was such as to validate such a sub-lease, he will not afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be. As to the doctrine I have no doubt, as to its application to the present case there is considerable difficulty. In the first place the estoppel was not pleaded in the written statement. One reason possibly is that the defence taken to the plaintiff's claim, that the lease was not valid for more that nine years was that the Bengal Tenancy Act did not apply. It is absolutely necessary to plead estoppel if it is intended to rely on it. This is not a technical rule of pleading, but a matter of substance. For if estoppel is pleaded it may be possible for the other side to show that there could be no estoppel, the real facts being known. It was particularly necessary that the plea should be taken in this case, for the document itself raises a doubt as to the grantor's competency to grant a permanent lease.

As a necessary consequence of the absence of the plea, there is no finding and presumably no evidence that such a representation as indicated above was made and relied on. Nor are we told even now what is the representation which was made as to the plaintiff's status. It is said the representation is made in the document itself. It does necessarily follow that it was on the faith of that statement that the sub-lessee accepted the lease. In fact the representation must have been made before the document was drafted, but if any was made which considering the general knowledge that villagers have of each other's affairs cannot be predicated as a matter of certainty, it is a reasonable assumption in favour of the appellant that the statement in the document is identical with the representation made and accepted. Now what is the representation contained in the document? The whole document has not been translated for us, but a portion has, and that portion contains a passage which indicates the representations. It runs:

"In the Survey Record you should record my right as raiyati and yours as harsana",

i. e., the plaintiff was making it clear that her status was that of a raiyat. Now ordinarily a raiyat cannot give a sub lease for more than nine years but there is one class of raiyats, which is not subject to the bar, viz:, raiyats holding at fixed rates. It has been held that such raiyats coming under S. 18, Ben. Ten. Act, are not subject to the provisions of S. 85. In fact that decision was given long after the sub-lease in question, at the date of which the question was an open one. Raiyats holding at fixed rates are a small and exceptional class. What we have then at most is that the status of the plaintiff was said in the document to be that of a class the members of which could only in exceptional cases grant permanent sub-leases, while the large majority of the class were subject to the provisions of S. 85. Estoppel by representation only arises when the representation is as to a matter of fact. It can, therefore, only be effectively pleaded in this case, if we can say that the plaintiff represented herself to be a raiyat at fixed rates and the

10. (1873) 6 H L 532=43 L J Ch 269.

defendant believing that representation was thereby induced to take the permanent lease. On the facts before us it is impossible to assume that she made any such representation. That being so, the appellant's argument based on estoppel, in my opinion, fails. There remains the other question whether the raiyat, the grantor of the lease, can avail himself of the bar created by S. 85 (2). In the case of *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (1) a numder of cases bearing on S. 85 were quoted as affirming the view that a lease granted in contravention of S. 85 was operative as between grantor and grantee. The list given is not exhaustive, as will appear from a reference to the reports of some of the cases cited, and with all respect to the learned Judges, I venture to question the accuracy of the conclusion which they drew from the cases cited. There are following cases in connexion with S. 85 in chronological order:

Srikant Mondul v. *Saroda Kant Mondul* (11), *Gopal Mondal* v. *Eshan Chunder Banerjee* (12), *Madan Chandra Kapali* v. *Jaki Karikar* (13), *Fazel Sheikh* v. *Keramuddi Sheikh* (7), *Ramgati Mandul* v. *Shyama Charan Dutt* (14) and *Ali Mahommad* v. *Nayan Rajah Bhuiya* (15), this case though decided in 1903 was not reported till 1912: *Basaratulla Mundle* v. *Kasirunnessa Bibi* (16), *Bipin Behari Hati* v. *Amirta Lal Bhattacharji* (17), *Tamijuddi* v. *Asgar Howladar* (18), *Manik Borai* v. *Bani Charan Mondal* (9), *Arab Ali* v. *Rachimaddi* (19), *Abdul Karim* v. *Abdul Rahman* (20), *Jarip Khan* v. *Duraf Bewa* (21), *Telam Pramanik* v. *Adu Shaikh* (8), *Mohim Chandra Dey* v. *Baidya Nath* (22), *Gonesh Mondol* v. *Thanda Namasundrani Janaki Nath Hore* v. *Prabhasini Dasi* (24) and *Lani Mia* v. *Muhammad Esin Mia* (25). Some of these cases were referred to by Carnduff, J., in the case of *Telam Pramanik* v. *Adu Shaikh* (8) and the learned Judge pointed out that those cases were not authorities for the construction of sub-S. (2), S. 85. And it is obvious that cases in which the question before the Judges was the effect to be placed on other sub-sections of S. 85 can be no authorities on the question before us, and if the learned Judges in those cases were led into making remarks referring to S. 85 (2), such remarks can at most be obiter dicta. Four of the cases in the above list, viz., Nos. 2, 3, 8 and 11 [*Gopal Mandal Eshan Chunder Banerjee* (12), *Nadan Chandra Kapali* v. *Jaki Karikar* (13), *Bipin Behari Hati* v. *Amirta Lal Bhattacharji* (17), *Arab Ali* v. *Rachimaddi* (19)], which dealt with S. 85 (3), may therefore at once be eliminated from our consideration.

Then there is a class of cases in which the lease was for nine years only but there was a covenant for renewal. In the 6th of the above cases [*Ali Mohammad* v. *Nayan Rajah Bhuiya* (15)] it was held that S. 85 was not a bar as the lease was not for more than nine years. That was followed in case No. 18 [*Lani Mia* v. *Muhammad Easin Mia* (25).] In *Tamijuddi* v. *Asgar Howladar* (18) also the lease was not one for more than nine years and the contest was between the superior landlord and the sub-lessee. In that case therefore the Judges did not have to consider the present question, viz. the validity of a lease for more than nine years, when raised as between the grantor and grantee. These three cases may therefore be eliminated. In the first case on the list [*Srikant Mondul* v. *Saroda Kant Mondul* (11) the Court decided that a sub-lease for more than nine years was altogether void. The case was however between the superior landlord and the sub-lessee and the Court had not to consider whether the grantor could question the validity of the lease. Nor is the 17th case, that of *Janaki Nath Hore* v. *Prabhasini Dasi* (24), an authority on the question before us. There the question arose between the purchaser of a holding in execution of a rent decree who is not a representative of the original raiyat, and the sub-lessee. It was pointed out that no considerations such as might apply between grantor and grantee applied to the case. This reduces the list of cases to which reference need be made

11. (1899) 26 Cal 46.
12. (1902) 29 Cal 148,
13. (1902) 6 C W N 877.
14. (1902) 6 C W N 919.
15. (191?) 13 I C 912.
16. (1907) 11 C W N 190.
17. (1909) 3 I C 685.
18. (1909) 36 Cal 256=1 I C 942.
19. (1911) 10 I C 562.
20. (1912) 13 I C 864.
21. (1912) 15 I C 476.
22. (1915) 29 I C 879.
23. (1917) 38 I C 486.
24. (1916) 43 Cal 778=30 I C 898.
25. (1916) 33 I C 448.

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to nine. In *Fazel Sheikh* v. *Keramuddi Sheikh* (7) the contest was between the sub-lessee and the successor in interest of the raiyat. It was held that the permanent lease was altogether void in view of the express provisions of S. 85 (2) and that the successor-in-interest of the grantor could question its validity.

In *Ramyati Mandul* v. *Shyama Charan Dutt* (14) the contest was between the superior landlord and the sub-lessee. In this case the superior landlord was a raiyat; he gave a sub-lease, and his lessee again gave a sub-lease. As between the two lowest lessees, S. 85 could not apply, as it applies only to sub-leases by a raiyat. But in order to ascertain the title of the lowest lessee the Court had to consider the validity of the permanant sub-lease granted by the raiyat and the learned Judges held, again at the instance of the grantor, that it was invalid. In *Basaratulla Mundle* v. *Kasirunnessa Bibi* (16) the lease was for a period of nine years with a covenant for renewal. On a suit to eject the sub-lessee after the expiry of the term of nine years, it was argued that the sub-lessee was protected by the covenant for renewal and that S. 85 (2) could be enforced only on behalf of the superior landlord. This argument was negatived by Geidt, J. In *Manik Borai Bani Charan Mondal* (1) the sub-lessee of the raiyat had been dispossessed by some persons other than the grantor of the sub-lease. It is not stated under what title these persons claimed, but in one passage in the judgment it is stated that the contest was between the under-raiyat (i. e., the sub-lessee) and a trespasser who had no title, and it was, therefore,

"unnecessary to consider whether the validity of a sub lease granted by a raiyat in contravention of S. 85 could be questioned by the grantor."

That being so, the case is not an authority for the question now before us, for though in another part of the judgment there is an expression of opinion that the question could only be raised by the superior landlord, the case was disposed of on the ground that "the plaintiff had a subsisting interest when the action was commenced." In *Abdul Karim* v. *Abdul Rahman* (20) the contest was between the raiyat and his lessee. It was held that the lease was a permanent one and that the contract was valid in law, so far as the contracting parties were concerned. Carnduff, J., was a party to this decision and he subsequently in *Telam Paramanik* v. *Adu Sheik* (8) expressed the opinion that the case had been wrongly decided and that the authorities quoted in support of the proposition stated therein were in fact not authorities for the proposition. In *Jarip Khan* v. *Durfa Bewa* (21) it was held that a sub-lease for more than 9 years, which had been registered in contravention of S 85 (2), must be treated as not registered and that there was, therefore, no proof of the title of the person who claimed under the sub-lease. The effect of this decision was the same as the effect of *Fazel Sheik* v. *Keramuddi Sheik* (7) and other cases on the same lines, viz., that a sub-lease for more than 9 years is absolutely void. To the same effect was the case of *Telam Paramanik* v. *Adu Sheik* (8), where the question was raised between the grantee and a transferee of the grantor.

In *Mohim Chandra Dey* v. *Baidya Nath* (22), a case between the raiyat and his lessee, it was held, following *Jarip Khan* v. *Durfa Bewa* (21) and *Telam Paramanik* v. *Adu Sheik* (8), that the lease was a nullity, and that acceptance of rent could not ratify a lease which was initially void. The learned Judges did not state whether they approved or not of the view taken in the two cases cited; this case, therefore, does not add to the authority of those cases. The only point worthy of note is that one of the Judges, viz. Coxe, J., was a party to the decision in *Manik Borai* v. *Bani Charan Mondal* (9) and if he intended to hold in the last mentioned case that the question of validity of the lease could not be raised as between grantor and grantee, he had apparently modified his view in 1914. *Gonesh Mondal* v. *Thanda Bamasundrani* (23) also does not lend authority either way. Fletcher, J., pointed out that there were two classes of cases, one in which the sub-lessee was precluded from proving his lease, as exemplified by *Jarip Khan* v. *Durfa Bewa* (21), and one in which he was able to rely on possession to prove his tenancy independently of his lease, as exemplified by *Manik Borai* v. *Bani Charan Mondal* (9). He had to see whether the facts of the case before him brought it within the first or the second class, and finding it to be within the latter, he considered the decision referred

to had to be followed. This case is not an authority for the proposition that the raiyat cannot question the validity of the sub-lease.

The result of the cases appears to be this: The document creating the lease cannot be given in evidence if the lease is for more than 9 years, whether the document has been registered or not, and the lease is void. This is undisputed, with this exception that the lease may perhaps be operative as against the grantor or a person claiming title from him. As to this point four different Judges in four cases [*Fazel Sheik* v. *Keramuddi Sheik* (7), *Ramgati Mandul* v. *Shyama Charan Dutt* (14), *Basaratulla Mundle* v. *Kasirunnessa Bibi* (16) and *Telam Paramanik* v. *Adu Sheik* (8),] have held that the grantor or a person claiming from him can question the validity of the lease and that it is not operative against him. In only one case [*Abdul Karim* v. *Abdul Rahman* (20)], in which it has been necessary to decide the point has the contrary been held and one of the Judges who took part in that decision subsequently took precisely the opposite view. The authorities, therefore, point to this: that the validity of the lease can be questioned by the grantor; and that this view should have been taken is not surprising when, to use the words of Jenkins, C. J.,

> "the legislature saw fit to carry out the particular purposes indicated in sub-S. (2) by a provision which must of necessity have been of universal application. In forbidding registration it forbade for all purposes the production of the document as evidence and withheld from it any ability to affect immovable property."

And though the Act has been extensively amended since three out of the four cases, to which I have just referred, were decided, S. 85 has remained untouched. I regret that I am compelled to take a view, which allows a man to profit by violating his own contract. The view may be taken that a person deserves no sympathy, who taking a lease for more than 9 years with his eyes open deliberately attempts to evade the law. The knowledge that he may be penalised by his grantor is perhaps the best deterrent, though it is not conducive to honesty to permit advantage to be taken of an evasion of the law by one who has himself been a party to it. However, the statute is so worded that, in my opinion, the conclusion to which I have come cannot be avoided. I, therefore, agree that the appeal should be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 923

CHATTERJEA AND NEWBOULD, JJ.

Jnan Chandra Das and *others*—Plaintiffs—Appellants.

v.

Rajani Kanta Pal and *others*—Defendants—Respondents.

Appeal No. 2313 of 1915, Decided on 27th July 1917, from appellate decree of Sub-Judge, Dacca, D/- 8th June 1915.

Transfer of Property Act (1882), S 54—Possession under Contract of sale on payment of purchase-money— Before registration land sold in execution of decree against purchaser —Purchaser cannot recover property from auction-purchaser on subsequent conveyance by registration,

The plaintiff got into possession of a piece of land on payment of the entire consideration for its purchase under a contract of sale. Before the conveyance was registered, however, the land was sold and was purchased by the defendant in execution of a money decree against the plaintiff:

Held: that the plaintiff at the date of the auction-purchase by the defendant had acquired a right to the land which passed to the defendant under the sale in execution, so that the plaintiff could not contend that he had no interest in the property which could be purchased by the defendant at the execution sale, and that he was not entitled to recover the property from the defendant on getting a registered conveyance from its former owner after the defendant's purchase.

[P 925 C 2]

Gobinda Chandra De Roy—for Appellants.

Birendra Chandra Das—for Respondents.

Judgment.—The suit out of which this appeal arises was one to recover possession of the lands in dispute under the following circumstances: The lands belonged originally to the plaintiff. They were sold in execution of a decree for money against him and purchased by Debendra in March 1905, and symbolical possession was taken by him in March 1906. Debendra agreed to convey the lands to to the plaintiff in consideration of a sum of Rs. 232 and actually executed a conveyance on 27th March 1906, but it was not registered as plaintiff paid only Rs. 200 out of the consideration. The plaintiff, however, was allowed to remain in possession. On 17th July 1907 the lands were sold in execution of another money decree against the plaintiff, and were purchased by defendant 1, who obtained possession of the lands. The plaintiff on 29th November 1907 obtained

a second kobala from Debendra which was duly registered. It is upon the strength of this second kobala that the plaintiff brought the present suit for declaration of his title by purchase from Debendra and for possession against defendant 1, on the ground that at the time of the purchase by the latter, he, the plaintiff, had not acquired any interest which could be purchased by defendant 1, the title to the lands being still then with Debendra as no registered conveyance had been executed until 29th November 1907, i. e. after the purchase by defendant 1.

As there was no clear finding whether the balance of the purchase money had been paid to Debendra before the purchase at the execution sale by defendant 1, and also upon the question whether the plaintiff was in possession at the date of the said purchase, we sent back the case to the lower appellate Court for findings on those points. The Court has found that the whole of the purchase money had been paid by the plaintiff to Debendra before the purchase by defendant 1, and that the plaintiff was in possesssion at the date of the auction-purchase by defendant 1. Upon the findings the position appears to be this. At the date of the purchase by defendant 1 at the execution sale (17th July 1907), the plaintiff had paid the entire consideration money (Rs. 232) to Debendra who had purchased his rights at a previous execution sale, and who had agreed to convey the property to him, and the plaintiff was allowed to remain in possession of the property. In the circumstances stated above, plaintiff undoubtedly could have sued Debendra for specific performance, and he could have successfully resisted a suit by Debendra if the latter sued the plaintiff for possession of the property, although there was no registered conveyance executed by him. The argument founded upon S. 54, T.P. Act, that in the absence of a registered instrument the transaction was a nullity, was relied on by Cox, J., in the case of *Puchha Lal* v. *Kunj Behary Lal* (1), but was overruled by the Court of appeal (Jenkins, C. J., and Mookerjee, J.) relying upon the principle laid down in *Walsh* v. *Lonsdale* (2). Jenkins, C. J., observed in that case:

> "there is no invasion or evasion of the Registration Act. It is merely securing to a party those rights to which he is entitled apart from the Acts—rights to which he has a good title in Courts to which the abiding direction has been given to proceed in all cases according to equity and good conscience."

The principle was followed in the case of *Khagendra Nath Chatterjee* v. *Sonatan Guha* (3), in which the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (4) was also relied upon. Having regard to those decisions we think that the plaintiff at the date of the purchase by defendant 1 had acquired a right to the property and that as Debendra could not, at that date, enforce any right against the plaintiff, the plaintiff cannot contend that he had no interest in the property which could be purchased by defendant 1. It is contended that defendant 1 cannot avail himself of any equity which could be enforced by the plaintiff, but defendant 1, as the purchaser of the rights of the plaintiff, can do so. It is contended further on behalf of the plaintiff-respondent that the view taken in the cases of *Puchha Lal* v. *Kunj Behary Lal* (1) and *Khagendra Nath Chatterjee* v. *Sonatan Guha* (3) must be taken to have been overruled by the decision of the Judicial Committee in the recent case of *Maung Shwe Goh* v. *Maung Inn* (5). In that case it was found that the mortgagor had, subsequent to the mortgage, agreed (on 4th April 1906) with the mortgagee to sell the property mortgaged to the latter on or before 6th July 1906 for one lac of rupees if he failed to pay the mortgage money (Rs. 50,000) with interest. He failed to do so and a decree was passed for specific performance of the contract to sell. The mortgagee entered into possession of the property on 24th March 1911 though no proper conveyance of the equity of redemption had been executed, and on an application which was in form for execution of the decree for specific performance, a question arose as to the manner in which the purchase money payable under the contract for sale was to be calculated. The mortgagee contended that interest continued to run upon his mortgage until the date when he entered into possession and

1. A I R 1914 Cal 21=20 I C 803.
2. (1882) 21 Ch D 9.
3. (1915) 31 I C 987.
4. A I R 1914 P C 27=42 Cal 801=28 I C 930 =42 I A 1 (P C)
5. A I R 1916 P C 139=44 Cal 542=38 I C 936 (P C).

that consequently the principal sum of Rs. 50,000 together with the agreed interest up to that date ought to be deducted from the one lac of rupees which was the purchase price, and the balance only should be paid by him. It was held by the Chief Court of Burma that he was entitled to bring into account the amount due for principal and interest up to the 6th July 1906.

The Judicial Committee pointed out that the foundation of that judgment of the Chief Court depended upon the application to the contract of 4th April 1906 of the well-known principle by which the rights of vendors and purchasers are regulated in England, and under which a contract for sale of real property makes the purchaser the owner in equity of the estate and from that principle it followed that:

"where the rights as to payment of interest on the purchase money are not regulated by the terms of the contract the purchaser is deemed to be entitled to the rents and profits of the property, as from the time when he did take or could safely have taken possession, and interest on the purchase money runs in favour of the vendor from that time,"

and observed:

"It has been pointed out to their Lordships that the underlying principle, upon which this rule depends, has no application to the sale of real estate in Lower Burma, since by S. 54. T. P. Act, 1882, (a Statute made applicable to Lower Burma), it is expressly provided that such a contract creates no interest in or charge upon the land. If, therefore, the contract was silent in dealing with the question of interest, their Lordships think that the appellant would have strong ground for contending that the reasoning in the Court of appeal could not be supported."

But apart from that consideration, their Lordships held that the appellant must succeed upon the construction of the contract itself. Now S. 54, T. P. Act, expressly lays down that a contract for the sale of immovable property does not of itself create any interest in or charge on such property, and to that extent it differs from the rule of English law, and this is all that was pointed out by the Privy Council. The question whether the equitable doctrine of part performance, which arises from the fact that the vendee has paid the full purchase money and has obtained possession of the property agreed upon to be sold, is inapplicable by reason of the provisions of S. 54, T. P. Act, was not considered nor decided by their Lordships. In the present case defendant 1 does not rely upon the mere contract of sale, which by itself (as laid down by S. 54, T. P. Act) does not create any interest in the property. He relies upon the fact of the entire purchase money having been paid and possession obtained by the plaintiff under the contract of sale. The Judicial Committee in an earlier case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (4) cited above, referring to the case of *Maddison* v. *Adlerson* (6), observed:

"Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne, in *Maddison* v. *Alderson* (6), founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow."

In the present case the person who disputes the right of defendant 1 is the plaintiff himself whose interests were purchased by the former. No question therefore arises of any third person having acquired any rights in the property and we are not pressed with any considerations of the policy of the Registration Act. We are of opinion that the interests of the plaintiff in the property passed to defendant 1 under the sale in execution. The decree of the lower appellate Court must therefore be set aside and that of the Court of first instance restored. The appellant will be entitled to his costs.

V.B./R.K. *Decree set aside.*

6. (1883) 8 A C 467.

A. I. R. 1918 Calcutta 925

MOOKERJEE AND WALMSLEY, JJ.

Kanai Lal Ghose — Plaintiff — Petitioner.

v.

Jatindra Nath Chandra — Opposite Party.

Civil Rule No. 82 of 1917, Decided on 15th May 1917, against the order of Dist. Judge, Burdwan, D/- 13th March and 28th August 1916.

(a) Specific Relief Act (1877), S. 9—"Suit" —Meaning, explained—Order in execution of decree is not appealable.

The term "suit" in S. 9 includes an execution proceeding on the basis of a decree. Therefore, no appeal lies against an order made in execution of a decree under S. 9. [P 926 C 2]

(b) **Jurisdiction—Consent.**

Where there is an inherent incompetency in a Court, no consent can confer upon it that jurisdiction which it does not possess. [P 927 C 1]

(c) **Civil P C. (1908), S. 151—Court cannot assume jurisdiction forbidden by legislature.**

A Court cannot in the exercise of its inherent power under S. 151, assume jurisdiction by way of review where it has been expressly forbidden by the legislature to entertain an application for review. [P 927 C 1]

(d) **Civil P. C. (1908), S. 115—Misconstruction of decree is error of law.**

An error due to the misconstruction of a decree committed by a Subordinate Court is an error of law which does not constitute sufficient ground for the interference of the High Court in the exercise of its revisional powers under S 115. [P 927 C 2]

Satindra Nath Mukherjee—for Petitioner.

Lalit Mohan Banerjee—for Opposite Party.

Judgment.—We are invited in this rule to set aside an order made in execution of a decree for costs in a suit under S. 9, Specific Relief Act. The petitioner instituted this possessory suit against 5 defendants, one of whom contested the claim and appeared at the trial. The suit was ultimately decreed in favour of the plaintiff with costs and interest. The concluding portion of the judgment ran as if the suit was decreed against all the defendants. The decree, however, was framed as a decree against defendant 1 only, namely, defendant 5 who had resisted the claim. The plaintiff decree-holder applied for execution and for recovery of the costs from all the defendants. The Court held that the decree was in essence against defendant 5 alone and so dismissed the application for execution against the other defendants. The decree-holder thereupon appealed to the District Judge. He held that the decree, interpreted by the judgment must be deemed a decree against all the defendants and accordingly directed execution to proceed against all of them. Subsequently, some of the defendants other than defendant 5 applied to the District Judge to review his judgment on the ground that he had no jurisdiction to entertain the appeal. The District Judge accepted this contention as well-founded and thus discharged his original order. The result was that the order of the trial Court stood restored. The plaintiff then obtained the present rule, which calls upon the defendants to show cause why the orders made by the Courts below should not be set aside and why such other order should not be passed as to this Court might seem fit and proper. Consequently all the orders made by the Courts below are before us for consideration. S. 9, Specific Relief Act, provides as follows :

"No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed."

The first question for determination is, whether the term "suit" includes an execution proceeding on the basis of the decree in the suit. In our opinion, the question must be answered in the affirmative. This view was taken in the case of *Thomas Souza* v. *Gulam Moiddin Peari* (1) and was subsequently adopted by the Punjab Chief Court in the case of *Mohfuz Ali* v. *Birji Nand Kerat* (2). Though we have not been able to trace any reported decision on the point in this Court, it is plain that the view taken by the Madras High Court is in conformity with a principle which has been repeatedly recognised and applied here. S. 102, Civil P. C., provides that no second appeal shall lie :

"in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees."

This provision is a reproduction of S. 585 of the Code of 1882, which replaced S. 27, Act 23 of 1861. It was ruled by this Court in the case of *Anund Chunder Roy* v. *Sidhy Gopal Misser* (3) that the expression "suit" in S. 27, Act 23 of 1861 included execution proceedings, and this view was subsequently affirmed by a Full Bench in the case of *Gora Chand Misser* v. *Raja Baykanto Narain Singh* (4). A similar view has been adopted in all the other High Courts [*Din Dayal* v. *Patra Khan* (5), *Narayan Parmanand* v. *Nagindas Bhaidas* (6) and *Mavula Ammal* v. *Mavula Maracoir* (7)]. When a similar question arose before this Court in connection with S. 153, Ben. Ten. Act, it was ruled in the case of *Shyama Charan Mitter* v. *Debendra Nath Mukerji* (8) that the bar provided in that section was applicable not merely to the decree made in the suit but extended to orders

1. (1903) 26 Mad 438.
2. (1915) 28 I C 282.
3. (1867) 8 W R 112.
4. (1874) 12 B L R 261=20 W R 421 (F B).
5. (1896) 18 All 481 (F B).
6. (1906) 30 Bom 113.
7. (1907) 30 Mad 212.
8. (1900) 27 Cal 484.

made in execution of such decree. This position was recently approved by a Special Bench of seven Judges in *Profulla Krishna Deb* v. *Nosibannessa Bibi* (9) We are consequently of opinion that the appeal to the District Judge was incompetent. The fact that no objection was taken to his jurisdiction when the appeal was heard, did not invest him with authority to entertain the appeal; for, as ruled by the Judicial Committee in *Meenaskhi Naidu* v. *Subramania Sastri* (10), where there is an inherent incompetency in a Court, no consent can confer upon the Court that jurisdiction which it does not possess. It is equally clear that the District Judge was not competent to entertain the application for review, because the order he had initially made was an order of the description mentioned in the concluding paragraph of S. 9; so that if the appeal to him was incompetent, as we hold it was, the application for review was equally incompetent.

It cannot futher be maintained that as the District Judge had exercised a jurisdiction which was not vested in him by law, he had inherent power to set matters right by way of review; for, as was explained in *Sasi Bhushan Mookerjee* v. *Radha Nath Bose* (11), it would be a patent misapplication by a Court of S. 151, Civil P. C., if it were, in the exercise of its inherent power, to assume jurisdiction by way of review where it was expressly forbidden by the legislature to entertain such an application. The position thus is that the appeal was heard by the District Judge without jurisdiction and the review was granted to him equally without jurisdiction, and both these orders must consequently be discharged. This leaves us with the order of the Court of first instance, and the only question for consideration is, whether that order is of such a character as to justify an interference by this Court. We are not satisfied that the order was erroneous on the merits. We have examined the decree as also the judgment and our inclination is to hold that the view taken by the Munsif was correct on the merits. But even if it were regarded as erroneous, the error which the Munsif committed would be nothing more than an error of law, due to a misconstruction of the decree such, an error does not constitute a sufficient ground for our interference in the exercise of our revisional jurisdiction. The result is that this rule is discharged, but each party will pay his own costs.

V.B./R.K. *Rule discharged.*

9. (1917) 37 I C 425.
10. (1870-72) 11 Mad 26=14 I A 160 (P.C).
11. A I R 1915 Cal 137=25 I C 267.

A. I. R 1918 Calcutta 927

CHITTY AND RICHARDSON, JJ.

Chandi Charan Giri and *others*—Petitioners.

v.

Gadadhar Prodhan and *another*—Opposite Parties.

Criminal Revn. Petn. No 707 of 1917, Decided on 10th August 1917, against order of Sub-Divl. Magistrate, Contai, D/- 3rd January 1917.

(a) Bengal Tenancy Act (1885), Ss. 69 and 70—Criminal P. C. (1898), S. 195.

A Collector acting under Ss. 69 and 70, Ben. Ten. Act is a Court within the meaning of S. 195, Criminal P. C. [P 928 C 1]

(b) Bengal Tenancy Act (1885), Ss. 69, 70—Proceedings under Ss. 69, 70 are of civil nature—Collector trying proceeding is subordinate to District Judge for purpose of Criminal P. C. (1898), S. 195.

Proceedings under Ss. 69 and 70, Ben. Ten. Act, are f a civil nature and the Collector's Court trying such proceedings must be deemed to be subordinate for the purpose of S. 195, Criminal P. C., to the principal Court of original civil jurisdiction in the district, i, e. the Court of the District Judge. [P 928 C 2]

(c) Criminal P. C. (1898), S. 195, Cl. 7—Principal Court of original jurisdiction does not refer to Court of any particular class.

Per *Chitty, J.*—The principal Court of original jurisdiction within the meaning of S. 195, Cl. 5, does not necessarily refer to a Court of any particular class. It is a Civil or Criminal or Revenue Court as the case may be. [P 928 C 2]

(d) Criminal P. C. (1898), S. 195 (7)—"Where no appeal lies" explained.

Per *Richardson, J.*—The words "where no appeal lies" in Cl. 7, S. 195, are wide enough to include both a particular case or class of cases in which no appeal lies as well a Court from which no appeal lies in any case e. g., a Small Cause Court. [P 929 C 1]

Per *Chitty, J.*—Although these words in Cl. 7, S. 195, are capable of such a wide meaning yet the legislature referred to Courts whose decisions are made final by law, e. g., Small Cause Court. [P 928 C 2]

Jyotish Chandra Hazra and *Santosh Kumar Pal*—for Petitioners.

Jogendra Narayan Mazumdar for *Sarada Charan Maity* — for Opposite Party.

Chitty, J. — In this case the petitioners Chandi Charan Giri and Gagendra Barik applied to the Sub-divisional Officer of Contai, exercising the powers

of a Collector, for appraisement of produce under S. 69, Ben. Ten. Act. In those proceedings the officer, deputed to hold a local enquiry, reported that the petitioners had made use of forged receipts. On this report the Subdivisional Officer refused their application, and at the instance of their opponents granted sanction for their prosecution under Ss. 471 and 209, I. P. C. From that order the petitioners applealed to the Commissioner of the Burdwan Division. The Commissioner held that he had no jurisdiction and that the Court to which the Subdivisional Officer's Court was subordinate was that of the District Judge of Midnapore under S. 195 (7) (c), Criminal P. C. The petitioners then applied to the District Judge, but he threw out their application on the ground that he had no jurisdiction to entertain it. He was of opinion that the Commissioner's Court had jurisdiction, as the Court to which appeals from the decisions of a Collector or officer exercising the powers of a Collectors under the Bengal Tenancy Act would ordinarily lie. Against the District Judge's order the petitioners applied to this Court to exercise its revisional powers, and this rule was issued. It should be noted that in proceedings under S. 69, Ben. Ten. Act, by S. 70 (5),

"the Collector may, if he thinks fit, refer any question in dispute between the parties for the decision of a civil Court, but subject as aforesaid, his order shall be final and shall on application to a civil Court by the landlord or the tenant be enforceable as a decree"

There is consequently no appeal from an order of the Collector under S. 70. The Collector acting under Ss. 69 and 70 is a "Court" within the meaning of S. 195, Criminal P. C.: see *Raghoobans Sahay* v. *Kokil Singh* (1). The question is to what authority he is to be regarded as subordinate for the purposes of S. 195 (6). S. 195-(7) purports to supply the answer, but it is so unfortunately worded as to leave the enquirer in much the same doubt and uncertainty as he was before. The difficulty of interpretation will be apparent if Cls. (a) and (b) be omitted. S. 195 (7) will then read:

"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say, (c) where no appeal lies such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate.

1. (1890) 17 Cal 872.

The difficulty seems to have arisen from the attempt to provide in one clause for cases where an appeal lies as well as for those where no appeal lies. No doubt the words "where no appeal lies" are wide enough to cover cases, where all decisions of a particular Court are made final by law, e. g., a Small Cause Court, and also cases where a particular order is non-appealable, e. g. the case before us. I am inclined to think that the former class of cases only was referred to by the legislature in this S. 195 (7). If it were not so, the word "ordinarily" in the earlier part of the sub-section would be meaningless. Further, there does not seem to be any good reason for possibly transferring jurisdiction from a Court of one class to a Court of another, simply because an appeal from the particular order in question is forbidden. Nor am I prepared to say that the principal Court of original jurisdiction must necessarily refer to a Court of any particular class. It is a Civil or Criminal or Revenue Court, as the case may be.

In this particular case, however, I think that the difficulty may be surmounted. I cannot agree with the learned District Judge when he says that appeals from the decisions of the Collector under the Bengal Tenancy Act ordinarily lie to the Commissioner of the Division. A perusal of the Act will show that while in some cases an appeal is allowed to the Commissioner, e. g., under S. 40 (5), in other cases an appeal lies to the special Judge, i. e., to a civil Court. If that be so, then under S. 195 (7) (b) the nature of the case has to be considered. Proceedings under Ss. 69 and 70 are clearly of a civil nature. The Collector may state a case for the decision of a civil Court and his order may be enforced as a decree of a civil Court. The Collector's Court may, therefore, be deemed to be subordinate to the civil Court, i. e., the Court of the District Judge for the purposes of S. 195. This is on the assumption that the words "where no appeal lies" refer only to the case where all decisions of a particular Court are not appealable.

If they also refer to a case like the present, where a particular order is not appealable, we arrive at the same result. In that view, it being a matter of a civil nature, the Collector's Court must be

regarded as subordinate to the principal Court of original civil jurisdiction, that is to the Court of the District Judge. The matter is by no means free from doubt, but this is the conclusion to which I have come after giving the matter my best consideration. I would accordingly make the rule absolute, set aside the order of the District Judge, and remand the application of the petitioners to his Court to be disposed of on the merits.

Richardson, J.—The opening words of Cl. (7), S. 195, were apparently intended as a general definition or explanation of the term "subordinate," as applied in the previous clauses to a Court. The sub-clauses of Cl. (7) were meant, I think, to indicate the result of applying the opening words of the clause to the particular cases dealt with in the sub-clauses. The words "that is to say" at the end of the opening paragraph refer to the preceding words as a whole, with the sense "which means" or "the result being." The language is not very happy, but that seems to me to be its effect. This Court has held in *Raghoobuns Sahay* v. *Kokil Singh* (1) that a Collector acting in appraisement proceedings under Ss. 69 and 70, Ben. Ten. Act, is a Court within the meaning of S. 195, Criminal P. C. Reference may also be made to *Abdullah Khan* v. *Emperor* (2).

Under Cl. (5), S. 70, Ben. Ten. Act, the Collector's order is final. There is, therefore, no appeal and the case would seem to fall within Cl. (7), sub-Cl. (c), S. 195. The words "where no appeal lies" in that sub-clause are wide enough to include both a particular case or class of cases in which no appeal lies and a Court from which no appeal lies in any case, such as Small Cause Court: *Nibaran Chandra* v. *Akshoy Kumar Banerjee* (3). As to the expression "principal Court of original jurisdiction" in sub-Cl. (c) it has been held in *Ajodhia Parshad* v. *Ram Lal* (4) that it means the principal Court of civil, criminal or revenue jurisdiction according to the nature of the case in which the question of sanction arises. I am not aware of any express decision on the point in this Court and I am not sure that it has not been generally assumed in this Province that under the clause, as it stands, "the principal Court of original jurisdiction" is in a district the Court of the District Judge who is also in the great majority of cases the Sessions Judge. However that may be it is unnecessary in the present case to carry the discussion further. I agree that proceedings before the Collector under Ss. 69 and 70, Ben. Ten. Act, are in their nature civil proceedings and I concur in the order proposed by my learned brother.

V.B./R.K. *Rule made absolute.*

2. (1910) 37 Cal 52=5 I C 62.
3. (1918) 41 I C 311.
4. (1912) 34 All 197=13 I C 284.

A. I. R. 1918 Calcutta 929

MOOKERJEE AND CUMING, JJ.

Dhirendra Nath Sarkar and *others*—Judgment-debtors—Appellants.

v.

Nischintapore Company—Decree-holder—Respondent.

Appeal No. 228 of 1915, Decided on 17th August 1916, from order of Sub-Judge, Nadia, D/- 13th May 1913.

Limitation Act (1908), Art. 182 (5)—Suit for arrears of rent of separate tenancies—Decree specifying sums due in respect of each tenancy amounts to separate decrees—Application for execution in respect of one of tenancies does not protect from bar of itmitation decree in respect of sum leviable from other tenancies.

Where in a suit for the recovery of arrears of rent in respect of three tenancies held by the defendants, a decree was made which at the instance of the plaintiffs specified the sums due in respect of and leviable from each of the tenancies:

Held: that although the dscree was passed in one suit and was set out on one sheet of paper, the position was precisely the same as if the plaintiffs had brought three distinct suits against the defendants, one in respect of each tenancy, and had obtained three different decrees. Consequently the rule of limitation would be applicable separately to each sum decreed against each tenancy, so that an application for execution of the decree in respect of the sum leviable from one of the tenancies would not, under Art. 182, Cls. (5) and (6), protect from the bar of limitation the decree in respect of the sums leviable from the other tenancies. 19 *W. R.* 30, (*F B*); 6 *W. R. Misc. Rulings*, 18 and 10 *B. L. R.* 259, 25 *W. R.* 310, *Ref.* [P 932 C 1]

Sarat Chandra Roy Chaudhury and *Satya Chanan Sinha*—for Appellants.

D. N. Bagchi—for Respondents.

Judgment.—This is an appeal by the judgment-debtors against an order for execution of a decree for arrears of rent. On 25th February 1911, the respondents as plaintiffs instituted a suit for rent against the appellants as defendants, who held under them three distinct tenancies

under three separate contracts. In ordinary course the landlords would have instituted three different suits for rent in respect of the arrears due. But they preferred to institute one suit for the recovery of the arrears, as they were entitled to unite in one suit different causes of action against the same set of defendants under R. 3, O. 2, Civil P. C. They realized, however that if a decree was obtained for the entire sum due, such a decree could not as held in a long line of authorities in this Court, be executed as a decree for rent against any of the tenures: *Mulluk Chand Das* v. *Satish Chandra Das* (1) and *Rashmohini Dasi* v. *Debendra Nath Singha Roy* (2). They accordingly prayed that the decree might specify the sums due in respect of each of the tenancies and that an order might be made for the realization of the sums in arrear from the respective tenancies. This was carried out, and the result was that on 5th June 1911 a decree was drawn up which specified that a certain sum, which for the sake of brevity, may be called *A*, was to be realized by sale of tenure *X*, that a similar sum *B* was to be realized by sale of tenure *Y*, and that a third sum *C* was to be payable by the judgment-debtors. There was also a direction that in the event of non-satisfaction of the sums due in respect of *X* and *Y*, the balance might be recovered from the person and property of the judgment-debtors. On 27th August 1913 the decree-holders applied for execution of the decree. They stated specifically that in respect of the third tenancy a separate decree had been passed and prayed, first, that the sum due therefrom might be realized by attachment and sale of the moveable properties of the judgment-debtors; and secondly, that if the whole amount due was not realized, the balance might be recovered by attachment of their peasons. It is remarkable that in Col. 7 of the application for execution, the sum shown as due was the sum realizable in respect of the third tenancy alone; in other words, the application for execution sought relief only in respect of the sum decreed with regard to the third tenancy. It is not necessary for our present purpose to narrate what took place on the basis of this application as we are now concerned with an application for execution made on 16th September 1914. The decree-holders stated therein that

"a decree had been passed in respect of the first tenure for a certain sum, that a decree had been passed in respect of the second tenure for another sum and that a decree had been passed in respect of a third tenure for a different sum."

They prayed that the first two sums due might be realized by sale of the first two tenancies respectively and that if the whole amount was not thereby obtained, processes might issue against the persons and other properties of the judgment-debtors. The judgment-debtors contended that the application was barred by limitation, in so far as the decree-holders sought to realize by sale of the first two tenures the sum directed by the decree to be levied therefrom. The Subordinate Judge has overruled this contention. The question for determination consequently, is whether the application for execution is barred by limitation on the ground assigned by the judgment-debtors. The answer to the question in controversy depends upon the true construction of Art. 182, Sch. 1, Lim. Act, 1908. The clauses relevant for this purpose are those numbered 1, 5 and 6 in Col. 3. Cl. 1 provides that an application for execution of a decree of any civil Court not provided for by Art. 183 or by S. 48, Civil P. C., of 1908, must be made within three years from the date of the decree. As the application for execution now under consideration was made after three years from the date of the decree, Cl. 1 by itself is of no assistance to the decree-holders. Reliance is consequently placed on their behalf on Cls. (5) and (6). Cl. (5) refers to a case where an application has been made in accordance with law to the proper Court for execution of the decree. Cl. (6) applies to a case where notice has been issued to the person, against whom execution is applied for, to show cause why the decree should not be executed against him when the issue of such notice is required by the Code of 1908; that is, in cases where the application for execution is made after the lapse of a year from the date of the decree or is made against the legal representatives of a deceased judgment-debtor.

The decree-holders contend that on 27th August 1913 an application was made in accordance with law to the proper Court for execution of the decree and that they are accordingly entitled to the benefit of Cl. (5). They further contend

1. (1909) 3 I C 306.
2. (1912) 13 I C 604.

that on such application for execution, notices were issued to the judgment-debtors on 24th September 1913, and that they are thus entitled to the benefit of Cl. (6). The appellants contend that neither Cl. (5) nor Cl. (6) is of real assistance to the decree-holders, because they took steps in respect of the decree for rent of the third tenancy and not with regard to the decree for rent of the first and the second tenancies. The contention in substance is that although there is nominally one decree in this litigation there are in substance three decrees in one sheet of paper. The judgment-debtors argue that the term "decree" as used in Cls. (5) and (6) must be read along with the term "decree" in Col. 1 of the Article and that the decree-holders are not entitled to the benefit either of Cl. (5) or Cl. (6) on proof that they have taken action with regard to what is in essence a distinct decree from the two decrees they now seek to enforce. We have not been able to trace any authority directly in point; but we are of opinion that the contention of the appellants is supported by a principle which underlies the decision of the Full Bench in *Wise* v. *Rajnarain Chukerburty* (3). It may be observed that so for back as 1866 it was recognized by this Court in the case of *Stephenson* v. *Annoda Dossee* (4) that there might be nominally one decree passed in a suit, which is essentially of a composite character and contains a number of decrees:

"It may be that some decrees, though based nominally on one document, are in reality separate decrees against separate individuals. In such cases the Court might and properly would consider them to be separate, and in execution put the law of limitation in force against different defendants as if they were separate."

This doctrine was ignored in the case of *Mohesh Chunder Chowdhry* v. *Mohun Lal Sircar* (5), which ruled that when a decree has been passed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution against one or more of such judgment-debtors keeps the decree in force against all simultaneously. The Court, however, reverted to the view indicated in the earlier case in *Khema Debea* v. *Kumolakant Bakshi* (6). The result was that when the question arose again in the case of *Wise* v. *Rajnarain Chukerburty* (3), the matter was referred for decision to a Full Bench. The question turned upon the true construction of S. 20, Act 14, of 1859, which was then in force, and was in these terms:

"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, or to keep the same in force within three years next preceding the application for such execution."

With reference to this provision, it was argued that when the decree granted to the plaintiff separate reliefs against separate defendants, if proceedings had been taken to enforce the decree against one judgment-debtor, the requirements of S. 20 were sufficiently fulfilled and that the effect was to keep alive the decree as against the other judgment-debtors. The substance of the contention was that the term decree should be liberally construed and as there could be only one decree in a suit, S. 20 should be so interpreted as to cover cases as well of joint decrees as of several decrees disguised under one decree. This contention was overruled by the Full Bench. Couch, C. J., observed with reference to the decree before him that although the decree was made in one suit, it was is reality and substance a separate decree against each for the portion for which each was declared to be liable: see also *Chowdhry Hureehur Singh* v. *Baboo Hridoy Narain* (7). The principle which underlies the decision of the Full Bench has now met with legislative approval and is embodied in expl. (1), Art. 182, Lim. Act, 1908, which is in terms identical with expl. (1), Art. 179, Lim. Act, 1877. On behalf of the decree-holders, however, endeavour has been made to draw a distinction between decrees made against different defendants and decrees made against the same defendants in respect of different properties. In our opinion there is in principle no distinction between the two classes of cases. In the case before us, the defendants held, from the plaintiffs as their landlords, distinct tenancies under separate contracts. The obligations for the enforcement whereof the suit was brought, were distinct and arose from different contracts. The decree recognized this and entitles the plaintiffs to bring to

3. (1873) 19 W R 30 (F B).
4. (1866) 6 W R Misc Rulings 18.
5. (1867) 8 W R 80.
6. (1873) 10 B L R 259 n.
7. (1876) 25 W R 310.

sale distinct tenancies for the realization of the arrears leviable respectively therefrom. The position is precisely the same as if the plaintiffs had brought three distinct suits for rent against the defendants, one in respect of each tenancy. If they had instituted such suits, there would have been on three different sheets of paper the very decrees which we now find set out on one sheet of paper.

If three suits were so brought, it is plain that the rule of limitation would have been applicable to each decree separately; and it could not have been urged for a moment that because the plaintiffs had taken out execution in respect of one decree for rent against the defendants, they were protected from the bar of limitation in respect of the other decrees. We are of opinion that although there was in the present case only one suit, yet, at the instance of the plaintiffs, three distinct decrees have been made for their benefit to enable them to proceed with execution under the provisions of the Bengal Tenancy Act with all the consequences which result therefrom, namely, to sell the tenures free of incumbrances imposed thereupon by the tenants. The plaintiffs sought this advantage and were awarded relief accordingly. If they now find themselves at a disadvantage from a different point of view which they had not possibly realized at the time, the difficulty is entirely of their own creation. There is, in our opinion, no escape from the position that the present application for execution is barred by limitation with regard to the sums claimed from the first two tenancies; but in respect of the sum due from the third tenancy, the application is in time, because made within three years from the date of the first application. The result is that this appeal is allowed in part. The application for execution wiil stand dismissed in respect of the sums due from the first two tenancies stated in Col. 7. The execution however will proceed in res pect of the sum decreed with regard to the third tenure with interest thereon. The appe llants are entitled to their costs in this Court. We assess the hearing-fee at two gold mohurs.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1918 Calcutta 932

CHITTY AND SMITHER, JJ.

Nando Lal Ganguli—Petitioner.

v.

Khetra Mohan Ghose—Opposite Party.

Civil Revision No. 2 of 1918, Decided on 28th January 1918.

(a) **Criminal P. C. (1898), S. 195—"Court" may include Tribunal empowered to deal with particular matter.**

The word "Court" in S. 195, has a wider meaning than a Court of Justice as defined in the Penal Code. It may include a Tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination. [P 933 C 1]

(b) **Calcutta Improvement Act (1911)—Court constituted under the Act is "Court" within Criminal P. C. (1898), S. 195.**

The Tribunal constituted under the Calcutta Improvement Act of 1911 is a "Court" within the meaning of S. 195, Criminal P. C. Therefore, a person who has given false evidence before the Tribunal cannot be prosecuted for perjury without its sanction. [P 938 C 1]

Atulya Charan Bose and *Manmotha Nath Pal*—for Petitioner.

Manmotha Nath Mukerjee—for Opposite Party.

Judgment.—An application was made to the President of the Tribunal constituted under the Calcutta Improvement Act, 1911, for sanction to prosecute one Khetra Mohan Ghose for giving false evidence before the President of the Tribunal in two apportionment cases. The President held that he had no jurisdiction to entertain the application, on the ground that the Tribunal was not a Court within the meaning of S. 195, Criminal P. C. Against that decision the applicant obtained this rule, and Khetra Mohan Bose has appeared by pleader and shown cause against it. The opinion of the President appears to be based upon the decision in *Hari* v. *Secy. of Siate* (1), where it was held that the Bombay Tribunal was not a Court but merely a body of arbitrators not subject to the supervision of the High Court. It was no doubt on account of this decision that Act 14 of 1904 was passed by the Imperial Legislative Council. In the case of Calcutta the Tribunal is constituted by the Calcutta Improvement Act of 1911, but the finality of its decisions is regulated by that Act as modified by the Calcutta Improvement (Appeals) Act, 1911, passed by the Imperial Legislative Council. It is unnccessary for us to discuss the question whether in view

1. (1903) 27 Bom 424.

of the subsequent legislation the Bombay decision is still good law, as we have no doubt whatever that the Calcutta Tribunal is a Court within the meaning of S. 195, Criminal P. C. By S. 70, Calcutta Improvement Act, the Tribunal is constituted for the purpose of performing the functions of a Court in reference to the acquisition of land for the Board under the Land Acquisition Act, 1894. By S. 71, (a) the Tribunal shall (except as to appeals which are specially provided for) be deemed to be the Court and the President the Judge under the said Act. S. 71 (c) gives the President the powers of a civil Court with regard to the summoning and attendance of witnesses and production of documents. By S. 77 (b) apportionment cases may be tried by the President sitting alone and his decision is then to be deemed to be the decision of the Tribunal.

It has been held by the Court that the word "Court" in S. 195 has a wider meaning than a Court of Justice as defined in the Indian Penal Code. It may include a Tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination; see *Raghoobuns Sahoy* v. *Kokil Singh* (2), where the question arose whether a Collector acting under Ss. 69 and 70, Ben. Ten. Act, was a Court. That case was followed in *Chandi Charan Giri* v. *Gadadhar Prodhan* (3), where the question was to what Court the Collector was subordinate. We may also refer to the definition of "Court" in S.3, Evidence Act. It includes all Judges and Magistrates and all persons except arbitrators legally authorised to take evidenee. We do not think that the Tribunal as "the Court" under the Land Acquisition Act, 1894, for the purposes of the Improvemant Trust can be regarded simply a body of arbitrators. It is the Court under that Act, and the President is the Judge. It follows that it must also be regarded as a Court for the purposes of S. 195, Criminal P. C. We may point out that if the contrary view were to prevail, the deplorable result would follow that any private person who alleged that false evidence had been given before the Tribunal might institute a prosecution without any control on his action by the Tribunal before whom the evidence was given. The rule is accordingly made absolute, the order of the President is set aside and the application remanded to him for adjudication upon the merits.

V.B./R.K. *Rule made absolute.*

2. (1890) 17 Cal 872.
3. (1918) 44 I C 177.

A. I. R. 1918 Calcutta 933

SANDERSON, C. J. AND MUKERJEE, J.

Priya Sakhi Debi—Plaintiff — Appellant.

v.

Bireshwa Samanta and *others*—Defendants—Respondents.

Letters Patent Appeal No. 33 of 1915, Decided on 6th June 1916, against the decree of Fletcher, J., D/- 3rd March 1915.

(a) Mortgage—Title by adverse possession against mortgagor—Right of mortgagee to sue for debt is not extinguished.

The enforcement of a title by adverse possession as against a person who has executed a simple mortgage of the property will not extinguish the right of the mortgagee to sue for his debt and realise his security within the time allowed by law. [P 938 C 1]

(b) Adverse possession—Meaning of.

Per *Sanderson*, C. J.—The term "adverse possession" implies that the person, against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment the adverse possession begins. [P 935 C 2]

(c) Adverse possession—Acquisition of title—Adverse possession affects only the interest which person having right to immediate possession has in property.

Adverse possession affects the interest, and the interest only, which the person who was entitled to immediate possession had at that time, or, in other words, only the interest which the person having the right to immediate possession has in property, when the adverse possession begins. [P 935 C 2]

(d) Adverse possession — Acquisition of title—Property subject to simple mortgage taken possession of by third person—Latter holds it subject to its liability of being sold in satisfaction of mortgage debt.

Where after a simple mortgage the mortgaged property is taken possession of by a third person, the latter takes possession only of what belonged to the mortgagor, viz., his equity of redemption, and, therefore, holds it subject to the liability of its being sold for the satisfaction of the mortgage debt; 33 *Cal* 1015 and 35 *Mad* 231, *Foll*; 7 *M I A* 323 (*PC*), *Dist.* [P 935 C 2]

(e) Transfer of Property (1882), S. 58—Simple mortgagee is not entitled to possession.

Per *Mookerjee*, *J.*—A simple mortgagee is not entitled under the Transfer of Property Act to take possession of the mortgaged premises, he holds the property as security for the loan while the mortgagor continues in possession thereof: 19 *Mad* 249, *Ref.* [P 937 C 2]

(f) Mortgage—Suit on—Suit by simple mortgagee for sale of mortgaged property—Nature of, explained.

A suit by a simple mortgagee for the sale of the mortgaged property is in no sense a suit for possession of an interest in immovable property; 30 *Mad* 425 (*P C*), *Foll.* [P 940 C 1]

(g) Mortgage—Suit on—Necessary parties enumerated.

The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper parties to such a suit are the mortgagor and the mortgagee those who have acquired interest therein subsequent to the mortgage; 33 *Cal* 425 and 5 *C L J* 95, *Foll.* [P 937 C 1]

(h) Mortgage—Suit on—Question of acquisition of title by third party by adverse possession should not be litigated.

The question whether a third party has by adverse possession for the statutory period acquired a title paramount to both the mortgagor and the mortgagee should not be litigated in a mortgage suit, and any person claiming such a title in a mortgage suit should be discharged from the suit. [P 937 C 2]

(i) Transfer of Property Act (1882), S. 58—Simple mortgage—Mortgage dispossessed—Equity of redemption extinguished by lapse of time by adverse possession—Interest of mortgagee is not affected—Limitation Act (1908), S. 28.

The dispossession of the mortgagor, subsequent to the execution of a simple mortgage, though it may operate by lapse of time under S. 28, Limitation Act, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee, as he is not entitled to possession of the mortgaged property either under the Statute or under the contract; 33 *Cal* 1015, *Foll.* 7 *M I A* 323 (*P C*), *Dist.*; 23 *Mad* 37, *Diss. from*, [P 938 C 2]

(j) Limitation Act (1908), S. 28—S. 28, is expressly limited to suits for possession—Provisions of Act merely bar remedy in respect of debts but do not extinguish right—Dispossession of mortgagor in simple mortgage does not extinguish title of mortgagee by lapse of time.

Section 28, Limitation Act, which prescribes a rule for the extinguishment of right to property, is expressly limited to suit for possession. In respect of debts, the provisions of the Limitation Act, merely bar the remedy but do not extinguish the right. Therefore, when a mortgagor in possession is dispossessed and does not institute a suit against the trespasser within twelve years of the dispossession, his equity of redemption, and prima facie nothing more becomes vested in the adverse possessor. The dispossession of the mortgagor in a simple mortgage does not extinguish the title of the mortgagee by lapse of time under S. 28, Limitation Act. [P 938 C 1; P 937 C 2]

(k) Adverse possession — Acquisition of title—Adverse possession operates against mortgagee when he is entitled to possession.

Adverse possession operates against the mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he in entitled to enter upon the land. [P 939 C 1]

Mohendra Nath Roy and *Bepin Behary Ghose*—for Appellant.

Ram Chandra Majumdar and *Sarat Kumar Mitra*—for Respondents.

Sanderson, C. J.—This is an appeal by the plaintiff from the judgment of Fletcher, J. (see *Bireswar Samnath* v. *Priya Sakhi Debi* (1), whereby he set aside the judgment and decree of the Subordinate Judge of Burdwan. The action was brought to enforce a mortgage-bond, dated 27th June 1887, executed in favour of the plaintiff by the original defendants 1 and 2. Under the bond the principal was to be paid by instalments and it was provided that the whole amount remaining unpaid should become payable upon default in payment of any one of the instalments with interest at 2 per cent. per mensem. One of the instalments was not paid on 11th February 1893; there was, however, a payment of interest on 18th October 1893 and the suit was brought on 22nd August 1905. The dispute in this case relates to certain land which has been described as plot No. 1. It appears that on 16th February 1894, this plot of land was sold by the then owners, called Mullicks, to the predeces sor-in-title of defendants 1 and 2, and that these defendants and their predecessors were in possession of the plot from that date until 1892. On 7th May 1875 the Mullicks, although they had already sold the plot, purported to execute a mortgage of the said land in favour of defendant 3.

On 27th June 1887 defendants 1 and 2 (as already stated) mortgaged the plot to the plaintiff. Defendant 3 brought a suit on his mortgage and on 6th February 1891 he obtained a decree. On 7th December 1891 at an auction, held in execution of the said decree, defendant 3 purchased the said land and in 1892, obtained possession thereof and from that time up to the institution of this suit, on 22nd August 1905, he remained in possession. Defendant 3 having been made a party to this suit, set up the defence that he had been in adverse possession of the said land for more than twelve years before the institution of this suit. The case having come up on appeal, two learned Judges of the High Court, in a judgment of 23rd March 1910, remanded it for the decision of this question as far as defendant 3 was concerned and whether the plaintiff was entitled to bring

1. (1915) 28 I C 917.

the said plot to sale as against defendant 3. The Court of first instance decided against the plaintiff. The Subordinate Judge, however, held that the plaintiff was not made a party to the mortgage suit brought by defendant 3 and consequently she was not bound by it. Further, that if defendants 1 and 2, after executing the mortgage in favour of the plaintiff, had entered into any compromise with defendant 3 by which they relinquished their right to the said plot (upon which he came to no definite conclusion as to the facts), the plaintiff could not be bound thereby, as she was no party to that proceeding; and finally that the possession of defendant 3 could not be held to be adverse to the plaintiff before the time when she could enforce the mortgage and, therefore, the learned Judge decided in favour of the plaintiff.

The learned Judge, Fletcher, J., held that the possession of defendant 3 was adverse to the plaintiff and consequently he reversed the judgment of the Subordinate Judge and decided in favour of defendant 3. The mortgage was a simple mortgage and it is to be noted that this suit was merely one for the realziation of the plaintiff's security; the plaintiff asked for a decree for the principal and interest due and a sale of the mortgaged property. It was held by the Subordinate Judge, when the case was first before the first appellate Court in his judgment of 4th May 1907, that the suit was not barred, for although there had been default in the payment of an instalment in February 1893, there had been a payment of interest on 18th October 1893 and that consequently under S. 20, Lim. Act, a fresh period of limitation should be computed from the time when the interest was paid and that the suit being instituted on 22nd August 1905 was, therefore, in time. This finding, so far as defendants 1 and 2 were concerned, was affirmed by the High Court on 23rd March 1910. The matter, therefore, in this appeal is between the plaintiff and defendant 3, for whom it was argued that the possession of defendant 3 was adverse to the mortgagors, defendants 1 and 2, and it must, therefore, be taken as adverse to the plaintiff, the mortgagee, and no decree for sale of the property should be made. It was argued on behalf of the respondent (defendant 3) that this question between plaintiff and defendant 3 must be treated as if it were a claim by the plaintiff for possession of immovable property against defendant 3, and that Art. 144, Lim. Act, was applicable, that defendant's possession became adverse to the plaintiff in 1892, and as the suit was not brought until 22nd August 1905, the plaintiff's claim against defendant 3 is barred. Assuming that this article is applicable to this suit, the question remains: When did the possession of defendant 3 become adverse to the plaintiff ?

In my judgment the term "adverse possession" implies that the person, against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins. The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time defendant 3 went into possession in 1892, and indeed the plaintiff has never yet become so entitled. Consequently in my judgment Art. 144, even if applicable, will not avail defendant 3 to dispute the plaintiff's claim. In my judgment the principle upon which this matter should be decided is that adverse possession affects the interest and the interest only, which the person who was entitled to immediate possession had at that time, or in other words, only the interest which the person, having the right to immediate possession, has in the property, when the adverse possession begins, can be affected by such adverse possession.

In this case the mortgage in favour of the plaintiff was created before defendant 3 purchased the property at auction and obtained possession thereof in 1892. The position of the plaintiff, the mortgagee, then was that he had an interest in the property with a right to bring it to sale for the realization of the mortgage-debt, but with no right to take possession of the property. When, therefore, the defendant took possession of the property after the mortgage to the plaintiff, he took possession only of what belonged to the mortgagor, viz., his equity of redemption, and in my judgment held subject to the liability of its being sold for the satisfaction of the mortgage debt.

This conclusion is in accordance with the decision of this Court in *Aimadar Mondul* v. *Makhan Lal Dey* (2) and the

2. (1906) 33 Cal 1015.

judgment of the Madras High Court in *Parthasarathi Naikan* v. *Lakshmana Naicken* (3). This last mentioned case, though reported in 35 *Mad* was later in date than *Ramasami Chetti* v. *Ponna Padayachi* (4), which was one of the cases relied on by the learned Judge and which has now been overruled by a Full Bench in *Viyapuri* v. *Sonamma Boi Ammani* (5). *Karan Singh* v. *Bakar Ali Khan* (6), which was considered by the learned Chief Justice in *Aimadar Mondul* v. *Makhan Lal Dey* (2), in my judgment, is not inconsistent therewith or with the principle above stated: for, in that case, if the defendant's contention had been maintained and he had been allowed to tack on to his own possession the possession of the Collector, and treat that as possession on his own behalf and adverse, then his possession would have begun before the mortgage, and in such case the operation of the adverse possession would not have been affected by the subsequent grant of the mortgage security. It was necssary, therefore, for the Privy Council to consider the question of tacking, and their Lordships did not decide that the possession of the defendant standing by itself should be considered adverse to the plaintiff.

Nor do I think that the decision in the cese of *Prannath Roy Chowdry* v. *Rookea Begum* (7), another of the cases reiied on for the respondent, covers the case now under consideration. For these reasons the appeal, in my judgment, should be allowed with the costs of both hearings in the High Court, the judgment of the learned Judge of the High Court should be set aside and the decree of the learned Subordinate Judge should be restored.

Mookerjee, J.—I am of opinion that the judgment of Fletcher, J., cannot be supported. The plaintiff seeks to enforce a mortgage security granted to her by defendant 1, on 27th June 1887. The mortgage provided that, on default of payment of specified instalments, the entire mortgage money would become repayable with interest. As the result of such default, the mortgage money became recoverable on 11th February 1893. Thereafter interest was paid by the mortgagors on 18th October 1893. The present suit was instituted on 2nd August 1905. The claim was resisted by defendant 3, who had been joined as a party, because the plaintiff found him in possession of one of the properties comprised in the mortgage security. His contention in substance was that the mortgage had ceased to be operative upon the property in his hands. The trial Court decreed the claim in full, and this decision was affirmed by the Subordinate Judge on appeal. On a second appeal to this Court, the suit was remanded to the Court of first instance for re-trial. That Court dismissed the suit in respect of the property held by defendant 3 This decision was reversed by the Subordinate Judge on appeal. Fletcher, J., next set aside the decision of the Subordinate Judge and restored the decree of the primary Court. The plaintiff has preferred this appeal against the judgment of Fletcher, J.. under Cl. 15 of the Letters Patent, and the question for determination. is whether what has been called the first property claimed by defendant 3, is liable for the satisfaction of the mortgage debt. The circumstances under which that defendant claims title to the property may be briefly narrated. The property belonged originally to a family of Mullicks who sold it to the Choudhuris (the mortgagors of the plaintiff) on 16th February 1874. Notwithstanding this sale the Mullicks mortgaged the property to the Samantas (now represented by the defendant 3) on 7th May 1875. The Samantas sued in 1890 to enforce their security, obtained a decree for sale on 6th February 1891, and, in due course, purchased the mortgaged property in execution on 7th December 1891.

In 1892 defendand 3 as purchaser obtained delivery through Court, and dispossessed defendants 1 and 2 (the Chaudhuris) who had meanwhile, on 27th June 1887, granted the simple mortgage in suit. The case for defendant 3 is that his adverse possession of the property from 1892 had by 1904 extinguished the title of all persons interested therein whether as mortgagor or as mortgagee, and that, consequently at the date of the institution of the present suit on 22nd August 1905, there was no subsisting charge on the property in his hands. Fletcher, J., has given effect to this contention. It is desirable to observe at the

3. (1912) 35 Mad 231=9 I C 791.
4. (1913) 36 Mad 97=9 I C 28.
5. (1913) 31 I C 412.
6. (1883) 5 All 1=9 I A 99 (P C).
7. (1857) 7 M I A 323=4 W R 37 (P C).

outset that the defence raised by defendant 3 is not a question of the rule of limitation applicable to the suit. The suit is obviously in time under Art. 12, Lim. Act, read with S. 20; it is a suit to enforce payment of money charged upon immovable property and it has been instituted within twelve years from the date when interest was paid on the sum due. The question raised is in essence one of title; the substance of the defence is that defendant 3 has by adverse possession for the statutory period acquired a title paramount to that of both the mortgagor and mortgagee. On principle such a question should not have been litigated in a mortgage suit. The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper persons to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage [*Jaggeswar Dutt* v. *Bhuban Mohan Mittra* (8) and *Bhaju Chowdhury* v. *Chuni Lal Marwari* (9)].

Consequently, defendant 3 should have been discharged from this suit, when he claimed a title adverse to that of both the mortgagor and the mortgagee. The parties however have deliberately adopted a different course, and the question in controversy has been raised and decided; both parties have in this Court expressed a desire that the matter in difference should be settled in this litigation, which has now lasted for over ten years. In these circumstances and in view of the qualifications to the general rule explained in the judgment in *Bhaju Chowhury* v. *Chuni Lal Marwari* (9), it is competent to this Court to determine, whether defendant 3 holds the property free of the mortgage; in other words, whether the right of the mortgagee to appropriate the property to the satisfaction of his debt no longer exists. As there has been much divergence of judicial opinion on this topic, it is desirable to investigate it in the first instance as a question of principle apart from authorities. S. 58, T. P. Act, defines a mortgage as the transfer of an interest in specific immovable property. Consequently when the owner of a property executes a simple mortgage thereof the entire interest originally vested in him is thereafter vested partly in him as the mortgagor and partly in the mortgagee. A simple mortgagee as such is not entitled under the Transfer of Property Act, to take possession of the mortgaged premises; he holds the property as security for the loan while the mortgagor continues in possession thereof: *Sri Raja Papamma Rao* v. *Sri Vira Pratapa* (10). If, then, after the grant of the simple mortgage, the mortgagor is dispossessed, what is the effect of the possession of the adverse holder upon the title, first, of the mortgagor, and secondly, of the mortgagee? The answer depends obviously upon the true construction of S. 28, Lim. Act, which is in these terms:

"at the determination of the period hereby limited to any person for instituting a suit for possession of any property shall be extinguished."

It is plain that this section which prescribes a rule for extinguishment of right to property is expressly limited to suits for possession; it has accordingly been held that in respect of debts, the provisions of the Limitation Act merely bar the remedy, but do not extinguish the right: *Nursing Doyal* v. *Hurryhur Saha* (11) and *Mohesh Lal* v. *Busunt Kumaree* (12). Consequently when the mortgagor in possession is dispossessed, he must under Art. 142, institute a suit for recovery of possession against the trespasser within 12 years from the date of dispossession; if he does not institute such a suit his right to the property is extinguished. But what is his right to the property? Clearly the equity of redemption, which is all that remains in him after he has executed the simple mortgage and which is all that he had when the adverse possession commenced against him. From this it follows that after the lapse of the statutory period for the institution of a suit for possession, his equity of redemption, and prima facie nothing more, became vested in the adverse possession for as pointed out in *Gossain Das Chunder* v. *Issur Chunder Nath* (13), *Jagrani Bibi* v. *Ganeshi* (14) and *Nandkumar Dobey* v. *Ajodhya Sahu* (15), the practical effect of S. 28, when a person suffers his right to be barred by the law of limitation is the extinction of his title in

8. (1906) 33 Cal 425.
9. (1907) 5 C L J 95.
10. (1896) 19 Mad 249=23 I A 32 (PC).
11. (1880) 5 Cal 897.
12. (1881) 6 Cal 340,
13. (1877-78) 3 Cal 224.
14. (1881) 3 All 435.
15. (1911) 11 I C 465.

favour of the party in possession. The question next arises, what is the effect, if any, on the title of the simple mortgagee produced by the dispossession of the mortgagor? Does S. 28 extinguish his interest? Obviously, the answer is in the negative. The simple mortgagee is not competent to institute a suit for possession of the property, because admittedly he is not entitled to possession either under the statute or under the contract. S. 28 clearly contemplates that the person whose right is extinguished by lapse of time is a person entitled to institute a suit for possession of the property. Consequently, the dispossession of the mortgagor does not extinguish the title of the mortgagee by the lapse of time under S. 28, Lim. Act, and our attention has not been invited to any other statutory provision which is applicable to the present case and which operates to extinguish interest in land. The true effect of a Statute of Limitation is lucidly stated by Angell:

"The principle on which the statute of limitation is predicated is not that the party in whose favour it is invoked, has set up an adverse claim for the period specified, but that such adverse claim is accompained by such invasion of the rights of the opposite party as to give him a cause of action, which having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by statute: Angell on Limitation, p. 308."

The question of the extinction of an incorporeal right by adverse possession thus presents considerable difficulties; *Lakshminarayana Aiyar* v. *Ulagammal* (16) and I am not prepared to accept the view indicated by Subrahania Iyer, J., in *Nallamuttu Pillai* v. *Betha Naicken* (17) where however the adverse possession had commenced before the date of the mortgage. The broad proposition that a hypothecation right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor, was sought to be supported from the following passage of the Code (c. 7, 36,1):

"Long standing silence supported by regular limitation, renders nugatory the action for creditors taking proceedings for their pledge unless the debtors or those who have entered into their rights command possession of the security: Salkowski's Roman Law tr. Whitefield 503; Mackeldy's Roman Law tr. Dropsit 287.

But it must be remembered that in later Roman law, in the case of a pignus as in that of a hypotheca the mortgagee was entitled to possession of the mortgaged property, in the former at the time of the transaction, in the latter when the debt became due (Salkowski 485, Mackeldy 285; Hunter 436, 447). This, however, is not the position of a simple mortgagee under the Transfer of Property Act: *Sri Raja Papamma Rao* v. *Sri Vira Pratapa* (10). On principle, accordingly, it is fairly plain that where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor though it may operate by lapse of time, under S. 28, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee who is not entitled to possession of the mortgaged premises either under the statute or under the contract. This is substantially the view taken in *Aimadar Mondul* v. *Makhan Lal Dey* (2). Fletcher J., however, has declined to follow the rule laid down in that decision, on the ground that it is inconsistent with two decisions of the Judicial Committee, namely, *Prannath Roy Chowdhry* v. *Rookea Begum* (7) and *Karan Singh* v. *Baker Ali Khan* (6). The respondent has been endeavoured to support the decision of Fletcher, J., by a three-fold argument, namely, first, that the rule laid down in *Aimadar Mondul* v. *Makhan Lal Dey* (2) is inconsistent with the decisions of the Judicial Committee just mentioned and cannot consequently be treated as good law; secondly, that it is in conflict with the earlier decision of this Court in *Ram Coomar Sein* v. *Prosunna Coomar Sein* (18) and consequently a reference to a Full Bench is unavoidable under the rules of Court; and thirdly, that there is weighty judicial opinion in support of this view, for instance, *Ramaswami Chetti* v. *Ponna Padayachi* (4).

In my opinion, these contentions cannot prevail. As regards the first branch of this contention, I am of opinion that neither of the two decisions of the Judicial Committee supports the contention of the respondent. In *Prannath Roy*

16. (1915) 26 I C 528.
17. (1900) 23 Mad 37.
18. (1864) W R 375.

Chowdhry v. *Rookea Begum* (7) the plaintiff, a mortgagee by conditional sale, had obtained a foreclosure order in proceedings instituted under Regn. 17 of 1806. He then sued to recover possession of the properties as owner from the defendant, who claimed under a purchase from the mortgagor which was neither proved nor admitted. The question was raised whether the plaintiff had validly foreclosed the mortgage by conditional sale so as to entitle him to bring ejectment as owner, as the proceedings for foreclosure were taken more than twelve years after the due date for the repayment of the mortgage money. The law of limitation then in force was contained in S. 14, Regn. 3 of 1793, whereby a suit was barred where the causes of action had arisen twelve years before any suit was commenced on account of it. Lord Kingsdown pointed out that a suit for foreclosure against the mortgagor or against persons claiming privity with the mortgagor might not be barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage might be barred; but he did not say that the mortgagee's right might be barred by the possession of an adverse claimant even if the mortgagee's right to possession had not accrued or where the mortgagee was not entitled to possession at all.

It was not necessary to make such a pronouncement, because it was found that the possession of the claimant had been originally not adverse to but consistent with the mortgage title, and there was nothing whatever to show that it became adverse at any time before twelve years preceding the institution of the foreclosure suit. On the other hand, there are passages in the judgment of James, L. J., in *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (19) and in *Brojonath Koondoo Chowdhry* v. *Khelut Chunder Ghose* (20) which indicate that adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land.

The case of *Karan Singh* v. *Baker Ali Khan* (6) also does not support the contention of the respondent. There the Collector had, for protection of the Government revenue, taken possession of the property in 1861, pending the settlement of disputes between rival claimants. The mortgages were executed in 1862 on behalf of one set of claimants, namely, the daughter's sons of the last male owner. In 1863, by an award of arbitrators, the title of the defendant, who was the brother's grandson of the late owner was established against the daughter's sons. The mortgagee was not a party to these proceedings and was not bound thereby. The Collector then made over possession of the property, together with the arrears of income of the estate in his hands, to the successful claimant. In 1874, the mortgagee sued to enforce his securities. The defendant pleaded that he had been in adverse possession for the statutory period from 1861 on the assumption that the possession of the Collector was his possession. If this contention was well founded, the case would be, not that of the dispossession of a mortgagor after he had granted a simple mortgage, but that of the grant of a mortgage by a person previously dispossessed: in such a contingency, the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested, but would oparate equally against the mortgagee, for in the words of Lord Kingsdown in *Prannath Roy Chowdhry* v. *Rookea Begum* (7), a cause of action is not prolonged by mere transfer of the title. The Judicial Committee, however, found that the defendant could not tack to his possession the possession of the Collector and had consequently not been in adverse possession for the statutory period since 1863. Sir Barnes Peacock observed, first, that the possession of the Collector was possession on behalf of the rightful owners, and, secondly, that the rightful owners were the daughter's sons and not the brother's grandsons, as found in a proceeding of the arbitrators whose decision did not bind the plaintiff as his bonds were prior to the submission to arbitration I must decline to hold that the Judicial Committee by implication decided a question of law which was not argued before them and which upon the pleadings and facts found could not arise for consideration.

There is no warrant whatever for the inference that the Judicial Committee assumed that a suit for sale by a simple mortgagee was a suit for possession. Sir

19. (1870-72) 14 M I A 101=16 W R 19 (P C).
20. (1870-72) 14 M I A 144 =16 W R 38 (P C).

Barnes Peacock expressly referred to the change in the law effected by the Limitation Act of 1871 and could not have held that a suit for sale was a suit for possession, as might possibly have been held under the Limitation Act of 1859: *Surwan Hossein* v. *Shahazadah Golam Mahomed* (21), *Juneswar Dass* v. *Mahabeer Singh* (22) and *Chetti Goundan* v. *Sundaram Pillai* (23). Under the present law, however, a suit for sale such as the present is in no sense a suit by a simple mortgagee for possession of an interest in immovable property; *Vasudeva Mudaliar* v. *Srinivasa Pillai* (24). The Judicial Committee could hardly have overlooked the distinction between S. 1, Cl. 12, Act 14 of 1859 and Art. 145, Act 9 of 1871, the former of which they have characterized as an inartificially drawn Statute and the latter as a more carefully drawn Statute: *Maharana Fattehsangji Jaswantsangji* v. *Desai Kullianraiji Hakoomutraiji* (25) and *Delhi and London Bank Ltd.* v. *Orchard* (26). I think it is reasonably plain that the decisions of the Judicial Committee in *Prannath Roy Chowdhry* v. *Rookea Begum* (7) and *Karan Singh* v. *Bakar Ali Khan* (6), do not conclude the question in controversy and do not directly or indirectly support the contention of the respondents.

As regards the second branch of the contention of the respondent, I am of opinion that the decision in *Ram Kumar Sein* v. *Prosunno Koomar Sein* (18) does not conflict with that in *Aimadar Mondul* v. *Makhan Lal Dey* (2). The earlier case arose out of a suit by a mortgagee for possession after foreclosure and was decided under the Limitation Act of 1859. The provisions of that Statute were, as I have just explained, radically different from those in the Limitation Act now in force, and that decision cannot be treated as an authority now binding upon us. I do not, however, decide that the case of *Ram Coomar Sein* v. *Prosunno Coomar Sein* (18) was correctly decided even under the law as it stood in 1859; indeed, it appears to me to be incapable of reconciliation with the principle deducible from the decision of the House of Lords in *Pugh* v. *Heath* (27), namely, that on foreclosure, a fresh right of action arises for possession as owner, or, as it is said, the decree absolute gives a new right, confers a new estate and thereby absolutely bars the Statute of Limitation. I cannot, consequently, accept the contention that the decision in *Ram Koomar Sein* v. *Prosunno Koomar Sein* (18) assists the respondent and the same observation applies to *Sheoumber Sahoo* v. *Bhowancedeen Kulwar* (28).

As regards the third branch of the contention of the respondent, it is indisputable that the balance of judicial opinion is in favour of the appellant. The earlier cases are reviewed in my judgment in the case of *Nandkumar Dobey* v. *Ajodhya Sahu* (15), where the question was expressly left open for future consideration and need not be analysed afresh. It is sufficient to state that the conflict of judicial opinion in Madras, as indicated in *Parthasarathi Naikan* v. *Lakshmana Naicken* (3) and *Ramasami Chetti* v. *Ponna Padayachi* (4), has now been settled by a Full Bench in *Viyapuri* v. *Sonamma Boi Ammani* (5) which, upon an exhaustive examination of the question from various points of view, affirms the principle that the possession of the trespasser who has dispossessed a simple mortgagor is not adverse to the simple mortgagee: see also *Peria Aiya Ambalam* v. *Shunmugasundaram* (29). The same view has been adopted in Allahabad: *Nandan Singh* v. *Jumman* (30) and *Raj Nath* v. *Narain Das* (31). It is not necessary to consider the class of cases of which *Lalla Kanhoo Lal* v. *Mt. Manki Bibi* (32) and *Tarubai* v. *Venkatrao* (33) may be taken as the type where a question arose as to the effect of adverse possession against a mortgagee upon the title of the mortgogor: nor need we consider the law on the subject in England which as shown in *Nandkumar Dobey* v. *Ajodhya Sahu* (15), does not support the contention of the respondent and lays down in fact that a charge on the property can be enforced against a trespasser who has

21. (1868) 9 W R 170=B L R Sup Vol 879.
22. (1875-76) 1 Cal 163=3 I A 1 (PC).
23. (1864-65) 2 M H C R 51.
24. (1907) 30 Mad 426=34 I A 187 (P C).
25. (1873-74) 1 I A 34=13 B L R 254 (P C).
26. (1877-78) 3 Cal 47=4 I A 127 (P C).
27. (1882) 7 A C 235=51 L J Q B 367.
28. (1870) 2 N W P H C R 223.
29. A I R 1914 Mad 334=22 I C 615=38 Mad 903.
30. (1912) 34 All 640=17 I C 632.
31. A I R 1914 All 95=24 I C 997=36 All. 567 (F B).
32. (1902) 6 C W N 601.
33. (1203) 27 Bom 43.

acquired a title by adverse possession: see the judgment of Farwell, J., in *Nisbet Pott's Contract, In re* (34) and *Ludbrook* v. *Ludbrook* (35). I hold, accordingly, that this appeal must be allowed with costs, the decree of Fletcher J., reversed and that of the Subordinate Judge restored.

v.B./R.K. *Appeal allowed.*

34. (1906) 1 Ch 386=75 L J Ch 238.
35. (1901) 2 K B 96=70 L J K B 552.

A. I. R. 1918 Calcutta 941

MOOKERJEE AND CUMING, JJ.

Dwarka Nath Ash—Defendant—Petitioner.

v.

Priya Nath Malki and *others* — Opposite Parties.

Rule Nisi No. 582 of 1916, Decided on 28th August 1916, against order of Sub-Judge, Khulna.

Contract — Privity — Contract when enforceable by stranger — Vendor reserving consideration for payment to creditors is trustee for them — Creditor's suit is not on novation but implied trust.

An agreement may, in certain circumstances, be enforced by a stranger thereto, that is, in what may be briefly described as cases of trust, quasi-contract or near relationship. A contract by the purchaser of a property to pay the whole or part of the consideration retained by him to the vendor's creditors is enforceable by the latter, even though they had no notice of the agreement. The ground of the purchaser's liability is not novation or a substituted contract, but that the purchaser is, in essence, a trustee of the vendor's creditors for the money reserved in his hands for their benefit: *A I R* 1914 *Cal* 129; *Tweddle* v. *Atkinson*, (1861) 1 *B & S* 393; 37 *Cal* 449 and *Gregory* v. *Williams*, (1872) 3 *Mer* 582, *Ref.*

[P 941 C 2]

Surendra Chandra Sen and *Hemendra Chandra Sen*—for Petitioners.

Nanda Lal Sarkar and *Triloki Nath Pandit*—for Opposite Parties.

Judgment.—The decision of this Rule turns upon an interesting point of law, involved in the question whether or not defendant 3 was liable for the debt due to the plaintiff from the first two defendants. It appears that the first two defendants borrowed a sum of money from the plaintiff on a promissory note executed on 6th January 1913. They transferred their properties to defendant 3 on 31st January 1913 and on that very date, defendant 3 executed an agreement in favour of his vendors, expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands. The plaintiff instituted this suit on 4th January 1916 against his debtors as also defendant 3. The Small Cause Court Judge has decreed the suit against all the defendants. On behalf of defendant 3, it is urged in this Court that there was an interpolation in the deed of agreement executed by him, and that in fact the recital as to the debt due to the plaintiff from the first two defendants was inserted without his knowledge after the execution but before the registration of the document. This defence has not been believed by the Court below, and upon the findings of the Small Cause Court Judge, it is impossible for us to examine this question of fact. We must consequently proceed on the assumption that defendant 3 did undertake to pay the plaintiff his dues out of the consideration money in his hands. The question is, whether the plaintiff is entitled to enforce the agreement made between defendant 3 and his vendors.

On behalf of the plaintiff, reliance is placed upon the decision in *Deb Narain Dutt* v. *Chuni Lal Ghose* (*Ram Sadhan Mandal*) (1), which is an authority for the proposition that the rule enunciated in *Tweddle* v. *Atkinson* (2) is not applicable in this country and that an agreement may in certain circumstances be enforced by a stranger thereto, that is, in what may be briefly described as cases of trust, quasi-contract, or near relationship: see *Jahanda-Baksh Mallic* v. *Ram Lal Hazra* (3). Defendant 3 however seeks to distinguish that case on the ground that there the arrangement between the debtor transferor and the transferee was communicated to the creditor, whereas there is nothing to show that in the present case the arrangement between the first two defendants and defendant 3 was ever brought to the notice of the plaintiffs by either of them. In our opinion the distinction mentioned is not material and the principle which underlies the decision in *Deb Narain Dutt* v. *Chuni Lal Ghose* (*Ram Sadhan Mandal*) (1) applies equally to the present case. In that case, there was a contention that the plaintiff was entitled to succeed on the ground of novation of contract, and from this point of view, strses, was laid upon the fact that the arrangement between the transferor and trans-

1. A I R 1914 Cal 129=20 I C 630=41 Cal 137.
2. (1861) 1 B & S 393=30 L J Q B 265.
3. (1910) 37 Cal 449=5 I C 565.

feree had been communicated to the creditor. This Court however held that notwithstanding such communication, there was no novation of contract and that the suit must be deemed to have been instituted on the original debt. That this is the true view of the situation is clear from the decision in *Gregory* v. *Williams* (4), which was quoted with approval and followed in *Deb Narain* v. *Chuni Lal Ghose (Ram Sadhan Mandal)* (1). The circumstances in that litigation were, as nearly as possible, identical with those of the case before us. There *P* transferred his properties to *W*, who retained the consideration money in his hands and agreed to apply the sum in satisfaction of a debt due to *G* from *P* and to appropriate the balance only in satisfaction of his own dues. The arrangement was intended to be communicated to *G*, but as a matter of fact was not brought to his notice. *W*, on the other hand, communicated to *G* an untrue version of what had happened, and as the report says, it was by a mere accident that *G* came to know of the arrangement between *P* and *W*. *G* along with *P* instituted a suit to recover the debt from *W*. The claim was resisted on the ground that the consideration had not moved from *G*, who was a stranger to the agreement between *P* and *W* and was entitled to no benefit thereunder. Sir William Grant, M. R., overruled this contention. He conceded that the action might not have been maintainable in a Court of law, because the engagement was made to *P* and not directly to *G* and the consideration was furnished by *P*. But he proceeded to hold that although, no party to the contract, *G* had an equitable right through the mediation of agreement to *P*, as shown by a decision of Lord Hardwicke to the same effect. There had been no communication of the agreement between *P* and *W* to *G*, and no such communication was necessary, because the claim was not based on novatien of contract on the allegation that by mutual arrangement of all the parties, a new agreement as between *W* and *G* had been substituted in supersession of the original agreement between *P* and *G*. The decision was based on the ground that *W* was in essence a trustee of the money in his hands for the benefit of *G*, who could clearly enforce it, whether or not the arrangement had been communicated to him by *P* or *W*.

We must hold, consequently upon principle as also upon authority, that the plaintiff is entitled to enforce his claim as against defendant 3. The Rule is discharged with costs, one gold mohur.

V.B./R.K. *Rule discharged.*

4. (1817) 3 Mer 582=17 R R 136.

A. I. R. 1918 Calcutta 942

CHITTY AND SMITHER, JJ.

Mafedul Sha Fakir and *others*—Plaintiffs—Appellants.

v.

Maharuddin— Defendant-Respondent.

Appeal No. 1401 of 1915, Decided on 28th November 1917, from appellate decree of Dist. Judge, Rangpore, D/- 18th March 1915.

Bengal Tenancy Act (1885), S. 49—Notice to quit by several joint landlords signed by one only is valid—Notice need not be actually signed.

A notice under S. 49 purporting to emanate from three landlords but in fact signed by one of them is a proper notice to quit. There is no necessity that the notice should be signed by the landlord at all. It is sufficient if the notice is at the instance of the landlord calling upon the under raiyat to quit the land. 29 *Cal* 231 *Foll.*

[P 942 C 2; P 943 C 1]

Girija Prosanna Sanyal for *Atul Chandra Gupta*—for Appellants.

D. N. Bagchi—for Respondent.

Chitty, J.—In this case the plaintiffs sued in ejectment after notice under S. 49, Ben. Ten. Act. The notice purports, as the District Judge has found, to have emanated from all the three plaintiffs but it was in fact signed by plaintiff 1 only. On that ground, without enquiring further into the facts, the District Judge has thrown out the plaintiffs' case. It is clear that this decision is erroneous. The first Court found on issue 1 that the notice was duly served and that it was valid and sufficient. The learned District Judge reversed the Munsif's decision on this point alone. His decision is against a decision of this Court in the case of *Mohendra Nath Sarkar* v. *Biswa Nath Haldar* (1). There the Court held and I may say I entirely agree, that:

"there is no necessity that the notice should be signed by the landlord at all. It is sufficient if the notice is at the instance of the landlord calling upon the under-raiyat to quit the land."

The learned Judges there remarked:

"It is quite immaterial whether the notice is actually given by the landlord himself, or at his instance, provided that the notice signifies to the

1. (1902) 29 Cal 231.

under-rafyat that the landlord has called upon him to quit the land."

Here, as the Judge says, the notice purports to emanate from the three plaintiffs. The tenant ought certainly to have regarded it as so emanating, and, no donbt, he did so. The plaintiffs also regarded it as a proper notice to quit, on which they have filed the suit. The decree of the learned District Judge must be set aside and the case remanded to him to be decided on the other points arising for determination. The plaintiffs-appellants must have their costs of this appeal from the defendant-respondents.

Smither, J.—I agree.

V.B./R.K. *Case remanded.*

A. I. R. 1918 Calcutta 943 (1)

RICHARDSON AND WALMSLEY, JJ.

Kandarpa Naran Mandal—Plaintiff—Appellant.

v.

Sridhar Roy and *others*—Defendants—Respondents.

Appeal No. 1826 of 1915, Decided on 12th February 1918, from appellate decree of Dist. Judge, Bankura, D/- 24th April 1915.

Limitation Act (1908), Arts. 116, 132 and 120—Suit on mortgage-bond executed for loan of paddy—Arts. 116 or 120 apply and not Art, 132.

A suit on a mortgage-bond executed for a loan not of money but of paddy is governed by Art. 116 or Art. 120 and not by Art. 132, Lim. Act.

[P 943 C 1. 2]

Bejoy Kumar Bhattacharjee—for Appellant.

Dwarka Nath Chakrabarty, *Upendra Lal Roy* and *Gopal Chndra Chakrabarty*—for Respondents.

Judgment.—This appeal is preferred by the plaintiff in a suit to enforce a mortgage security. The parties to the suit are not the original mortgagor and the original mortgagee. They are persons to whom the mortgage and the equity of redemption have respectively been transferred. The Courts below have concurred in dismissing the suit on the ground that it is not maintainable in its present form. Whatever may be said on that subject, on which we express no opinion, a preliminary point has been taken before us on behalf of the defendants that the suit is barred by limitation. The contention is that inasmuch as the mortgage-bond was executed by the respondent in respect of a loan, not of money but of paddy, Art. 132, Lim. Act, has no application and the suit is governed either by Art. 116 or Art. 120. This contention is founded on the ruling of the late Sir Lawrence Jenkins, C. J., and Holmwood, J., in the case of *Rash Bihari Das* v. *Kunjabihari Patra* (1).

The learned pleader for the plaintiff has argued that, that decision cannot be supported, and that the word "money" in Art. 132, should be construed as including money's worth. We are bound however to follow the decision unless we are prepared to refer the matter to a Full Bench, and as at present advised we are not disposed to take that course. On the face of the plaint there can be no doubt that this suit was brought more than six years after the due date of the bond, the date on which the paddy borrowed should have been repaid. It is said that the defendants in their written statement pleaded payment of interest for several years, but that plea was negatived in that Court and the plaintiff has given no credit for any payment of interest such as might have saved the suit from the bar of limitation. Some reference has been made in the course of the argument to a consent decree made in a suit between the original mortgagor and the original mortgagee. The decree is not referred to in the plaint. And even if the compromise amounted to an admission of liability by the mortgagor, that admission was made more than six years before the date of the institution of this suit and cannot help the plaintiff. In our opinion the objection of the respondent that the suit is barred by limitation is an objection which on the face of the record must prevail.

The result is that this appeal must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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1. (1917) 37 I C 805.

A. I. R. 1918 Calcutta 943 (2)

TEUNON AND RICHARDSON, JJ.

Abdul Hakim Khan—Petitioner.

v.

Buzruk Ali Khan—Opposite Party.

Criminal Revn. No. 538 of 1917, Decided on 18th June 1917, against order of Sess. Judge, Backerguuge, D/- 16th April 1917.

(a) Criminal P. C. (1898), Ss. 258 and 436—Accused acquitted of offence under S. 465, Penal Code—Sessions Judge cannot commit or order further enquiry for offence under

S. 467, Penal Code—Penal Code (1860), Ss. 465, and 467.

Per *Richardson, J.*—Where a person accused of forging a document is charged with an offence under S. 465, I. P. C., and is acquitted by a First Class Magistrate under S. 258, Criminal P. C., the Sessions Judge has no power to direct his committal or to order a further inquiry under S. 436, Criminal P. C., on the ground that the offence alleged falls under S. 467, I. P. C., as it relates to a document which is a valuable security. [P 944 C 2; P 945 C 2]

The acquittal of such a person on a charge under S. 465, I, P. C., cannot be construed as an order of discharge in respect of the alleged offence under S. 467. [P 945 C 2]

(b) **Criminal Trial—Discharge, explained.**

An order of discharge under the provisions of the Criminal Procedure Code should precede the framing of a charge, though there might be cases in which an accused can be discharged otherwise than under the specific provisions relating to discharging in the Criminal Procedure Code. [P 944 C 2]

Per *Teunon, J.*—The Magistrate's order acquitting such an accused of an offence under S. 465, I. P. C., is tantamount to an order discharging the accused of the graver offence in respect of the same document punishable under S. 467, I. P. C: 20 *Cal* 633, *Disappr.* [P 945 C 2]

A. K. Fazlul Huq, Atindra Nath Mukerjee and *Gangan Chand Boral*—for Petitioner.

P. N. Dutt, Ganesh Chandra Das Gupta and *Sharat Chandra Mukerjee*—for Opposite Party.

Richardson, J.—This Rule was issued at the instance of the petitioner, Abdul Hakim Khan. The petitioner was tried by a Magistrate exercising first class powers upon a charge of forgery framed under S. 465, Penal Code. The learned Magistrate found him not guiity and acquitted him under S. 258, Criminal P. C. The complainant in the case then moved the Sessions Judge of Backergunge upon the grounds that the document to which the charge related was a valuable security and that the petitioner should properly have been charged under S. 467, Penal Code and committed for trial upon that charge to the Court of Session. It may be mentioned that an offence punishable under S. 465 is triable by a Magistrate of the 1st Class, while the Court of Session alone is empowered to try the aggravated offence of forging a valuable security, punishable under S. 467. The Sessions Judge, having heard the matter, held that the offence alleged fell under S. 467 and he made an order directing that the petitioner be committed to the Court of Session for trial upon a charge framed under that section. The question which arises is whether the learned Sessions Judge had jurisdiction to make that order, and for the present purpose it may be assumed, without deciding the point, that the document which the petitioner is said to have been forged is a valuable security. The order purports to be made under S. 436, Criminal P. C., which runs as follows:

"When, on examining the record of any case under S. 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged."

Then come two provisos:—

"Provided as follows, (*a*) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made. (*b*) That if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence."

The question before us turns on the meaning of the word "discharged" as used in the section. The same word is used in the following section, S. 437. Under the Criminal Procedure Code an acquittal means more than a discharge. A discharge takes place before a finding of "guilty" or "not guilty' is recorded and the guilty or innocence of the accused is not res judicata. A discharge generally takes place either under S. 209 in the Chapter headed "of inquiry into cases triable by the Court of Session or High Court" or under S. 253 in the Chapter headed "of the trial of warrant cases by Magistrate." Both sections contemplate an inquiry into some alleged offence and as a result a discharge before any charge is framed against the accused. A discharge may also take place under S. 494, which again illustrates the general rule of the Code that a discharge should precede the framing of a charge. I do not, however, say and must not be understood as saying, that an accused cannot be discharged otherwise than under the specific provisions referred to. So much for the meaning of the term "discharge." In the present case the petitioner was acquitted of an offence under S. 465, Penal Code. With that acquittal the Sessions Judge had no power to interfere. But an offence under S. 467 being ex-

clusively triable by the Court of Session the petitioner under Cl. (4), S. 403, was (and is) still liable to be tried for that offence, the acquittal under S. 465, not operating as a bar, and if the petitioner can be said to have been discharged in respect of any such offence it was competent to the Sessions Judge to direct his committal. In my opinion the acquittal of the petitioner on the charge actually framed does not necessarily imply that the Magistrate discharged him in respect of any other charge which might have been framed. Nor does the mere omission of the Magistrate to frame a charge under S. 467, carry the case further. So far as the record shows, the Magistrate never considered whether the accused had or had not committed an offence under S. 467. His mind was never directed to that issue and it was not inquired into. It is not sufficient to say that the result is the same as if the petitioner had been discharged. That argument might be stretched to cover a case in which an accused has never been placed before a Magistrate at all. Clearly the mere fact that an accused has not been charged with an offence is in itself insufficient. At least the Magistrate must consciously do something or make some order which shows that in his opinion, on the materials before him, the accused should not be charged with, or tried for, that offence.

Prima facie, therefore, as S. 436, is worded, I should hold that the petitioner was not discharged either properly or improperly in respect of the offence non-alleged under S. 467, and that the learned Sessions Judge had no power to direct his committal, or to order a further inquiry under proviso (b). The learned Pleader for the petitioner referred to the decision of this Court in the case of *Baijanath Pandey* v. *Gauri Kanta Mandal* (1), a decision which has been followed in Madras: *Queen-Empress* v. *Hanumantha Reddi* (2). Those cases, no doubt, support the view which I have expressed, but they go further than is necessary in the present case. In both cases the Magistrate had taken action which amounted to a refusal to charge the petitioner with the offence exclusively triable by the Court of Session, in respect of which the Sessions Judge had afterwards directed a committal. Moreover, *Hanumantha's* case (2) was overruled and *Baijanath Pandey's* case (1) was dissented from, by a Full Bench of the Madras High Court in *Krishna Reddi* v. *Subbamma* (3). There the Magistrate refused the request of the prosecution that he should frame a charge under S. 477, I. P. C., and acquitted the accused on certain other charges. His order refusing to frame a charge under S. 477, was held to be in substance an order discharging the accused in respect of the offence alleged under that section. In cases arising under S. 437, Criminal P. C., it has been similarly held in this Court that an order though not in terms of an order of discharge may amount to such an order: see *Ajab Lal Khirher* v. *Emperor* (4). The cases of *Queen-Empress* v. *Gundya* (5) and *King-Emperor* v. *Ayyan* (6), which were also cited before us, are not precisely in point. They show, however, that the proceedings of the Magistrate were not void under S. 530 (p), Criminal P. C. For present purposes it is sufficient to say that the Magistrate made no order which was either in terms or in substance an order of discharge and that the learned Sessions Judge, therefore, had no power to direct the petitioner's committal to the Sessions Court for trial. In that view the rule must be made absolute and the order of the Sessions Judge must be set aside.

Teunon, J.—As at present advised, I am included to hold that the Magistrate's order acquitting the accused of an offence under S. 465, I. P. C., is tantamount to an order discharging the accused of the graver offence in respect of the same document punishable under S. 467. That no charge was framed and that the Magistrate was in fact not moved to frame a charge under the graver section, I am inclined to think is immaterial. I, therefore, reserve to myself the right at a fitting opportunity to refer to a Full Bench the question whether the case of *Baijanath Pandey* v. *Gauri Kanta Mandal* (1) was rightly decided. Meanwhile in the present case I assent to the order proposed by my learned brother, and I do so all the more readily as in view of the provisions of S. 503, sub-S. (4), Criminal P. C., it appears to be open to the Crown or to the complainant to take

1. (1893) 20 Cal 633.
2. (1900) 23 Mad 225.
3. (1901) 24 Mad 136.
4. (1905) 32 Cal 783.
5. (1889) 13 Bom 502.
6. (1901) 24 Mad 675.

such further action as their respective legal advisers may deem appropriate.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 946

MOOKERJEE AND BEACHCROFT, JJ.

Ram Prosad Pramanik and *another*—Defendants—Petitioners.

v.

Sricharan Mandal —Plaintiff —Opposite Party.

Rule Nisi No. 928 of 1916, Decided on 22nd March 1917, against order of Munsif Boalia, in Suit No. 454 of 1916.

(a) Provincial Small Cause Courts Act (1887), Art. 35 (2)—Suit for compensation for unlawfully cutting and removing trees and misappropriating crops is not cognizable by Small Cause Court—Suit decreed by Small Cause Court without objection as to jurisdiction—Objection can yet be raised in review—Civil P. C. (1908) S. 114.

A suit for compensation for unlawfully cutting and removing a tree and misappropriating crops is excepted from the cognizance of a Court of Small Causes by Art, 35, sub Cl. (2), Sch. 2, Provincial Small Cause Courts Act as amended by the Provincial Small Cause Courts Amendment Act, of 1914. [P 946 C 2]

Where, after such a suit has been decreed by a Small Cause Court without objection by the defendant as to the Court's jurisdiction to entertain the suit, the defendant applies for review, the Court should not refuse the application for review on the ground that the objection as to jurisdiction was not raised at the trial. [P 946 C 2]

(b) Jurisdiction—Absence of—Inaction on part of defendant does not confer jurisdiction.

Where there is an entire absence of jurisdiction no action on the part of the plaintiff and no inaction on the part of the defendant can invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent. [P 946 C 1]

(c) Civil P. C. (1908), S. 115—Jurisdiction usurped by lower Court—High Court must interfere.

Where a subordinate Tribunal has usurped jurisdiction it is incumbent upon the High Court to interfere. [P 946 C 2]

Jatindra Mohan Chowdhury—for Petitioners.

Krishna Kamal Maitra—for Opposite Party.

Judgment.—This Rule is directed against a decree of a Court of Small Causes in a suit for compensation for a tree wrongfully cut and for crops misappropriated by the defendant. The case for the plaintiff was that the land in dispute was his property and was in his possession, that the tree had been grown and crops of mustard raised by him and that the defendant had unlawfully cut and removed the tree and the crops. It is plain that a suit of this description is excepted from the cognizance of a Court of Small Causes by Art. 35, sub-Cl. (2), of the Sch. (2), Provincial Small Cause Courts Act, which has been inserted therein by the Provincial Small Cause Courts Amendment Act, (1914). This provision excludes from the jurisdiction of Courts of Small Causes suits for compensation for acts which are, or save for the provisions of Ch. 4, I. P. C. would be, offences punishable under Ch. 17 of the said Code. It is clear that if the acts attributed to the defendans are true, they have been guilty of mischief, if not of theft. Consequently, the suit could not be tried by the Court of Small Causes, No objection, however, appears to have been rised to the trial of the suit.

But, after the suit had been decreed, the defendants applied for review of judgment. The Court refused the application for review on the ground that the objection as to jurisdiction was not raised at the trial. In our opinion, the review should have been granted. The objection as to jurisdiction was apparent on the face of the record. The plaintiff could succeed only if his allegations as to possession were established. Indeed, on the evidence the Court ultimately found that the allegations were true and proceeded to grant relief to the plaintiff on that basis. It is clear that under such circumstances omission on the part of the defendants to take exception to the jurisdiction of the Court could not legalise the acts of the Court. Where there is an entire absence of jurisdiction, no action on the part of the plaintiff, no inaction on the part of the defendant can invest the Court with jurisdiction, for jurisdiction, cannot be created by waiver or consent: *Golab Sao* v. *Chowdhury Madho Lal* (1) and when a subordinate tribunal has usurped jurisdiction it is incumbent on this Court to interfere: *Surendra Nath* v. *Bansi Badan* (2)

The result is that this rule must be made absolute and the decree of the Small Cause Court Judge set aside. We direct that under O. 7, R. 10. Civil P.C. the plaint be returned to the plaintiff for presentation to the proper Court. As the objection to jurisdiction was not raised at the earliest possible stage, the plaintiff is entitled to the costs which have been

1. (1905) 2 C L J 384.
2. (1916) 36 I C 457.

thrown away, that is, the costs of the hearing in this Court as also in the Court below. We assess the costs in this Court at Rs. 16 and the costs in the Court below at Rs. 10. The defendants must pay the plaintiff this sum (Rs. 26), irrespective of the ultimate result of the suit.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 947

CHAUDHURI AND NEWBOULD, JJ.

Joyti Prokash Nande —Defendant—Appellant.

v.

Muti Prokash Nande and *others*—Plaintiffs—Respondents.

Appeal No. 238 of 1915, Decided on 21st March 1916, from original decree of 1st Sub-Judge, Burdwan, D/- 30th June 1914.

(a) Contract Act (1872), S. 172—"Pledge" lies midway between loan and mortgage.

A "pledge" or "pawn" as defined in S. 172, Contract Act, lies midway between a loan and a mortgage which wholly passess the property in the thing conveyed. [P 949 C 1]

(b) Contract Act (1872), S. 172—Contract of pawn—Delivery actual or constructive is necessary.

It is essential to a contract of pawn that the property pledged should be actually or constructively delivered to the pawnee: *Carter* v. *Wake*, (1876) 4 *Ch D* 605; *Backhouse* v. *Charlton*, (1878) 8 *Ch D* 444; *In re Richardson Shillito* v. *Hobson*, (1886) 30 *Ch D* 396 and *Halliday* v. *Holgate*, (1867) 3 *Ex* 299, *Ref.* [P 949 C 1]

(c) Contract Act (1872), S. 172 — Title-deeds are not "goods" that may be pledged within meaning of S. 172.

The law relating to pawns contained in the Contract Act is not applicable to pledges of all classes of documents. Title-deeds of property are not "goods" that may be pledged within the meaning of S. 172, Contract Act. [P 949 C 2]

(d) Contract Act (1872), S. 178 — Government securities not mentioned in S. 178—Pledge of —They cannot be pledged except by endrosement by owner.

Government securities which are not specifically mentioned in S. 178, Contract Act, cannot be pledged except by endorsement by the owner, even if they are already in the possession of the pledgee: 19 *Cal* 322 (*P C*), *Ref.* [P 949 C 2]

(e) Contract Act (1872), S. 176—Rights of pledge—Nature of.

The rights of a pledgee under S. 176, Contract Act, either to sue on the debt or to sell the property pledged are concurrent rights: 22 *Cal* 21 and 27 *Mad* 518, *Ref.* [P 949 C 2]

Bepin Behary Ghose and *Jyotish Chandra Sarkar*—for Appellant.

Bankim Chandra Mukerjee— for Respondents.

Judgment.—The plaintiffs and the defendant are brothers. When they and their brother Goti Prokash Nandy, who is not a party to this suit were all minors. Karuna Nidhan Mukherjee was appointed their guardian by the District Judge of Burdwan. Certain Government securities endorsed in the names of the five brothers came into the hands of Karuna Nidhan as such guardian. The defendant Jyoti Prokash attained his majority about 1901. Their estate, however, remained under the management of Karuna Nidhan who acted as the manager of the defendant and as guardian for his infant brothers. In or about 1909 the defendant wanted money for purchasing a house in Calcutta, but there was not sufficient money in the hands of his manager, in his share of the income from which the amount could at that time be paid. Karuna thereupon suggested that he could advance Rs. 50,000 from certain Government securities in his hands belonging to the shares of his infant brothers who are the plaintiffs in this suit, two of whom have since attained majority and the third still an infant being represented by Karuna in this suit. It appears that an application was thereupon made by the defendant to the District Judge praying that Karuna Nidhan Mukherjee as such guardian might have permission to grant the defendant a loan of Rs. 50,000 out of the Government papers belonging to his minor brothers. He offered to pay interest at 5 per cent and stated that he was ready to pledge his share in the ejmali Government securities, meaning the Government papers which stood in the joint names of himself and his brothers and also his share in the ejmali ornaments as security for the said advance. The ornaments were at that time in a room to which locks had been separately put by Karuna and himself. Karuna also represented to the Judge that the defendant had proposed to pledge as security for the said debt his share in the Government securities left by his father. He stated that he had originally in his hands Rs. 3,20,000 in Government securities which stood in the joint names of the defendant and his brothers and that the defendant's share in the said Government securities was Rs. 64,000, but as the defendant had drawn out Rs. 13,000 which had been previously separated from the ejmali account and transferred to his separate share the defendant had at that time a right to receive Government secu-

rities of the value of Rs. 51,000 only on account of his share. The Judge thereupon made an order to this effect:

"The guardian personally applied to me for permission to lend Rs. 50,000 to the elder brother of the minors Lala Jyoti Prokash Nande. The conditions of the loan to be as follows: Lala Jyoti Prokash Nande will take Government pro-notes to the face value of Rs. 50,000 bearing interest at 3½ per cent. He will pay interest at 5 per cent on Rs. 50,000 and will execute a handnote for that amount. He will also pledge his share in the Government pro-notes belonging to his estate which amounts to Rs. 51,000 and his 1/5th share in the ornaments left by his father. The notes and ornaments pledged will remain with his guardian. The loan is to be repaid by transfer of Government pro-notes to the face value of Rs. 50,000 bearing interest at 3½ per cent. A time for repayment should in my opinion be fixed on the above conditions. The loan proposed is sanctioned."

The date of repayment of the loan was subsequently fixed for three years. In accordance with this order Karuna Nidhan Mukerjee as guardian of his infant brothers handed over to the defendant Government securities for Rs. 50,000 belonging to the infants. The defendant's case as regards the arrangement about repayment is set out in para. 5 of the written statement Cls. (f) (1 to 4). It is admitted that the jewellery which was to have been pledged remained under their joint lock and key and was never delivered to Karuna. It has also been shown that a portion of the ejmali Government securities was subsequently pledged by the defendant with the Bank of Bengal, and sold to pay off the debt due to the Bank. The defendant's share in the Government securities is said to be not now in existence. In 1909 he had a right to receive pro-notes of the nominal value of Rs. 51,000 in his share, but no papers were specifically allotted to his share or kept apart. Karuna stated in his evidence that the defendant spent his share of the ejmali Government securities which were gradually purchased by the minors and the cash value was taken by the defendant from time to time, and that finally under orders of the District Judge all the Government securities were endorsed over to the minors according to the account which Karuna had submitted to the District Judge. He also stated that the defendant used to take his share of the income of the ejmali estate and had overdrawn his account. The estate when under Karuna was kept joint and a joint jamakharan was kept by him. Karuna said that he had agreed to lend to the defendant as guardian of the minors

"in the idea that the defendant would not be able to get his share separated before the repayment of the amount advanced by him on behalf of the minors",

but that the defendant had drawn out the value as aforesaid. No specific Government securities were pledged by the defendant. None were set apart. Except signing a pro-note for Rs. 50,000 the defendant did not do anything further. He had merely a right at that time to get a share in the Government securities which stood in the joint names of himself and his brothers. Government securities are by the statute neither negotiable nor transferable without endorsement on the back by the transferor. There was no such endorsement made by the defendant. From Exs. D and E it is quite clear that demands were being made for payment of the advance without any effect. The defendant was clearly told by Karuna that he had overdrawn his account and that he should immediately take steps to pay the amount due to his brothers on his pro-notes. The defendant, however, did nothing and this suit had to be instituted to save his promissory notes being barred. In his written statement the defendant submitted that Karuna was an accountable party to him and should be made a party to this suit in his personal capacity, and further that this suit could not be adequately adjudicated upon without an account of the whole management of the joint estate by Karuna both for the period during which the defendant was a minor and for the period subsequent thereto during which Karuna continued as manager of the defendant and guardian of his minor brothers: See para. 14 of the written statement. It is stated in the petition that the defendant's share was to be pledged and the Judge directed it to be pledged, but no document was then executed. There was no formal handing over of any securities to Karuna. They were already in the custody of Karuna and remained in his custody. It has been proved that subsequently the defendant took out a portion of the ejmali Government securities and pledged them with the Bank of Bengal. It is admitted that no pledge of the defendant's share in the ejmali ornaments was effected. Can it be said that there was an effective pledge

of his share of the securities? He dealt with his share in them as if it was his own. It may be that Karuna ought not to have permitted him to deal with them before the amount due to his wards had been paid. But we are not concerned in this case with any breach of duty Karuna may have committed.

The defendant knows that he has overdrawn his share of the joint income and we believe he knows fully well what has happened to his share of the Government securities. His denial we are not prepared to accept. He has not scrupled to make a charge that the endorsement of payments of certain sums appearing on the pro-notes are false. The learned Judge has ccrrectly found them to be genuine. The defendant pretends that he does not know how his account in the ejmali estate stands. He had ample opportunity of knowing it and the circumstances indicate that he must have known it. But we have nothing to do with these accounts. The learned Judge has correctly held that he is not entitled to have the accounts taken in this suit as submitted by him in his written statement. It is submitted before us that in any event the defendant is entitled to have an account taken of the manager's dealings with these joint Government securities. This was not originally asked for, but it seems to us to be an indirect method of having the whole of the account taken. The learned Judge has, in our view, correctly held that the plaintiffs are entitled to have their remedy on the pro-notes independently of the alleged pledge under the provisions of S. 176, Contract Act. S.172, Contract Act, defines a pledge. It is essential to the contract of pawn that the property pledged should be actually or constructively delivered to the pawnee. Here it cannot be said that there was any actual delivery. It is very doubtful whether there was a constructive delivery in this case. It may be said that the intention was to create a charge on the defendant's share, which is not the same thing as effecting a pledge. A pawn is not an equitable mortgage. It is a security intermediate between a simple loan and a mortgage which wholly passes property in the thing conveyed: see *Carter* v. *Wake* (1), *Backhouse* v. *Charlton* (2), *In re Richardson*, *Shillito* v. *Holson* (3), *Halliday* v. *Holgate* (4). S. 176 gives a clear right to the pawnee to institute a suit independently of the pawn, and we think the learned Judge is right in the view he has taken.

Section 172, Contract Act deals with "goods". Certain classes of documents are specifically referred to in S. 178 which do not include "Government securities." It is difficult to apply the law relating to pawns as contained in the Contract Act to pledges of all classes of documents. Take the case of title-deeds. What can the pawnee sell? There is no equitable mortgage even created by their delivery or deposit as collateral security outside Presidency Towns. They may be "goods" in the sense of being pieces of parchment or paper, but what value are they as such? Mere delivery of Government securities gives no property in them for the purpose of negotiation or sale, without endorsement. Government securities standing in the names of five persons, as in this case, require the endorsement of four of them in favour of the fifth effectively to vest the property in them to him. In the case of *Nim Chand Baboo* v. *Jagabundhu Ghose* (5) it was held that when moveable property is pledged to a person for money lent, he acquires a special property therein, and he is entitled, under S. 176, Contract Act, either to bring a suit against the owner upon the debt or promise retaining the goods pledged as collateral security, or he may sell the things pledged upon giving reasonable notice of the sale. *Mahalinga Nadar* v. *Ganapathi Subien* (6) followed the Calcutta case and held that both rights existed and were concurrent rights. *Neckram Dobay* v. *Bank of Bengal* (7) was a case ofa pledge of Government securities, but It is well known that such pledges to a bank are created by endorsement and delivery.

There is nothing to prevent the defendant from asking for an account against the manager for his dealings with his estate, but we do not think we can allow such an acccunt, even in respect of the Government securities, being taken in

1. (1876) 4 Ch D 605=46 L J Ch 841.
2. (1878) 8 Ch D 444=26 W R 504.
3. (1885) 30 Ch D 396=55 L J Ch 741.
4. (1867) 3 Ex 299=37 L J Ex 174.
5. (1895) 22 Cal 21.
6. (1904) 27 Mad 528.
7. (1892) 19 Cal 322=19 I A 60 (P C).

this suit. We dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 950

SANDERSON, C. J. AND MOOKERJEE, J.

Bhusan Chandra Ghosh and *others*—Defendants—Appellants.

v.

Srakanta Banerjee and *others*—Plaintiffs—Respondents.

Appeal No. 2459 of 1914, Decided on 16th March 1916, from appellate decree of Addl. Sub-Judge, Burdwan, D/- 16th May 1914.

Bengal Tenancy Act (1885), S. 167—Person acquiring title by adverse possession to portion of sub-tenancy is in position of "encumbrancer"—Notice to him, in case of annulment of sub-tenancy, is necessary.

Where a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy and stands in the position of an "encumbrancer" and is entitled to notice from the purchaser of a superior tenancy seeking to annul the sub-tenancy under S. 167, Ben. Ten. Act: 10 *W R* 15; 9 *Cal* 367; 10 *Cal* 577; 23 *Cal* 863; 29 *All* 593; 11 *I C* 453 and 14 *I C* 349, *Dist.*

[P 950 C 1]

Bepin Behary Ghosh and *Mohini Mohan Chatterjee*—for Appellants.

Mohendra Nath Roy and *Kalidas Sirkar*—for Respondents.

Sanderson, C. J.—This is an appeal from the judgment of the Subordinate Judge, Burdwan, in which he gave judgment for the plaintiff, and defendants 1 and 2, whom I may call the Ghose defendants, have appealed. Now, it appears that in 1886 the Mookerjees who held under one Amir Ali entered into an agreement with an individual whom I shall call Pal, by which a subordinate tenure was created, and it appears that this tenure was of the character of a permanent under-tenure. It was in respect of 60 bighas, but apparently prior to 1889 a man called Gobardhan had got into occupation of 2½ bighas, part of the 60 bighas, and he was paying rent to defendants 1 and 2, the Ghoses, and in 1889 Pal brought an action against Gobardhan and the first two defendants, the Ghoses, for the purpose of recovering possession of the 2½ bighas. He failed in that action and from that time Gobardhan or some other occupant has been in possession of the 2½ bighas, and Gobardhan or the other occupant has been paying rent to the Ghoses down to the institution of the present suit.

Now, a suit for rent was brought by the landlord against the Mookerjees in 1902, and a decree was obtained in that suit. The plaintiff purchased the land in pursuance of that decree and in order to obtain possession of the land free from incumbrances he gave notice or caused notice to be given to Pal or his representatives--I am not sure whether he was still alive—for the purpose of putting an end to the incumbrance which was the agreement of tenancy created between the Mookerjees and Pal. But the Ghoses say in this case that they too were the holders of an incumbrance within the meaning of S. 167, Ben. Ten. Act, and, therefore, they were entitled to notice, and that is the question in this case, namely, whether the Ghoses were in the position of holders of such an incumbrance as entitled them to notice under S. 167. I am of opinion that they were.

It appears that the tenancy was of the nature, as I have already said, of a permanent tenure which was capable of assignment either in whole or in part, and, therefore, if Pal had assigned his interest in the tenure in respect of the 2½ bighas to the Ghoses, in my judgment the Ghoses would clearly have been in the position of incumbrancers to whom notice would have had to be given under S. 167, if the plaintiff desired to get possession of the land free from incumbrances. There was no actual conveyance in this case, but it has been held, and there is no dispute about it, that at all events ever since 1889 the Ghoses have been in possession of this 2½ bighas by means of their tenants who were in fact occupying the 2½ bighas and paying rent to the Ghoses and, therefore, as against Pal they have, by reason of their possession as against him, obtained title, just as much an effective title as if Pal had in fact conveyed his interest in the 2½ bighas to the Ghoses, and for that reason I am of opinion that the Ghoses were holders of an incumbrance and consequently it was necessary for the plaintiff, if he desired to get possession, of the property free from incumbrances, to give notice not only to Pal which in fact he did, but also to the Ghoses which in fact he did not.

The result, therefore, is that the judgment of the Subordinate Judge was wrong, because he held that it was not necessary for the plaintiff to give notice to the Ghoses, whereas in my judgment he was entitled to such notice. The appeal is, therefore, allowed and the suit dismissed with costs in all the Courts. We do not intend to decide anything by this judgment which would prevent the plaintiff from recovering rent from the Ghoses in a proper proceeding. We do not think we can deal with that matter in this case.

Mookerjee, J.—I agree that the decree of the Subordinate Judge cannot be supported. The facts material for the determination of the question of law raised before us lie in a narrow compass and may be briefly recited. Under one Chongdar as talukdar the Mookerjees held a mukarari tenure. In 1886, the Mookerjees created a permanent under-tenure in favour of Pal. In 1889, the Ghoses took possession of 2½ bighas of land included in the tenancy of Pal under the Mookerjees. This adverse possession of the Ghoses against Pal continued for the statutory period and in 1901, by operation of S. 28, Lim. Act, the Ghoses acquired a good title to this 2½ bighas of land as against Pal. In 1902, Chongdar brought a suit for arrears of rent against the Mookerjees and obtained a decree. At the sale held in execution of that decree on 22nd January 1903, the plaintiff purchased the mukarari tenancy of the Mookerjees under Chongdar. He then took proceedings under S. 167, Ben. Ten. Act, to annul the incumbrances on the property, that is, the tenancy created in 1886 by the Mookerjees in favour of Pal. The plaintiff, it is conceded, served a notice under S. 167 on Pal and the question in controversy is whether the notice so served affects the Ghoses.

On behalf of the plaintiff-respondent it has been argued that he completely fulfilled the requirements of S. 167 when he served notice upon Pal and that he was under no obligation to take notice of the right, ff any, which by operation of law might have been acquired by the Ghoses against Pal. In support of this view, reliance has been placed on the decisions in *Womesh Chunder Goopto* v. *Raj Narain Roy* (1); *Krishna Gobind Dhur* v. *Hari Churan Dhurn* (2); *Sheo Sohye Roy* v. *Luchmeshur Singh* (3); *Sharat Sundari Dabia* v. *Bhobo Pershad Khan* (4); *Gunga Kumar Mitter* v. *Asotosh Gossami* (5); *Thamman Pande* v. *Maharaja of Vizianagram* (6), which formulate the doctrine that adverse possession against a tenant is ordinarily not operative as adverse possession against the landlord during the continuance of the lease. This proposition is obviously of no avail to the respondent. The question in controversy is, not whether the possession of the Ghoses was adverse to the Mookerjees, but whether the Ghoses have acquired by operation of law the status of incumbrancers within the meaning of S. 167, Ben. Ten. Act. The appellants contend that this question should be answered in the affirmative, because they are persons in whom the incumbrance, that is, the sub-tenancy created by the Mookerjees in favour of Pal in 1886, has, as to a portion thereof, become vested. In fact, after the lapse of the statutory period, the position of the Ghoses became that of grantees of 2½ bighas from Pal. Consequently the notice served on Pal alone is inoperative so far as the Ghoses are concerned and has not in any way affected the interest a cquired by them in the subtenancy.

It may be pointed out that the transfer of a share of a permanent tenure or undertenure or of a raiyati holding at a fixed rate of rent is valid under Ss. 11, 17 and 18, Ben. Ten. Act, although, under S. 88 the transferee of the share is not entitled to claim a sub-division of the tenure or holding as against the landlord. The Ghoses here do not claim a sub-division of the tenancy as against the plaintiff; all that they assert is that they have acquired an interest in the tenancy created by the Mookerjees in favour of Pal, that they have thus become "incumbrancers" and that they are consequently entitled to notice under S. 167. This contention is clearly well founded on principle and must prevail. Reference has been made in the course of the argument to the decision in *Gokul Bagdi* v. *Debendra Nath Sen* (7) and *Arsadulla* v. *Munseb Ali* (8), which recognize tne principle that the term "incumbrance" used in Ss. 159 and

1. (1868) 10 W R 15.
2. (1883) 9 Cal 367.
3. (1884) 10 Cal 577.
4. (1886) 13 Cal 101.
5. (1896) 23 Cal 863.
6. (1907) 29 All 593.
7. (1911) 11 I C 453.
8. (1912) 14 I C 349.

161, Ben. Ten. Act, includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. This doctrine had no application to the circumstances of the present case, because the Ghoses claimed title and possession, not against the Mookerjees, but against Pal. The true view is that when a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when on a sale of the superior tenancy for arrears of rent the purchaser seeks to annul the sub-tenancy as an "incumbrance," such person stands in a position of an "incumbrancer" and is entitled to notice under S. 167. In my opinion this appeal must be allowed and the suit dismissed with costs in all the Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 952

SANDERSON, C. J. AND CHATTERJEA, J.

Bejoy Singh Dudhuria—Plaintiff—Appellant.

v.

Krishna Behari Biswas and *another*—Defendants—Respondents.

Letters Patent Appeal No. 23 of 1916, Decided on 28th March 1917, against decree of Newbould, J , D/- 28th January 1916, in Appeal No. 3881 of 1916.

(a) Bengal Regulation (1812), S. 3—Sum named in kabuliyat held to be abwab and not intended by parties to form part of rent and hence irrecoverable.

In a kabuliyat executed in the year 1883 in respect of a patni tenure, the rent was fixed at Rs. 3,315-4-0 and in a subsequent clause it was stipulated by the tenant, "besides this I shall continue to pay in the month of Badhra every year the sum of Rs. 15 as the mamuli for the Iswar Thakur (idol) at your house. In the details of instalments, the said sum of Rs. 15 was not included. The sum of Rs. 3,315 4-0 was referred to throughout the kabuliyat as the rent, and the Rs. 15 was neither described nor treated as part of the rent in any part of the kabuliyat.

Held: that the sum of Rs. 15 could not be recovered by the zamindar, as it was an abwab and was not intended by the parties to form part of the rent or to be payable in respect of the use and occupation of the land. [P 955 C 2]

Per *Chatterjea, J.*—Even assuming that the sum of Rs. 15 did form part of the consideration for the use and occupation of the land, it was not recoverable under Regulation 5 of 1812 as it did not form part of the rent, nor was it treated by the parties as part of the rent. The fact that a certain item is dealt with in a kabuliyat in a separate clause or that it is not included in the instalments of rent specified, has an important bearing upon the question of the intention of the parties to the kabuliyat, as to whether the item is or is not rent. [P 956 C 1; P 960 C 1]

(b) Bengal Regulation (1812), S. 3—It is only rent and not any other item though not indefinite nor arbitrary that can be recovered.

Per *Chatterjea, J.*—The concluding portion of S. 3 does not mean that the Court is to enforce payment of every sum which is not indefinite and which may have been specifically agreed upon between the parties, but it is only the rent, and not any other item, though neither indefinite nor arbitrary and though agreed upon to be paid in the written engagement of the tenant, which can be recovered under the Regulation: 17 *Cal.* 726, *Foll.* [P 956 C 2]

(c) Bengal Regulation (1812), S. 3—Abwab.

Per *Chatterjea, J.*—As regards the question whether an additional sum (claimed by the landlord) under a kabuliyat is or is not an abwab there is no difference between a raiyati holding and a permanent tenure. [P 959 C 1]

(d) Bengal Regulation (1812), S. 3—"Rent"—Meaning explained.

For the purpose of deciding whether a certain sum specified in a kabuliyat is or is not an abwab, every consideration for a lease is not necessarily "rent" within the meaning of S. 3. [P 959 C 2]

(e) Bengal Regulation (1812), S. 3—Abwab—Question whether sum specified in "lease" is abwab depends on construction of contract.

Per *Sanderson, C. J.*—Whether a particular sum specified in a lease or agreed to be paid by the tenant is or is not an abwab, must depend upon the proper construction of the contract made by the tenant and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, i. e., if it is really part of the rent although not described as such, the landlord can recover it. [P 955 C 1]

Ram Chandra Majumdar—for Appellant.

Mahendra Nath Roy, Monmotha Nath Roy and *Sasodhur Roy*—for Respondents.

Sanderson, C. J.—This is an appeal from the judgment of Newbould, J., whereby he affirmed the judgment of the first appellate Court. The plaintiff's claim was for Rs. 3,330 as arrears of rent. The defendants pleaded that the rent was Rs. 3,315 per annum and that the further sum of Rs. 15 claimed by the plaintiff was in the nature of an abwab and was not recoverable. It appears that in 1883 a kabuliyat was executed by Ram Sharan Biswas, the predecessor-in interest of the defendants, in favour of one Roy Dhanapat Singh Bahadur, who subsequently sold the mahal to the plaintiff. In this kabuliyat the annual rental is stated to be Rs. 3,315 4-0, but it was further provided by the document that

the defendants' predecessor should pay in the month of Bhadra every year the sum of Rs. 15 in respect of a Thakur. The words of the clause, according to a translation which was agreed upon by the learned vakils who argued the case, were as follows:

"Besides this I shall continue to pay in the month of Bhadra of every year the sum of Rs. 15 as the mamuli (usual) for the Iswar Thakur at your house at Azimgunj. If I fail to pay the aforesaid sum amicably, then you shall deduct the same from the money remitted by me as the rent or sue for the amount along with or separately from the arrears of rent. I shall not take objections thereto."

The clause relating to the annual rental was near to the beginning of this document, and the clause relating to the Rs. 15 was near the end of the kabuliyat. A schedule setting out "details of instalments" was attached to the kabuliyat. Therein the total jama was stated to be Rs. 3,315-4-0 and neither any of the monthly instalments nor the total included the payment of Rs. 15 in respect of the Thakur. The learned Judge held that the sum of Rs. 15 could not be regarded as part of the rent but must be regarded as an irrecoverable "abwab." From this decision the appeal has been brought. It was argued on behalf of the appellant that the learned Judge's decision was wrong and that the Rs. 15 was recoverable because the liability to pay it was created at the same time as the putni, and in the same document, that the agreement to pay Rs. 15 was part of the consideration for the grant of the putni, that the said sum was neither an arbitrary nor an indefinite cess within the meaning of S. 3, Regulation 5 of 1812 and that being so and the sum of Rs. 15 being part of the consideration for the putni it could not be an "abwab." On the other hand, it was argued on behalf of the defendants that the sum of Rs. 15 was not part of the rent and was not money payable for the use and occupation of the land, but was a sum which was stipulated and understood by the parties as being additional to the rent and was therefore an abwab, even though the sum itself was not indefinite and though the clause relating to the payment thereof was definite. The kabuliyat was executed in 1883 and it was agreed by both sides that the matter was governed by S. 3, Regulation 5 of 1812. The words of the section are as follows:

"Such part of Reg. 8 of 1793 and of Reg. 4 of 1794 as require that the proprietors of land shall prepare forms of pattas, and that such forms shall be revised by the Collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulations in question shall be deemed to be invalid, are likewise hereby rescinded, and the proprietors of land shall henceforward be considered competent to grant leases to their dependent talukdars, under-farmers and raiyats and to receive corresponding engagements for the payment of rent from each of those classes or any others classes of tenants, according to such form as the contracting parties may deem most convenient and most conductive to their respective interests: provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of abwab, mathat or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of judicature to be null and void, but the Courts shall, notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or in other words, enforce payment of such sums as may have been specifically agreed upon between them."

There is no definition of the term "abwab" in the Regulation, but for the appellants it was argued that the accurate definition of the term "abwab" was that which was approved by O'Kinealy, J., in his judgment in *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) as follows:

"The term is particularly used to distinguish the taxes imposed subsequently to the establishment of the asul, or original standard rent, in the nature of addition thereto. In many places they had been consolidated with the asul, and a new standard assumed as the basis of succeeding impositions."

That being the meaning of the word, it was urged that it would not be applicable to the payment of Rs 15 in this case, for it was agreed between the parties at the time the original rent was agreed, and in the very document by which the rent was reserved: and that inasmuch as the sum in question is neither arbitrary nor indefinite, and was part of the consideration for the patni, it can be recovered even though it cannot strictly be said to be part of the "rent" agreed upon. To this argument the respondents reply that unless it was part of the "rent" or understood and agreed by the parties to be part of the "rent" properly so called it cannot be recovered, and they rely principally upon two cases—First, a Full Bench decision in *Chultan Mahton* v. *Tilukdari Singh* (2) and a decision of the Judicial Committee of the Privy Council in the same case reported as *Tilukdari Singh* v.

1. (1890) 17 Cal 726.
2. (1885) 11 Cal 175.

Chultan Mahton (3) and second, *Radha Prosad Singh* v. *Bal Kowar Koeri* (1). In my judgment the actual decisions in these cases do not cover this case, though expressions of opinion in some of the judgments of the learned Judges in this Court are certainly material. In the case of *Chultan Mahton* v. *Tilukdari Singh*(2), the items in dispute were claimed as "abwabs" and the Judicial Committee's decision was that the High Court was right in holding them to be "abwabs" and that if they were payable at the time of the Permanent Settlement, they ought to have been consolidated with the rent under S. 54, Reg. 8 of 1793, and not being so consolidated they could not be recovered: and if they were not payable at the time of the Permanent Settlement, they would come under the description of new "abwabs" in S. 55 and so would be illegal. There was no written agreement, as in this case, providing for the payment of a definite sum, made at the same time as the agreement for rent, and the Judicial Committee did not decide the point now before us. In the Full Bench case reported as *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) the reference was:

"Whether the portions of the claim that are objected to as coming under the denomination sarak neg and khuruch are illegal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with the rent and without any specification in the rent receipts?

and the Court held that the amounts sued for under the head of sarak neg and khuruch were abwabs and not recoverable. The point now before us was not involved in this decision. In this case, however the judgments were of an elaborate nature and entered upon a consideration of the subject of the recovery of abwabs, much of which was not necessary for the decision as was pointed out by O'Kinealy, J., at p. 742. The opinions of these learned Judges, however even though not strictly necessary for the decision of the case, must carry great weight and the majority seem to have come to the conclusion that the last four lines of S. 3, Regn. 5 of 1812 referred to the ground rent of the Permanent Settlement, confirming in this respect Mitter, J.'s opinion in *Chulton Mahton* v. *Tilukdari Sengh* (2) where he said:

"This provision. . . .refers only to the amount which is by the contract fixed as the rent payable to the landlord."

This is the view as to the construction of the section which seems to have been acted upon in this Court since 1885 and whatever one's own views might have been if the matter were free from judicial opinion, I do not think it would be right for us sitting in a Division Bench of this Court to depart from a construction which has been adopted for so many years. In *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) Petheram, C. J., however went further and expressed the opinion as follows at p. 739:

"By this judgment I understand the Privy Council, while affirming that of the High Court, to go beyond it and to hold that under the Regulations nothing could be recovered for the occupation of land, except one sum which must include everything which was payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract, whether express or implied, to pay anything beyond that sum under any name whatever, for or in respect, of the land could not be enforced,"

and he emphasises the point by declaring at p. 740 that the judgment of the Privy Council

"decided that nothing can be recovered from the tenant except the one sum fixed as the rent of the land."

On the other hand Ghose, J., at p. 767 interpreted the decision of the Privy Council as follows:

"I do not understand that they intended to go any way beyond what Mitter, J., said in his judgment, and to lay down, as it is said they did lay down, that nothing, save and except one sum, including every item of payment could be recovered as payable for the occupation of land; and that an agreement to pay anything beyond that sum, although it might be a lawful consideration for the lease, could not be enforced. It appears to me that if in any given case the Court finds that any particular sum specified in the lease or agreed to be paid is a lawful consideration for the use and occupation of any land, that is to say, if it is really part of the rent, although not described as such, it would be justified in holding that it is not abwab, and is recoverable by the landlord."

It is to be noticed that the interpretation placed upon the Privy Council's judgment by Petheram, C. J., has not been followed in this Court, as for instance. *Kalanand Singh* v. *Eastern Mortgage and Agency Co. Ltd.*, (4). In that case it was agreed that the lessee should pay a fixed sum of Rs. 4,300 of which rupees 4,300 was described as jama, Rs. 5 as selami towji and Rs. 5 as tehwari dasara. It is to be noticed that the sum fixed for rent was Rs. 4,300 and other two sums could not be called rent in the strict

3. (1890) 17 Cal 121=16 I A 152 (P C).

4. (1913) 19 I C 701.

sense, yet it was held that they could be recovered on the ground that the payment of the specific sums was provided for and agreed upon in the lease creating the tenancy and that the stipulation for such payment was not stipulation or reservation for the pryment of arbitrary or indefinite cesses but were in the language of the S. 3, Regn. 5 of 1812,

"a definite clause in the engagement contracted between the parties which should be maintained and given effect to and that in fact the two sums then in question, though not described in the lease as rent, were in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid:" see the judgment in that case at p. 85 of 18 *C. L. J.*

There are other cases in which the interpretation given by Petheram, C. J., to the decision of the Privy Council in *Radha Prosad Singh* v. *Bal Kowar Koeri* (1), has not been followed, e. g., *Assanulla Khan Bahadur* v. *Tirthbashini* (5). *Mathura Prasad* v. *Tota Singh* (6), and *Upendra Lal* v. *Atulla* (7). In the first of these cases it was argued by the vakil for the respondents that the mere fact of the amount claimed on account of chaukidari tax not being consolidated with what was called the patni rent but being kept separate, was enough to render it an abwab and, therefore, not recoverable and *Tilukhdari Singh* v. *Chultan Mahton* (3), and *Radha Prosad Singh* v. *Bal Kowar Koeri* (1), were cited as authorities for the proposition. The learned Judges, however, though they said that there were passages in some of the judgments delivered in these cases which, taken alone, might appear to lend support to the respondents' contention, did not adopt the argument. It seems, therefore, that the rule which has been followed in this Court is that each case must depend upon the proper construction of the contract before the Court and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, *i. e.*, if it is really part of the rent although not described as such, the landlord can recover it, and I apply this rule to the present case. It is necessary, therefore, to consider the nature of the payment which is in question.

5. (1895) 22 Cal 680.
6. (1913) 40 Cal 806=17 I C 177.
7. (1916) 36 I C 404.

It is a yearly payment for the Iswar Thakur at the lessor's house at Azimgunj, and the nature of it is shown by the fact that the plaintiff who is the assignee of the lessor has nothing to do with the Thakur at Azimgunj and does not maintain it in any way. Further, the clause relating to the payment of the sum of Rs. 15 and to its recovery is that couched in terms which led me to think this payment cannot have been intended by the parties to be part of the rent or to be payable in respect of the use and occupation of the land: in addition to this there is the absence of any reference to this sum in the details of the instalments of the end of the document, and on true construction of the terms of the lease I have come to the conclusion that this sum of Rs. 15 was not intended by the parties to be part of the consideration for the use and occupation of the land or as part of the rent and therefore, is not recoverable. Consequently, in my judgment, this appeal should be dismissed with costs.

Chatterjea, J.—The question involved in this appeal is whether a sum of Rs. 15, which was agreed upon to be paid by a permanent tenure-holder under a kabuliyat as the "mamuli for the Iswar Thakur at the house" of the zeminder is or is not an abwab. The kabuliyat was in respect of a patni tenure and was executed in the year 1882. The rent of the patni was fixed at Rs. 3, 315-4-0. In a subsequent clause it was stipulated:

"Besides this, I shall continue to pay in the month of Bhadra of every year the sum of Rs. 15 as the mamuli for the Iswar Thakur at your house at Azimgunj."

In the details of instalment the total rent stated to be Rs. 3,315-4 0, which was distributed into twelve monthly instalments specified in the lease and did not include the said sum of Rs. 15 which was made payable only once, in the month of Bhadra every year. The sum of Rs.3,315-4-0 is referred to throughout the kabuliyat as the rent, and the Rs. 15, as already stated, was neither described nor treated as part of the rent in any part of the kabuliyat. Then it was provided that if the patnidar failed to pay the said sum of Rs. 15 amicably, the zemindar would be entitled to deduct the said amount from the money which might be remitted by the patnidar as the rent, or realise the amount along with the arrears

of rent, or separately, by instituting suits, thus clearly distinguishing the said sum of Rs. 15 from the rent. These provisions would have been wholly unnecessary, had the sum of Rs. 15 been part of the rent. There is no doubt, therefore, that the sum of Rs. 15 did not form part of the rent, nor was it treated as part of the rent.

It is contended on behalf of the appellant that the said sum of Rs. 15 formed part of the consideration for the patni lease and is therefore recoverable. But in the first place, I do not think the said sum is part of the consideration for the patni. The sum was agreed to be paid as the customary present to the deity at the house of the then zamindar, Dhanpat Singh. The plaintiff is an assignee of Dhanpat and he has nothing to do with the Thakur at Azimgunj which is maintained by the sons of Dhanpat, the original lessor. The "mamuli for the Iswar Thakur," I think, cannot be claimed by the plaintiff, as it was not money payable on account of the use and occupation of land. In the next place, even assuming that it did form part of the consideration for the use and occuption of the land, I am of opinion that it cannot be recovered as it did not form part of the rent. It is contended on behalf of the appellant that if a specific sum which is neither uncertain nor indefinite is agreed upon to be paid in the lease creating the tenancy as part of the consideration for the use and occuption of the land, the stipulation to pay such a sum is not void and must be given effect to, and reliance is placed on the provisions of S. 3 Regn. 5 of 1812 (which is the law applicable to the present case) and certain decisions of this Court. Now S. 3 of that Regulation runs as follows:

"Such part of Regn. 8 of 1793, and of Regn. 4 of 1794, as required that the proprietors of land shall prepare forms of pattas, and that such forms shall be revised by the Collectors and which declare that engagements for rent contracted in any other mode than that prescribed by the regulations in question shall be deemed to be invalid, are likewise hereby rescinded; and the proprietors of land shall henceforward be considered competent to grant leases to their dependent talukdars, under-farmers and raiyats and to receive corresponding engagements for the payment of rent from each of those classes, or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests; provided however that nothing herein contained shall be construed to sanction or legalise the imposition of arbitrary or indefinite cesses, whether under the denomination of 'abwab' or 'mathat' or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Court shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or in other words, enforce payment of such sums as may have been specifically agreed upon between them."

It will be seen that the section clearly prohibits the imposition of arbitrary or indefinite cesses, whether under the denomination of abwab, mahtut or any other denomination. It is true that the concluding portion of the section says:

"The Court shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties or, in other words, enforce payment of such sums as may have been specifically agreed upon between them."

But I think that does not mean that the Court is to enforce payment of every sum which is not indefinite and which may have been specifically agreed upon between the parties. If that is the meaning of the section, a stipulation to pay a fixed sum (in addition to the rent) expressly described as abwab or mahtut, if specifically agreed upon in the contract creating the tenancy, must be enforced. It may be said that an abwab or mahtut is an arbitrary ceses and is expressly prohibited by the section, and therefore cannot be recovered even if specifically agreed upon. But the section prohibits the imposition of cesses not only under the denominations of abwab or mahtut, but of any arbitrary or indefinite cese under any other deuomination. The concluding portion of S. 3 Regn. 5 of 1812, came up for consideration before the Full Bench in the case of *Chultan Mahton* v. *Tilukdari Singh* (2) and Mitter. J. (Tottenham and Pigot, JJ., concurring with him) referring to the last four lines of the section observed at p. 184 of the report:

"This provision, it seems to me, refers only to the amount which is by the contract fixed as the rent payable to the landlord. The section in question provides mainly that the proprietors of land shall thenceforth be competent to grant leases to raiyats, etc., and to receive corresponding engagements for the payment of rent from them. Having regard to the words of the section in question italicized, I think the words 'sum specified, refer to the amount of the rent specified."

It is true the question referred to the Full Bench was whether certain items over and above the rent described in the zamindari papers and in the plaint as abwabs were legally recoverable. One of

the argument however before the Court was that as there was a contract between the parties for the payment of the sums claimed in that case, under the latter portion of S. 3, Regulation 5 of 1812, the plaintiffs were entitled to recover them. So that the construction of that section came up for consideration before the Full Bench. On appeal the Judicial Committee, no doubt, affirmed the decision in that case upon a consideration of the provisions of Ss. 54 and 55, Regulation 8 of 1793, and held that if the abwabs claimed existed at the time of the Permanent Settlement, they ought to have been consolidated with the rent under S. 54 of that Regulation, and if they were not payable at that time they would come under the descriptions of new abwabs under S. 55, and therefore could not be recovered. But their Lordships did not disapprove of the view taken by the Full Bench as to the construction to be placed on S. 3, Regulation 5 of 1812. A similar view was taken by the Full Bench in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (1). The question in that case was whether certain cesses under the denomination of sarak neg and khuruch, which had been paid for a long time along with the rent and without specification in the rent receipts, were recoverable. They were not agreed upon to be paid by any written engagement at the creation of the tenancy or as part of the rent, and appear to have been subsequent impositions. But the correctness of the decision in *Pudmanund Singh* v. *Baij Nath Singh* (8) having been questioned in the order of reference the provisions of S. 3, Regulation 5 of 1812, were considered by the Full Bench in dealing with the question of abwabs, and the opinion of the learned Judges is certainly entitled to great weight. O'Kinealy, J., (Prinsep and Pigott, JJ., agreeing with him) observed at p. 752:

"By S. 2, Regn. 18 of 1812, the proprietors were empowered to grant leases of any form for rent, and by S. 3, Regulation 5 of 1812, they were empowered to receive from the tenants; corresponding engagements for the payment of rent' and it only. No further power was given. And as if to mark the distinction between cesses and rent, the former are referred to as paid under stipulations or reservations, the latter under engagements, and it was the engagements for the pay- of rent, and not the stipulations for cesses, that were to be enforced. It was not the intention of the framers of this Regulation to allow the parties to contract for anything in money or in kind not then known as rent, and when they described abwabs and mahtuts as arbitrary or indefinite they were only using words applied to these assessments from 1772. Bearing this in mind, a comparison of the latter portion of this section with Ss. 54 and 57, Regulation 8 of 1793, shows that the words 'specifically agreed' in Regulation 5 of 1812 are the same as' specifically stated' in S, 57, and refer to the one specific sum of S. 54 in the Permanent Settlement. They have no reference to cesses. This is the view taken by the Full Bench in *Chultan Mahton's* case (2), where it is that the last four lines of S. 3, Regulation 5 of 1812 refer to the ground rent in the Permanent Settlement."

We have been referred to certain observations of Banerjee, J., in the case of *Assanulla Khan Bahadur* v. *Thirthabashini* (5) in support of the appellant's contention. The amount objected to in that case was chowkidari cess, which the patnidar agreed to pay to the zamindar. The agreement to pay chowkidari tax by a patnidar, as pointed out in that case, could not possibly be considered as a stipulation to pay an arbitrary or indefinite cess in the nature of an abwab within the meaning of S. 3 of the Regulation. It is true Banerjee, J. (in referring to the fact that the majority of the learned Judges in the Full Bench case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (1) took the same view of Rigulation 5 of 1812 as was taken by the Full Bench in *Chultan Mahton's* case) (4) observed that

"the majority of the Full Bench in the former case based their conclusion that *Pudmanund's* case (8) was wrongly decided, not upon the ground that the items there claimed . . . . . were kept separate from the amount styled the rent, and were, therefore, not recoverable; but upon the grounnd that they were from their very nature no part of the ground rent, the items being selami and tehwari"

But that involves a distinction between rent and cesses; and Banerjee, J., himself in the case of *Sree Kanta Pershad* v. *Irshad Ali Sarkar* (9) disallowed the "price of presents and unpaid labour" in addition to the rent stipulated for in the kabuliyat, on the ground (among others) that they were dealt with separately from the actual rent in the kabuliyat. The construction of S. 3, Regn. 5 of 1812, now put forward on behalf of the appellant was distinctly set up in the case of *Pudmanund Singh* v. *Baij Nath Singh* (8). That was also a case of a permanent tenure and the tenant agreed to pay a certain fixed sum as rent and also certain other items designated selami and tehwari

8. (1888) 15 Cal 828.

9. (1912) 17 I C 173.

in the contract creating the tenancy. Tottenham and Ghose, JJ., held

" that they were not illegal cesses within the Full Bench ruling of *Chultan Mahton* v. *Talukdari Singh* (2), not being uncertain and arbitrary in their character, but specific sums which the tenants agreed to pay to the landlords and the payment of which, no less than the payment of rent itself, formed part of the consideration upon which the tenancy was created, and which were in fact part of the rent agreed to be paid, although not so described; they were recoverable, therefore, under Regn. 5 of 1812."

In the Full Bench case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (1), however, Ghose, J., although he repeated the same observations, said at p 768 with reference to the opinion expressed in *Pudmanund's* case (8) as follows:

"And I may here observe that it was not intended thereby to hold that anything that is not arbitrary and indefinite is recoverable, although it may not be part of the rent. In that case, both the elements were supposed to be present, viz, that the items in question were not of an arbitrary or indefinite character; and secondly, they formed part of the rent agreed to be paid. I am, howevr, bound to say that having since more carefully considered the subject, I have come to the opinion that we were not right in holding that the items of tehwari and selami were part of the rent stipulated to be paid under the lease. They were, I now think, abwabs."

So that according to the opinion of Judges in the two Full Bench cases (including Ghose, J., himself) it is only the rent, and not any other item though neither indefinite nor arbitrary and though agreed upon to be paid in the written engagement, which can be recovered under the Regulation and the contrary view taken in *Pudmanund's* case (8) was dissented from. The question, therefore, is what is the rent which is recoverable under the Regulations. Is it the single item which may be called the rent proper, or does it include any other item which is consolidated with it, and agreed upon by the parties as the rent. In *Radha Prosad's* case (1), Petheram, C. J., was of opinion that the Judicial Committee in *Tilukhdari Singh* v. *Chulhan Mahton* (3) while affirming the judgment of the High Court went beyond it, and held that:

" under the Regulations nothing could be recovered except the sum, which must include everything which was payable for such occupation arrived at either by agreement or by some judicial determination between the parties, and that any contract to pay anything beyond that sum under any name whatever for or in respect of the occupation of the land could not be enforced."

O' Kinealy, J., also (as stated above) observed with the concurrence of two other Judges that it is only one specific sum being the "ground rent" of the Permanent Settlement which can be recovered. The view, however, that nothing beyond "one sum" can be recovered has not been followed in the subsequent cases, unless the expression "one sum" was meant to include a consolidated sum agreed upon as "the rent" though consisting of more items than one. In all the subsequent cases the only distinction which has been drawn is that between the sum agreed upon as the rent (i. e., the amount which is fixed by the contract as the rent) and sums not so agreed upon, and the decisions proceed upon the view that more items than one may constitute the rent, if it appears from the lease that more items than one have been treated by the parties as part of and included in the 'rent' and described as such in the lease. It is unnecessary to go into all these cases in detail. Where a lease provides for payment of a fixed sum as rent and also provides for the payment of certain other fixed sums apart from the rent (for instance as the price of certain articles), such amount has been held to be an abwab though stipulated to be paid by the written contract creating the tenancy and though the amount payable is not indefinite; and in determining whether such item did or did not form part of the rent, the fact that it has been stipulated to be paid separately from the rent, and also the fact that it is not included in the instalments of the rent, have been considered as having a material bearing on the question. For instance in the case of *Radha Charan Ray Chowdhry* v. *Golak Chandra Ghose* (10), a fixed amount mentioned in the lease as payable annually for collection charges, which together with the rent was described as the jama and which was included in the kistbandi, the total being referred to as the rent, was held not to be an abwab.

On the other hand a certain sum stipulated to be paid for Iswar puja: *Narenda Kumar Ghose* v. *Gora Chand Poddar* (11), or as holi selami: *Bipin Behary Mitter* v. *Sarat Chandra Sirkar* (12), or as the "price of presents and unpaid

10. (1904) 31 Cal 834.
11. (1906) 33 Cal 683.
12. (1910) 7 I C 760.

labour:"*Sree Kanta Pershad* v. *Irshad Ali Sarkar* (9) or as price of husk: *Mathura Prasad* v. *Tota Singh* (6) and *Kalar Singh* v. *Mathura Prasad* (13), where the sum was treated in the kabuliyat separately from the rent or was not included in the kistbandi, was held to be an abwab. In all these cases, there was a written engagement at the creation of the tenancy, and there was express stipulation to pay a specific sum of money which was not uncertain or indefinite, and yet it was held that the sum did not form part of the rent but was an abwab and could not be recovered. Some of these cases relate to raiyati holdings and not to permanent tenures. But so far as the question whether the additional sum claimed under the kabuliyat was or was not an abwab, is concerned, there is no difference between a raiyati holding and a permanent tenure. The latest cases on the point are *Kalanand Singh* v. *Eastern Mortgage and Agency Co., Ltd.* (4) and *Upendra Lal* v. *Ataulla* (7). In the first case a permanent tenure was created by a lease dated 31st January 1874, and in the lease it was specifically provided that the lessee should pay to the lessor year by year a fixed sum of Rs. 4,310, of which the sum of Rs. 4,300 was described as jama and Rs. 10 as selami and tehwari.

Chitty and Teunon, JJ., that held they were not abwabs as they were specific sums provided and agreed upon in the lease creating the tenancy, and such stipulation was not for the payment of arbitrary or indefinite cesses, but in the language of S. 3, Regn. 5 of 1812, is "a definite clause in the engagement contracted between the parties" which should be "maintained and given effect to." The learned Judges were of opinion that the two sums in question, though not described in the lease as rent. were in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid. In *Upendra Lal* v. *Ataulla* (7) a sum of Rs. 3 1-0 described as enhanced rent for collection charges together with the rent proper was fixed as the total rent, the details of the kistbandi dealt with the whole amount including the said sum of Rs. 3-1-0, and the total amount was throughout referred to as the rent. It was under these circumstances that the amount was held to be part of the rent and not an abwab, in accordance with the view taken in the previous decisions on the point since *Radha Prosad's* case (1). The case of *Kalanand Singh* v. *Eastern Mortgage and Agency Co., Ltd.* (4) was referred to in the judgment (to which I was a party) as the learned Judges in that case had held, upon a construction of the kabuliyat (the terms of which were not fully set out in the report), that the two items were part of the rent agreed upon to be paid. If, however, the learned Judges took the same view as had been taken by Tottenham and Ghose, JJ., in *Pudmanund's* case (8) (in which the very same items selami and tehwari were in dispute), it is opposed to the view taken not only by the majority of the Full Bench (and in a manner by Ghose, J. himself as stated above) in *Radha Prasad's* case (1) and in *Chultan Mahton's* case (2) but in all the cases decided subsequently.

The actual decision in *Upendra Lal's* case (7) proceeded upon the ground that the sum objected to was part of the rent. The expression "consideration for the lease" used in the judgment was qualified by the words "and part of the rent" and these words were repeated more than once in our judgment. It was not meant that any consideration for the lease mentioned in the kabuliyat creating the tenancy is rent and not an abwab. Any sum agreed upon to be paid as "rent" is consideration for a lease but for the purpose of deciding the present question every consideration for a lease is not necessarily "rent" within the meaning of S. 3 of the Regulation, and anything which is prohibited by Statute cannot be said to be lawfully payable. In fact the distinction between what upon a construction of a lease is rent and a sum not treated nor described as rent but which may have been agreed upon to be paid by the kubuliyat was recognized in that judgment, as the references to the several cases cited show (though the fact that such a distinction was not observed by Garth, C. J., in *Mahomed Fayez Chowdhry* v. *Jamoo Gazee* (14) was overlooked in citing that case,) and the judgment was in fact founded upon the distinction, though not clearly expressed. The observation that since the Full Bench decision, the question has been treated as one of construction "al-

13. A I R 1914 Cal 781=25 I C 647.

14. (1882) 8 Cal 730.

though more items than one are described as constituting the rent" was made with reference to the view taken by some of the Judges in *Radha Prosad's* case (1) that only one sum is rent and the rest are abwabs. What was meant to be said was that if the item other than the rent proper is consolidated with it and appears from a construction of the lease to have been included in and treated as part of the rent, so that the two items constitute the "rent" agreed upon at the creation of the tenancy, then the mere fact that there are two items would not make the item other than the rent proper an abwab.

It is contended that the mere fact that a certain item is dealt with in the kabuliyat in a separate clause or that it is not included in the instalments of rent ought not to make any difference in determining whether the item is or is not rent. But those facts have an important bearing upon the question of intention of the parties to the contract. They show whether the parties intended to treat a particular item as part of the rent agreed upon to be paid or as something different from the rent, and those facts have accordingly been taken into consideration in all the cases decided since the Full Bench.

The question whether a particular item is or is not rent, no doubt depends upon the construction of the lease in each case. But once it is held that a particular item has not been agreed upon by the parties as the "rent" nor described in the lease as such, the further question whether such sum, although it may form part of the consideration mentioned in the contract, is recoverable or not must depend upon the law as laid down in the Regulations and Acts on the point. So far as the construction of the lease in the present case is concerned, the sum of Rs. 15 as Thakurbari mamuli is not, for the reasons already stated, part of the rent. The sum therefore cannot be recovered, having regard to the provision of Regn. 5 of 1812 and the cases decided on the point. I accordingly, agree in dismissing the appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 960

CHATTERJEE AND NEWBOULD, JJ.

Rajani Nath Das—Plaintiff—Appellant.

v.

Ofajuddi Mullah and *others*—Defendants—Respondents.

Appeal No. 2403 of 1914, Decided on 9th May 1916, from appellate decree of Offg. Sub-Judge, 2nd Court, Backergunje, D/-12th June 1914.

Registration Act (1908), S. 47—Kabala when registered operates from date of its execution.

As soon as a kabala is registered, it operates from the date of its execution and, therefore, the title created by it will have priority over that created by a later kabala executed in favour of another person in respect of the same property, notwithstanding its prior registration and the delivery of possession to that person. 6 *Bom* 165 and 8 *Bom.* 182 *not Foll*; 29 *Bom.* 42 11 *Cal.* 121 (*P. C.*) and 13 I. *C.* 653 *Foll.* [P 960 C 2]

Atul Chandra Gupta and *Tarakeshwar Pal Chowdhury*—for Appellant.

Surendra Nath Guha—for Respondents.

Judgment.—This appeal has been very clearly and ably argued by Babu Atul Chandra Gupta, vakil for the appellant, and we are quite satisfied that the learned Judge below was wrong in dismissing the suit of the plaintiff. Defendant 1 in this case executed a kabala in favour of the plaintiff on receipt of consideration. Thereafter he executed a second kabala in respect of the same property in fauour of defendant 2 and had the latter document registered first and placed the second purchaser in possession. The learned Judge below has held that because defendant 2 acquired the property without any notice of the previous title of the plaintiff, his title ought to prevail against the prior title of the plaintiff, which was registered later. This view is clearly in violation of S. 47, Registration Act, which provides thrt a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. As soon as the kabala of the plaintiff was registered, it operated from the date of its execution, and, therefore, the title of the plaintiff is prior notwithstanding the prior registration and delivery of possession to the defendant. The learned vakil for the respondent relied upon two cases in the Bombay High Court, namely *Hasha* v. *Ragho Ambo*

Gondhali (1) and *Santaya Mangarsaya* v. *Narayan* (2). These cases, however, are no longer law in the Presidency of Bombay, because we find from the cases of *Narayan Venkap Shetti* v. *Laxuman Shantaya Kini* (3) and *Motichand Jivraj* v. *Sagun Jethiram* (4) that a different view has been held in that Court in consequence of a decision of the Privy Council in the case of *Kalidas Mullick* v. *Kanhaya Lal Pundit* (5), which held that in order to complete title under the Hindu law, delivery of possession was not a necessary ingredient. The same view with regard to priority of title between competing registered documents was held in this Court also in the case of *Jadunandan Prosad Singha* v. *Koer Kallaya Singh* (6). We, therefore, think that the learned Judge was clearly wrong in his enunciation of law in this case. This appeal, therefore, is decreed with costs.

V.B./R.K. *Appeal allowed.*

1. (1881-82) 6 Bom 165.
2. (1886) 8 Bom 182.
3. (1905) 29 Bom 42.
4. (1905) 29 Bom 46.
5. (1885) 11 Cal 121=11 I A 218 (P C).
6. (1912) 13 I C 653.

A. I. R. 1918 Calcutta 961

MOOKERJEE AND CUMING, JJ.

Jagabandhu Saha —Plaintiff—Appellant.

v.

Magnamoyi Dassi—Defendant—Respondent.

Appeals Nos. 2963 and 3450 of 1913, Decided on 23rd June 1913.

(a) Bengal Tenancy Act (8 of 1885), S. 5, Cl. 5—Scope—It is not confined to suit between landlord and tenant—Presumption under Cl. 5 applies to tenancies before the Act—It is not confined to tenancies of more than 100 bighas — It applies to determine character of tenancy of more than 100 bighas though subdivided before the Act.

Clause 5, S. 5, Ben. Ten. Act, is not limited, like S. 50, in its application to suits or proceedings between landlords and tenants under the Act. [P 962 C 2]

The presumption under Cl 5, S. 5, Ben. Ten. Act applies to tenancies craated before the Act came into force. That clause is not limited to cases of tenancies of more than 100 bighas in existence as such, either at the commencement of the Bengal Tenancy Act or at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination. And it may properly be applied to determine the character of a tenancy of more than 100 bighas though that tenancy had been subdivided into tenancies each of less than 100 bighas before the Bengal Tenancy Act came into operation: 24 *Ca* 272 and 2 *I C* 72, *Ref.* [P 962 C 2, P 963 C 1; P 964 C 1]

(b) Bengal Tenancy Act (1885), S. 5, Cl 5—It does not create new rights or affects any right created before the Act—It furnishes mode of proof of character of certain tenancies — It is adjective law and hence retrospective.

Clause 5, S. 5, does not create any new right or purport to affect any right created before the commencement of the Bengal Tenancy Act. It simply furnishes a mode of proof of the character of tenancies of certain descriptions and is consequently a provision not of substantive but of adjective law, and therefore may have retrospective operation. [P 963 C 1]

(c) Interpretation of Statutes—Act affecting previously existing right or imposing new liabilities must be presumed to be not retrospective.

Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new liability or attaches a new disability in respect of transaction already past, must be presumed to be intended not to have a retrospective effect: *Bourke* v. *Nutt, School Board Election for the Parish of Pulborough, In re*, (1894) 1 *Q B* 725, *Foll.* [P 963 C 1]

(d) Land Tenure—Partition — Division of divisible tenure does not affect its continuity.

The subdivision of a tenure divisible in its nature does not create a breach of its continuity and each fragment carved out of the original tenure retains its incidents: 21 *I C* 385 and 36 *I C* 707, *Foll.* [P 964 C 1]

(e) Grant—Construction—Object of grant and not the conduct of grantee determine real nature of tenancy.

The real nature of a tenancy is determinable by proof of the purpose of the original grant, the grantee's dealing with it is by no means decisive as to the true character of the tenancy. [P 964 C 1 2]

(f) Evidence Act (1 of 1872), S. 102—Burden of proof of defence to suit for ejectment on ground of holding being at fixed rent and transferable is on the defendant.

In a suit by a landlord for ejectment of the transferee of a holding on the ground that the holding is a non-transferable occupancy holding the defendant who asserts that it constitutes a holding at fixed rates of rent (and as such is transferable), must establish the truth of the assertion. [P 964 C 2]

(g) Evidence Act (1 of 1872), S. 114—Rent not altered for 40 years—Origin of tenancy of occupancy raiyat not known—Fact of non-alteration alone is not sufficient to infer that tenancy was at fixed rent.

The mere fact that the rent of a tenancy (of which the origin is unknown) of agricultural land held by an occupancy raiyat has not been altered for a period of 40 years, does not as a matter of law, lead to the inference that at the inception of the tenancy its rent was by agreement of parties fixed in perpetuity. [P 965 C 1]

S. P. Sinha, *Dwarkanath Mitter* and *Debendra Nath Mandal*—for Appellant.

Mahendra Nath Roy and *D.N. Bagchi*—for Respondent.

Judgment.—The subject-matter of the litigation, which has culminated in these appeals, comprises the lands of three tenancies held by one Kaliprasanna Pal under the plaintiff. The plaintiff asserts that the tenancies were non-transferable and yet on 22nd June 1909, the tenant transferred the lands to the defendant who entered into wrongful possession. He consequently instituted this suit on 20th September 1911 for recovery of possession on declaration of title. His claim was resisted substantially on the ground that the tenancies were transferable. As regards the first two tenancies, each of which consisted of 25 bighas of land, the defendant alleged that they were raiyati holdings held at a fixed rent and were consequently transferable in the same way as a permanent tenure under S. 18, Ben. Ten. Act. As regards the third tenancy, which comprises an area of 63 bighas, she pleaded that it constituted a transferable tenure. The Court of first instance came to the conclusion that the first two tenancies constituted non-transferable occupancy-holdings and that the third was a transferable tenure. In this view the Subordinate Judge made a decree in favour of the plaintiff for the lands comprised in the first two tenancies and dismissed his claim in respect of the lands included in the third tenure. Appeals were thereupon preferred against the decision of the Subordinate Judge as well as by the plaintiff as by the defendant. The District Junge has dismissed both the appeals and affirmed the decision of the trial Court. In this Court the decree of the District Judge has been assailed by each of the parties in so far as that decision is adverse to his interests.

The question for determination in the appeal preferred by the plaintiff is whether the lands comprised in the third tenancy constitute a transferable tenure. It has been found by both the Courts below that the 63 bighas, now in suit formed part of a tenure of 126 bighas, which was divided into two tenancies of 63 bighas each, at some date anterior to the commencement of the Bengal Tenancy Act. They have held in substance that the statutory presumption embodied in Cl. 5, S. 5, Ben. Ten. Act, is applicable to the circumstances of this case, that till the contrary is proved, the tenancy of the 126 bighas must be presumed to have been a tenure, and that consequently the lands now in suit, which comprise one half of the lands included in that tenure, also constitute a tenure. This view is assailed by the appellant, who assigns three reasons in support of the contention that Cl. (5), S. 5 has no application to the present litigation, namely, first, that the clause like S. 50, is limited in its application to suits or proceedings between landlords and tenants under the Bengal Tenancy Act; secondly, that the clause is applicable only to lands which constitute a tenancy of more than 100 standard bighas at the date of the institution of the suit wherein the character of that tenancy requires determination; and thirdly, that the clause is, in any view, limited in its application to tenancies which existed as tenancies of more than 100 standard bighas at the date of the commencement of the Bengal Tenancy Act.

The first branch of this contention is sought to be supported by reference to S. 50. In our opinion, the terms of Cl. 5, S. 5, when contrasted with the language used by the legislature in S. 50, show conclusively that there is no foundation for the argument. Sub-S. 2, S. 50, states explicitly that the presumption mentioned therein applies only to suits or proceedings under the Act. *Mohabir Prasad* v. *Charles Fox* (1), *Bazlul Karim* v. *Satish Chandra Giri* (2), *Nityananda Pal* v. *Nanda Kumar Chowdhuri* (3). If the legislature had desired that Cl. 5, S. 5, should have a similarly restricted application, appropriate words might have been used to indicate that intention; and it would be clearly wrong to read into the section words not to be found there. There is thus no substance in the first branch of the contention of the appellant. The second branch of the contention is equally groundless. The argument is that Cl. 5 is limited to cases of tanancies of more than 100 bighas in existence as such at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination. The answer obviously is that the language used by the legislature in Cl. 5 is perfectly general and does not support this narrow construction. As is clear from the decisions in *Bengal Indigo Co* v.

1. (1909) 1 I C 112.
2. (1911) 10 I C 325.
3. (1911) 10 I C 163.

Roghobur Das (4) and *Khatajan Bewa* v. *Aswini Mohon Ghose* (5), the presumption applies to cases of tenancies created before the Act came into force. The third branch of the contention of the appellant has been sought to be supported by an appeal to the principle that a statute is deemed to be prima facie not retrospective in its operation. The rule on this subject is well settled and is accurately stated by Lopes, L. J., in the case of *Bourke* v. *Nutt, School Board Election for the Parish of Pulborough, In re* (6):

"Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect."

As Wright, J., observed in *In re Athlumney (Lord)* (7):

"a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure,"

or in the words of Lord Selborne, in *Main* v. *Stark* (8), quoted by Lord Morris in *Reynolds* v. *Attorney-General for Naova Scotia* (9):

"words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed."

What then is the true position, when we test the scope of Cl. 5 S. 5 in the light of these principles; We cannot by any stretch of language, hold that it creates any new rights or purports to affect any rights created before the commencement of the Bengal Tenancy Act, It simply furnishes a mode of proof of the character of tenancies of certain descriptions. If the area held by a tenant exceeds 100 standard bighas and a question arises as to the status of such a tenant, the legislature lays down ahat the tenancy is to be presumed to be that of a tenure-holder; but be it noted, that the presumption thus raised is rebuttable. The clause is consequently, a provision not of substantive but of adjective law; it lays down a presumption and changes the burden of evidence. Whereas in the absence of the presumption, the party who affirmed that the tenancy was of a particular description would have to give evidence in support of his contention, the presumption, where it applies, relieves the party relying thereon from the obligation to furnish such proof in the first instance. If in respect of a tenancy, the area whereof exceeds 100 bighas, it is contended that the tenant is a raiyat and not a tenure-holder, the burden of proof lies upon the party who makes the assertion, that he has to rebut the presumption. In substance, here as in other cases, the effect of the presumption is to shift the burden of evidence or the burden of proof as it is sometimes inaccurately called. The establishment of the presumption of law by proof of facts from which it arises, sustains the burden of evidence and so far as it extends. shifts it to the opposite side. This is implied by the fact that it creates a prima facie case, for the burden of evidence rests always on him who has to create or meet such a case, according as he has or has not the burden of proof properly so called; consequently, the theoretical effect of a presumption is that it is a legal ruling which affects the duty of producing evidence.

This may have important practical consequences: but that does not alter the quality of a presumption and make it a rule of substantive law rather than a rule of mode of proof. We can see no valid reason why the presumption should not be applied to a tenancy which existed before the commencement of the Bengal Tenancy Act; one might as well contend that the provisions of the Evidence Act are inapplicable to events and circumstances which took place before the commencement of the Act. Reliance, however, has been placed upon a passage from the judgment of the Judicial Committee in the case of *Bengal Indigo Co.* v. *Roghobur Das* (4), where Lord Waston observed that

"it was not necessary to notice the reasoning which prevailed in either of the Courts below, because it entirely ignored statutory definition of the word 'raiyat' contained in S. 5, sub-S. 5, which was in the following terms: 'where the area held by a tenant exceeds 100 standard bighas the tenant shall be presumed to be a tenure-holder until the contrary is shown'."

Possibly Lord Watson intended to refer to the definition of the term 'raiyat' as given in S. 5, sub-S. 2, for the sub-S. 5 does not at all define the term raiyat, it lays down, as we have explained, a statutory presumption in respect of a tenancy which exceeds 100 standard bighas in area, a presumption which expressly

4. (1897) 24 Cal 272=23 I A 158 (P C).
5. (1909) 2 I C 72.
6. (1894) 1 Q B 725=63 L J Q B 497.
7. (1898) 2 Q B 547=67 L J Q B 935.
8. 15. App Cas 384=59 L J P C 68.
9. (1896) A C 240=65 L J P C 16.

made operative, only till the contrary is established. We may further point out that the presumption embodied in R. 5, Cl. (5), does not incorporate a novel principle into our land, but merely qualifies what had been a recognized doctrine under the old law. The cases of *Baboo Dhunpat Singh* v. *Baboo Gooman Singh* (10), *Gopee Mohan Roy* v *Sibchunder Sen* (11) and *Sarat Chandra Roy Chowdhury* v. *Ratubuddin Mandal* (12) show that the area of the land held by the tenant was taken into consideration along with other circumstances in the determination of the question of status. The only difference caused by the adoption of the presumption is that we have now a definite rule of evidence, a crystallized mode of proof, for as Walker, J., puts it in *Cogdel* v *Ry. Co.* (13):

"an inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded."

We do not think it would be right to put a narrow construction upon the presumption, so as to defeat the object which the legislature had in view, namely, to import certainty into the land and thereby to shorten, if not to prevent, litigation. We are consequently of opinion that sub-S. 5, S. (5) may be properly applied to determine the character of the tenancy of 126 bighas, although that tenancy had been sub divided into two tenancies before the Bengal Tenancy Act came into operation. The tenure was divisible, the fact of sub-division clearly did not create a breach of its continuity and each fragment, carved out of the original tenure, retained its incidents: *Adit Singha* v. *Sukhraj Rai* (14), *Chandra Kanta Chakrabarty* v. *Ram Krishna Mahalnabis* (15). The tenancy of 63 bighas now in suit has thus been rightly held to be a transferable tenure. Though it was open to the plaintiff landlord to establish the contrary, he has failed in the attempt. The only circumstance whereon reliance has been placed on his behalf is that some tenants of the land themselves carried on cultivation and did not collect rent from under-tenants.

That fact, however, is not by any means decisive as to the true character of the tenancy: *Bibhudendra Mansingh Bhramarbar Rai* v. *Debendra Nath Das* (16). The real nature of the tenancy would be determined by proof of the purpose of the original grant [*Durga Prosunno Ghose* v. *Kalidas Dut* (17), *Pramatho Nath Kumar* v. *Nilmoni Kumar* (18), *Promodo Nath Roy* v. *Asiz-ud-din Mandal* (19), *Bamapada Ray* v. *Midnapur Zamindary* (20), but it has not been shown that the tenancy though in respect of 126 bighas, was created for the purpose of cultivation by the grantees. The presumption thus stands unrebutted and we must hold that there is no substance in the contention of the appellant. The appeal is consequently dismissed with costs.

We have next to deal with the appeal of the defendant, which involves the determination of the question of the true character of the first two tenancies. These tenancies are admittedly agricultural holdings; the only point of difference is that while the plaintiff-landlord alleges that the tenancies were non-transferable occupancy-holdings, the defendant-purchaser asserts that they constituted holdings at fixed rates of rent. The burden clearly lies upon the defendant to establish the truth of her allegation. It is plain that the tenancies were not transferable by local usage or custom. It is equally plain that sub-S. 2, S. 50, has no application, because this is a suit not under the Bengal Tenancy Act, but under the general law, for ejectment of an alleged trespasser. The defendant is consequently, driven to rely upon the conduct of the parties, in the absence of direct evidence as to the terms of the original contract between them. No document is produced nor is oral evidence forthcoming to show that at the time when the grants were made, the rent was fixed in perpetuity. But the defendant has proved that the rate of rent has not been changed during the last 40 years; she also asserts that the origin of the tenancies is unknown, although the Courts below have concurrently held that the tenancies were created 40 years prior to the institution of the suit; this however, it is said is not based on any evidence on the record. We shall assume in favour

10. W R Gap Act 10 Rulings 61.
11. (1864) 1 W R 68.
12. (1912) 17 I C 227.
13. (1903) 132 N C 852.
14. (1913) 21 I C 385.
15. (1916) 36 I C 707.
16. A I R 1915 Cal 300=27 I C 432.
17. (1882) 9 C L R 449.
18. (1941) 10 I C 431.
19. (1911) 11 I C 262.
20. (1912) 16 I C 276.

of the defendant that the time of the origin of the tenancies is unknown, and that there is no direct evidence of the terms of the initial contract between the parties.

The question, consequently, arises whether from these circumstances, it follows as a matter of law that the contract of tenancy in its inception must have been a tenancy at a fixed rate of rent. In support of the affirmative of this proposition reference has been made on behalf of the defendant-appellant to the decision of this Court in *Moharam Sheikh Chaprasi* v. *Tellamudddin Khan* (21). That was a case of a non-agricultural tenancy let out for residential purposes. It was established that the origin of the tenancy was unknown, that the land had been held at a small and uniform rate of rent for at least 60 years and that the holding had been treated as transferable and heritable. The Court below declined to infer from these circumstances that the tenancy was permanent, because there was no permanent substantial structure erected by the tenant on the land. This Court reversed that decision, held that the question was of mixed law and fact, and concluded, on the authority of a long line of decisions of the Judicial Committee, that from the facts proved, the only inference deducible was that the tenancy in its inception was permanent. The case before us is of a very different character. Here, we have two plots of agricultural land held by tenants who have been unquestionably occupancy-raiyats; their rent has not been altered for a term of 40 years; and the origin of the tenancies is unknown. Can we hold as a matter of law that the only inference legitimately deducible from these facts is that at the inception of the tenancies the rent was by agreement of parties, fixed in perpetuity?

It is plain that the inference as to the terms of the original contract is drawn from the conduct of the parties. The only conduct of the plaintiff or his predecessor whereupon reliance is placed by the defendant, is his omission to claim enhancement of rent for a period of 40 years. Does such forbearance on the part of the landlord necessarily justify the inference that the contract of tenancy in its inception was for payment of rent fixed in perpetuity? The answer must obviously be in the negative. The conduct of the landlord, though consistent with the hypothesis that the rent was fixed in perpetuity, is equally consistent with a very different hypothesis. The landlord might not have sued for enhancement of rent, because in view of the amount of rent already fixed, as well as the character of the land comprised in the tenancies, no further rent could be legitimately claimed. We have no information about the history of the holding or the condition of the land included therein. We do not know what would be fair rent at the present time or would have been the fair rent during years past. In these circumstances, from the mere forbearance on the part of the landlord to claim enhancement of rent even for 40 years, the inference does not follow as a matter of course that the original contract was for payment of rent by the tenant at a fixed rate for ever. If we were to accede to the contention of the defendant-appellant, we should be driven to hold in substance that every landlord who refrains from the institution of a suit for enhancement of rent of an occupancy-holding, does so at his peril, and that his forbearance, however just, will raise a presumption against him that the tenant held at a rent fixed in perpetuity. From whatever standpoint we examine the case, it thus transpires that this appeal also is groundless and must be dismissed with costs.

V.B./R.K. *Appeals dismissed.*

21. (1912) 13 I C 606

A. I. R. 1918 Calcutta 965

FLETCHER AND SMITHER, JJ.

Prafulla Nath Tagore and *others*—Plaintiffs—Petitioners.

v.

Matabaddin Mandal and *others*—Opposite Parties.

Civil Rule No. 183 of 1917, Decided on 7th May 1917, against decision of Munsif, 1st Court, Sealdah, D/- 9th December 1916.

Bengal Tenancy Act (1885), S. 169 (c)—Rent decree—Landlord is entitled to interest on arrears accruing due since institution of suit.

Where a tenure is sold in execution of a decree for arrears of rent, the landlord is entitled under S. 169 (c) to be paid out of the surplus sale-proceeds the arrears of rent that have accrued due since the institution of the former suit, together with interest thereon at the rate provided for by the Act. [P 966 C 1]

Broja Lal Chakravarti and *Hira Lal Chakravarti*—for Petitioners.

Surendra Nath Bose and *Bon Behari Sirkar*—for Opposite Parties.

Judgment.—This is a Rule calling upon the opposite party to show cause why the order complained of should not be set aside on the grounds stated in the petition. The applicants before us, who are the landlords of the opposite party, were the plaintiffs in a rent suit. They having obtained a decree for rent against the opposite party brought the tenure to sale. The tenure having been sold and the decree satisfied, there remained in the hands of the Court a balance representing the surplus of the sale proceeds. Certain arrears of rent having accrued due to the plaintiffs since the institution of the former suit, the petitioners made an application. under the provisions of S. 169, Ben. Ten. Act, for payment to them out of the surplus sale proceeds of those arrears with interest and costs, and the learned Judge of the Court below directed payment of those arrears of rent so accrued due after the institution of the suit out of the surplus sale proceeds, but did not direct the payment of interest upon such arrears. The only question is whether under the terms of S. 169 (c), Ben. Ten. Act, interest ought to be directed to be paid out of the surplus sale proceeds on the rent in arrears at the rate provided for by the terms of the Act.

The decision of this Court in *Maharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mookerjee* (1) is a clear authority in favour of the plaintiffs-petitioners. It is quite true that the observations of Ghose, J., in that case were not approved of by Brett, J., in the case of *Maharaja Monindra Chandra Nandy Bahadur* v. *Asar Mahmud Mandal* (2). But that was a decision of Brett, J., sitting alone. There seems to us to be no reason why we should depart from the terms of the earlier decision of a Bench of this Court in *Maharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S C. Mookerjee* (1); clearly, it has the advantage of preventing further suits and proceedings in execution to recover the interest which the Statute gives on the rent that accrues due after the date of the institution of the former suit. We think we ought to follow the decision in *Maharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mookerjee* (1) and make this rule absolute so far as regards interest, and direct interest to be paid at the rate provided for by the Statute on the rent accrued due after the institution of the suit in execution of the decree in which the tenure was ultimately brought to sale.

A point has also been argued before us as regards the costs in the Court below. No doubt the Court has jurisdiction to award costs if it thinks fit, but in this case the Court having given to the petitioners no costs, we see no reason to interfere with the discretion of the Court below in that respect. The rule is accordingly made absolute on the terms stated above with costs one gold mohur.

V.B./R.K. *Rule made absolute.*

1. (1907) 11 C W N 1106.
2. (1903) 12 C W N 144 note.

A. I. R. 1918 Calcutta 966

TEUNON AND RICHARDSON, JJ.

Baidya Nath Bose—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 320 of 1917, Decided on 30th April 1917, against order of 4th Presy. Magistrate, Calcutta, D/- 15th January 1917.

Motor Vehicles Act (8 of 1914), S. 11—Rash driving by driver contravening R. 19—Master is liable whether he abetted contravention or not.

The owner of a motor car who has permitted or authorised the use of his car, is liable for any contravention of the rules framed by the Governor-in-Council under S. 11 for the purpose of regulating the use of motor vehicles in Calcutta, committed by his licensee or servant during the period of such user, even though such owner may not have abetted the contravention. [P 967 C 1]

Santimoy Majumdar—for Petitioner.

Camell—for the Crown.

Judgment.—In this case the petitioner has been convicted under Part 2, R. 3, read with R. 19 of the rules framed by the Governor-in-Coucil under S. 11, Motor Vehicles Act 8 of 1914, for the purpose of regulating the use of motor vehicles in Calcutta. The petitioner is the owner of taxi-cab No. B. E. 1, and it has been found that on the night of 14th September last the licensed driver placed by the petitioner in charge of his car drove so negligently as to overturn the car into a roadside drain and cause injury to the passengers. It is not disputed that the driver has thereby contravened R. 19 and the question is whether, by virtue of R. 3, the owner against whom, on the disppearance of the driver,

proceedings have been taken, is liable for the acts and conduct of his servant. R. 3, in so far as applicable to the present case, runs as follows :

"No person shall .... permit to be used any motor vehicle .... which is so driven or used as to contravene any of these ruels."

The contention of the petitioner is that this rule makes an owner liable only when he abets the driver in the commission of his offence. On the other hand, the Crown contends that the effect of the rule is that when, as in this case, an owner has permitted or authorised the use of his car, he is liable for any contravention of the rules committed by his licensee or servant during the period of such user. The language of the rule cannot be said to be very happy, and speaking for myself I think the construction is not free from doubt. But it appears that the question is concluded by authority. In the case of *Edward Thorton* v. *Emperor* (1) a Bench of this Court placed upon a rule, couched in identical terms, the construction for which the Crown now contends. No doubt that rule was framed under the provisions of Bengal Act 7 of 1903 which has since been repealed and replaced by Act 8 of 1914, but there is nothing in the amending Act to suggest that the Court should now place a different construction upon the rule in question. On the authority of the case cited this rule is discharged.

V.B./R.K. *Rule discharged.*

1. (1911) 38 Cal 415=9 I C 480.

A. I. R. 1918 Calcutta 967

SANDERSON, C. J. AND WALMSLEY, J.

Taru Bahu—Petitioner.

v.

Emperor—Opposite Party.

Civil Revn. No. 17 of 1916, Decided on 21st July 1916, against the order of 2nd Munsif, Howrah, D/- 20th May 1916.

(a) Criminal P. C. (1898), Ss. 195 and 476—Court has no power to accord sanction for prosecution under Penal Code (1860), S. 225 B.

A Court has no power to accord sanction for prosecution of a person under S. 225-B, I. P. C., for snatching away a judgment debtor from the custody of one of its process peons, as S. 225-B, I. P. C., is not mentioned in S. 195, Criminal P. C. [P967 C 2]

(b) Criminal P. C. (1898), Ss. 195 and 476—Court sending person to take trial for alleged offence without preliminary inquiry as to circumstances constituting alleged offence acts without jurisdiction.

A Court acts without jurisdiction under S. 476, Criminal P. C., in sending a person to take his trial, for an alleged offence, without making a preliminary inquiry as to the circumstances constituting the alleged offence. The inquiry may be unnecessary when the Court is already in possession of the material facts from the evidence recorded at the trial, but where the incident constituting the alleged offence took place outside the Courts as to which the Judge himself has no knowledge, it is incumbent on the Court to make an enquiry preliminary to passing orders under the section. [P 968 C 1]

Monmotha Nath Mookerjee—for Petitioner.

Sanderson, C. J.—In this case we think the rule should be made absolute. What happened was this. It was brought to the knowledge of the learned Munsif who had tried a particular case, No. 614 of 1915, that certain persons, one of whom was the petitioner to this Court, had endeavoured to rescue a certain person from the custody of the execution peon. The learned Munsif directed these persons to appear before him and to show cause why they should not be committed for trial in the criminal Court. Then it came to his knowledge that a relation of his was assisting to conduct the case for some of the accused. He therefore very properly felt that he ought not to adjudicate upon the case. Consequently. he proceeded to send

"the aforesaid porsons to the Magistrate to try them on the charge of snatching away Sadhan Chandra Nandy from the lawful custody of the said peon." He also sent "the said Sadhan Chandra Nandy to the Magistrate to take his trial before him for abetting the aforesaid persons in the commission of the offence."

To my mind it is clear that he purported to act under S. 476, Criminal P. C. The question arises whether he had power so to do. In my opinion he had not; first, because the section in pursuance of which the accused persons were charged was S. 225-B, I. P. C. That is a section which is not mentioned in S. 195, Criminal P. C. Therefore for that reason the learned Munsif would not have power to send the accused for trial for that offence. But there is another reason which to my mind is a more important reason, and it is this. S. 476, Criminal P. C. says.

"When any civil, criminal or revenue Court is of opinion that there is ground for inquiring into any offence referred to in S. 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court,

after making any preliminary inquiry that may be necessary may send the case for inquiry or trial to the nearest Magistrate of the First Class."

Now it is quite evident in this case that the learned Munsif made no preliminary inquiry whatsoever. It was reported to him that these persons had snatched away or endeavoured to snatch away the judgment-debtor from the custody of the peon. He did not make any enquiry. It is quite true, as has been pointed out by Mr. Mookerjee, that the words are "any preliminary inquiry that may be necessary," and I can quite imagine that in certain cases no preliminary inquiry is necessary. It may be that in a case where the Judge is trying the case and all the facts which are material to the charge have been brought to the notice of the learned Judge, or have come out during the course of the hearing of the case, it would be mere waste of time and quite unnecessary to hold a preliminary inquiry, because the learned Judge is already in possession of all the material facts on which it is necessary for him to form the judgment. But in such a case as this, where the incident took place outside the Court, and as to which the learned Judge himself could have no knowledge, and as to which evidence must be called for, in my judgment, unless he does hold such a preliminary inquiry as may be necessary to enable him to determine whether or not there is any case fit to be sent to the Magistrate, he has no jurisdiction to send the accused under S. 476, Criminal P. C. For these two reasons in my judgment the learned Munsif had no jurisdiction. I think one ought to say that our decision does not necessarily put an end to any such proceedings as ought to be taken against the accused persons. A complaint may be laid before the Magistrate in the ordinary way in respect of this matter and the learned Magistrate may proceed to inquire into it in the usual course.

In our opinion, this rule, which is obtained by the petitioner in this case, should be made absolute. But we think that it ought to be made applicable to all the accused persons.

Walmsley, J.—I agree.

V.B./R.K. *Rule made absolute.*

A. I. R. 1918 Calcutta 968

RICHARDSON AND WALMSLEY, JJ.

Babu Ram Dheng and *others*—Plaintiffs—Appellants.

v.

Upendra Nath Koley and *others*—Defendants—Respondents.

Appeal No. 3236 of 1915, Decided on 27th February 1918, from appellate decree of Sub-Judge, Hooghly, D/- 11th September 1915.

(a) Bengal Tenancy Act (1885), Ss. 22 (2) and 85 (1) — Landlord purchasing raiyati interest in execution of money decree cannot eject under-raiyat.

A landlord who purchases a raiyati interest at a sale in execution of a decree for money is in no better position than the landlord who purchases such interest under a private alienation, consequently he cannot insist upon any right which he as landlord might otherwise have had under S. 85 (1), to treat the under-raiyat as a mere trespasser. [P969 C 1, 2]

(b) Bengal Tenancy Act (as amended by Act 1 of 1907), S. 22 (2)—Change made by amending Act has not altered law as previously understood.

As regards Cl. (2), S. 22, Ben. Ten. Act, the change made by the amending Act of 1907 does not seem to have altered the law as previously understood. A fractional landlord who gets a transfer of an occupancy holding still acquires from the raiyat some sort of tenancy or intermediate interest (except the right of occupancy) which prevents him from treating the under-raiyat as a trespasser. [P 969 C 2]

Sib Chandra Palit and *Jadunath Mondal*—for Appellants.

Lalit Mohan Banerjee — for Respondents.

Richardson, J.—The appellants before us are the plaintiffs in a suit for possession. They claim the right to possess the land to which the suit relates as under-raiyats. The defendants include some of the co sharer landlords of the original raiyati holding. They have purchased the holding in execution of a decree for money obtained by them against the original raiyat. It is alleged that after their purchase they sub let the land to the original raiyats, that is, to the persons under whom or under whose predecessor the plaintiffs originally came in as under-raiyats. These persons have also been made defendants. The Court of appeal below has dismissed the suit on the ground that under S. 85 (1), Ben. Ten. Act, the plaintiffs have no valid title to possession as against the landlord defendants.

The conclusion seems to me to be based on a misapplication to the facts found of

the law contained in the Bengal Tenancy Act as explained and illustrated by decided cases. The present case is clearly within the principle of such cases as *Amirullah Mahomed* v. *Nazir Mahomed* (1) and *Lal Mahomed Sarkar* v. *Jogir Sheikh Mallik* (2). The distinction between the position of a landlord who purchases a raiyati interest under a private alienation and the position of the landlord who purchases that interest in execution of a decree for arrears of rent at a sale under the Bengal Tenancy Act is also adverted to in the case of *Janaki Nath Hore* v. *Prahbasini Dasi* (3). The landlord who purchases at a sale in execution of a decree for money is in no better position than the landlord who purchases under a private alienation. In both cases the purchaser is the purchaser of the right, title and interest of the raiyat.

No doubt the law, as it was laid down in the two earlier of the cases to which I have referred, more especially in the case reported as *Lal Mahomed Sarkar* v. *Jogir Sheikh Mallik* (2), depended to some extent upon the provisions of S. 22 of the Act as they originally stood and not upon these provisions as modified by the Amending Act of 1907. Moreover both cases were decided under Cl. (1) of the section while the present case, the purchase of the holding having been made by some of the cosharers landlords, falls to be decided under Cl. (2). But the result arrived at in the two cases in regard to transfers under Cl. (1) had already been arrived at by a Full Bench in regard to transfers under Cl. (2); *Ram Mohan Pal* v. *Sheikh Kachu* (4). I have referred to the two cases because they explain the principle more fully and illustrate its effect upon the position of the uuder-raiyat let in by the transferring raiyat. Under both Cls. (1) and (2) in their original form the effect was that only the occupancy right and not the entire interest of the transferring raiyat came to an end and the transferee landlord (whether a sole landlord or a fractional landlord) could not say that the whole tenancy had been extinguished. Some intermediate interest still remained derived by the landlord from the raiyat which prevented the landlord from insisting upon any right which he might otherwise have had under S. 85 (1) to treat the under-raiyat as a mere trespasser.

It is unnecessary on the present occasion to consider the effect on the case-law of the change made in the language of Cl. (1), S. 22. As regards Cl. (2) the change does not seem for the present purpose to have altered the law as previously understood. The fractional landlord still appears to acquire from the raiyat some sort of tenancy or intermediate interest with the same effect as regards the right to treat the under-raiyat as a trespasser as before. Other and possibly more difficult, problems may arise, but for the present purpose the topic need not be further pursued. In my opinion the judgment and decree of the Subordinate Judge in the lower appellate Court must be discharged and the case must be remitted to that Court in order that it may determine the issue dealt with by the Munsif but not dealt with by the Subordinate Judge, whether the plaintiffs have proved their title as under-raiyats under the original raiyats. If that issue is decided against the plaintiffs the suit will be dismissed. If it is decided in favour of the plaintiffs, a decree will be made entitling them to khas possession of the land in dispute and, unless the Subordinate Judge is able to dispose of the question either by agreement of parties or on the materials on the record, remitting the case to the trial Court for further inquiry as regards the claim for mesne profits.

Walmsley, J.—I agree.

V.B./R.K. *Case remitted.*

1. (1907) 34 Cal 104.
2. (1909) 2 I C 654.
3. (1916) 43 Cal 178=30 I C 898.
4. (1905) 32 Cal 386 (F B).

A. I. R. 1918 Calcutta 969

MOOKERJEE AND WALMSLEY, JJ.

Naurang Singh—Appellant.

v.

Janardan Kishore Lal Singh Deo and *another*—Respondents.

Appeal No. 481 of 1914, Decided on 22nd May 1917, from original decree of Sub-Judge, Second Court, Burdwan, D/- 19th June 1914.

(a) Transfer of Property Act (1882), S. 111 (g) — Rent not paid—Forfeiture on breach of covenantdoes not determine lease—Overt act intimating intention of landlord to determine lease is necessary.

Where the rights and obligations of the parties to a lease are regulated by S. 111 (g), T. P. Act,

there is no determination of the lease by a forfeiture immediately on breach of a covenant, but the lessor is required to do some act thereafter showing his intention to determine the lease. [P 971 C 1]

The act, however, need not be a formal notice to quit, and may be a demand for possession, oral or written; what is essential is an overt act which intimates to the tenant the intention of the landlord to determine the lease. [P 971 C 2]

(b) **Transfer of Property Act (1882), S. 111 (g)—Rent not paid under lease—Ejectment—Suit for, does not show intention to determine lease.**

The institution of a suit for ejectment of the tenant cannot be regarded as the requisite act showing the intention of the landlord to determine the lease within the meaning of S. 111 (g). [P 971 C 2]

On non-payment of rent by the lessee the landlord brought a suit for his ejectment on the ground that under the terms of the lease the tenancy was forfeited in consequence of the non-payment:

Held: that a suit for ejectment was not maintainable for want of a cause of action, as it was not even alleged in the plaint that before the institution of the suit the plaintiff had, on the failure of tenant to pay rent, done any act showing his intention to determine the lease. [P 971 C 2]

Bepin Behari Ghose and *Gobinda Chandra Dey Roy*—for Appellant.

Ram Charan Mitra—for Respondents.

Judgment.—This is an appeal by the defendant in a suit for arrears of rent of a colliery held by him under the plaintiffs on the basis of a lease, dated 28th September 1901. The plaintiffs seek to recover their dues in respect of the years 1313 to 1317 B. S., and pray for ejectment of the defendant on the ground that, according to the terms of the contract between the parties, the lease had been forfeited by non-payment of rent. The Subordinate Judge has decreed the suit. His decision has been assailed in this Court on two grounds, namely, first, that a larger sum has been allowed to the plaintiffs than what is really due to them, and, secondly, that, on the face of the plaint, the claim for ejectment cannot be sustained.

The first point is sought to be established in two ways, namely first, that credit should have been allowed for a sum of Rs. 1,500 and secondly, that abatement of rent should have been allowed in respect of seven instead of six bigas. There is no force in either of these contentions. Upon the facts found by the Subordinate Judge, it is plain that the sum of Rs. 1,500 paid by the defendant had been rightly appropriated by the plaintiffs in satisfaction of the dues for earlier period. As regards the amount of abatement legitimately allowable, we see no reason to differ from the Subordinate Judge as to the quantity of land acquired by the Railway Company. In our opinion, the amount decreed by the Subordinate Judge is recoverable by the plaintiffs from the defendant. The second point raises an important question of law and and requires careful consideration. The lease contains the following clause:

"We will pay the whole amount of the rent, year by year, by the 30th Chaitra. If by non-payment of rent, we keep a couri thereof unpaid, you will have power, in the beginning of the month of Bysack of the next following year, to take khas possession of the whole land lying within the undermentioned boundaries, including the coal mine thereon made by us, by your own authority, and settle the same with another tenant and realize the amount of arrears with interest from our properties, moveable and immovable, standing in our own names or benami and from our persons."

The plaintiffs contend that as default was made in the payment of rent the tenancy has been forfeited and they have become entitled to possession of the property demised. The Subordinate Judge has given effect to this contention. We are of opinion that his decision overlooks more than one elementary principle. In the first place, no decree for ejectment can be made for a non-payment of the arrears of four years. It is well settled that if rent is claimed for two consecutive years, ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year, because the very fact that rent is claimed for the second year, shows conclusively that the forfeiture, if any, incurred at the end of the first year has been waived by the landlord. Illustrations of this principle will be found in the cases of *Jogeshuri Chowdhrain* v. *Mahomed Ebrahim* (1), *Sitanath Midda* v. *Basudeo Midda* (2), *Kalanand Singh* v. *Gunpat Singh* (3), *Raj Mohan De* v. *Mati Lal Saha* (4). In the second place, a decree for ejectment cannot be made in this case, even on account of default of payment of rent of the fourth year, as, on the face of the plaint, there was no completed forfeiture of the tenancy at the date of the institution of the suit. The statutory provision on the subject is embodied in S. 111, Cl. (g), T. P. Act, and may for the pur-

1. (1887) 14 Cal 33.
2. (1905) 2 C L J 540.
3. (1911) 11 I C 974.
4. (1916) 33 I C 331.

poses of this case, be enunciated in the following terms:

"a lease of immovable property determines by forfeiture, in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void: and the lessor or his transferee does some act showing his intention to determine the lease."

This makes it plain that where the rights and obligations of the parties are regulated by S. 111 (g), T. P. Act, there is no determination of a lease by forfeiture immediately on breach of covenant, but the lessor is required to do some act thereafter, showing his intention to determine the lease; in other words, the breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law. This view was adopted by this Court in the case of *Anandamoyee* v. *Lakhi Chandra Moitra* (5), which was accepted as a correct exposition of the law in *Qadir Baksh* v. *Prag Narain* (6). The distinction as regards the question of forfeiture, between cases governed by the Transfer of Property Act and by other Statutes, has been repeatedly pointed out in Madras, where it has been surmised that the requirements of a further act is probably a relic of the antiquated technicality of the Common law which required the formality of re-entry by the lessor of leased lands before the lease could be determined for breach of covenant: Warvelle on Ejectment, S. 47, Newell on Ejectment, Ch. 8, S. 17, *Venkataramana Bhatta* v. *Gunduraya* (7), *Padmanabaya* v. *Ranga* (8), *Chengiah* v. *Damara Kumara Thimma* (9), *Korapalu* v. *Narayana* (10) *Ramakrishna Mallay* v. *Baburaya* (11), *Vidyapurna Thirtha Swamiar* v. *Rangappayya* (12), *Sivarama Aiyar* v. *Alagappa Chetty* (13). The requirements of the Transfer of Property Act are perfectly plain and its express provisions cannot be ignored or treated as surplusage, whatever may have been the history of the development of the law on the subject in England: *Goodright* v. *Cator* (14), *Evans* v. *Davis* (15), *Jones* v. *Carter* (16), *Fenn* v. *Smart* (17), *Baylis* v. *Le Gros* (18), *Roberts* v. *Davey* (19); *Serjeant* v. *Nash* (20), *Moore* v. *Ullcoats Mining Co. Ltd.* (21), *Grimwood* v. *Moss* (22).

It is further obvious that the institution of the suit for ejectment cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of S. 111, Cl. (g). The forfeiture must be completed and the lease determined before the commencement of the action for ejectment, for there must be a cause of action in existence antecedent to the suit [*Deo Nandan Pershad* v. *Meghu Mahton* (23)]. The act, however, need not be a formal notice to quit and may be a demand for possession, oral or written; what is essential is an overt act, which intimates to the tenant the intention of the landlord to determine the lease. In the case before us, the plaint does not even allege such an act on the part of the landlords. Consequently there is no escape from the position that the plaint does not disclose any cause of action for the claim in ejectment. The result is that this appeal is allowed in part and the decree, in so far as it entitles the plaintiffs to eject the defendant, is cancelled; but it will stand in all other respects. Each party will pay his own costs in this Court.

V.B./R.K. *Appeal partly allowed.*

5. (1906) 33 Cal 339.
6. (1912) 14 I C 747.
7. (1908) 31 Mad 403.
8. (1911) 34 Mad 161=6 I C 447.
9. (1912) 15 I C 445.
10. (1915) 38 Mad 445=20 I C 930.
11. (1912) 17 I C 917.
12. (1913) 21 I C 405.
13. (1915) 31 I C 211.
14. (1780) 2 Dougl. 477=99 E R 304.
15. (1879) 10 Ch D 747.
16. (1846) 15 M & W 718=71 R R 800.
17. (1810) 12 East 444=104 E R 173.
18. (1858) 4 C B (n.s.) 537.
19. (1833) 4 B & Ad 664.
20. (1903) 2 K B 304=72 L J K B 630.
21. (1908) 1 Ch 575=77 L J Ch 282.
22. (1872) 7 C P 360=41 L J C P 239.
23. (1907) 34 Cal 57.

A. I. R. 1918 Calcutta 971

MOOKERJEE AND BEACHCROFT, JJ.

Ambar Ali and *others*—Defendants—Appellants.

v.

Lutfe Ali and *others*—Plaintiffs—Respondents

Letters Patent Appeal No. 121 of 1915, Decided on 23rd April 1917, against decree of Newbould, J., D/- 30th June 1915, in Appeal No. 1525 of 1914.

(a) Record of Rights—Evidence—Entry in draft of Record of Rights is inadmissible.

An entry in the draft Record of Rights is not admissible in evidence, as the presumption of correctness applies only to the record when finally published. [P 973 C 1]

(b) Practice — Judgment — Admission of inadmissible evidence does not necessarily vitiate judgment.

The mere fact that inadmissible evidence was admitted by a Court does not vitiate its judgment, if the Court arrived at its conclusions on the merits independently of the evidence improperly admitted. [P 973 C 1]

(c) Practice—Admission—Several persons jointly interested in subject matter of suit—Admission by co-party is admissible against others—Evidence Act (1872), S. 17.

Where several persons are jointly interested in the subject-matter of a suit, an admission by any one of these persons is admissible not only against himself, but also against the others, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and is made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The admission of the one co-plaintiff or co-defendant is not admissible against another merely by virtue of his position as a co-party in litigation but because of some privity of title or of obligation which justifies the use of the admission of one agsinst the other. [P 973 C 2, P 974 C 1]

(d) Evidence Act (1872), S. 32 (3)—Recital in document of conveyance as to boundaries of land sold is admissible against strangers to deed.

A statement by the vendors in a deed of sale, that the land conveyed is limited by certain boundaries, is an admission that their proprietary interest does not extend over any land outside the boundaries mentioned, and as such is admissible against strangers to the transaction under S 32 (3). [P 974 C 2]

(e) Practice—Appeal—Document admitted without objection — Objection cannot be allowed to be taken in appeal when it is apparent that objection if taken in first Court, steps could have been taken to make it admissible.

Where a document which was not receivable in evidence against some of the defendants was admitted in evidence in the primary Court without any objection, and it was apparent that had objection been taken the plaintiffs could have taken some steps to introduce the document as evidence against all the defendants:

Held : that the appellate Court was not in error in using the document as evidence against those defendants against whom it was improperly received, in spite of objection raised to its admissibility in that Court. [P 975 C 1]

Birendra Chandra Das—for Appellants.

Ram Dyal De—for Respondents.

FACTS will appear from the following judgment of Newbould, J. : "The plaintiffs have obtained a decree establishing their title to a certain tank and for ejectment of the defendants. The points taken in this appeal are that in coming to the decision in favour of the plaintiffs, the lower appellate Court has relied on certain documents which are inadmissible in evidence, and secondly, that the suit is bad for nonjoinder. "The documents to which objection is taken are deeds of sale executad by defendants 4 and 5 in which the tank is described as Laskar Gazi's tank. The fact that the tank is so called is an important point in this case. The plaintiffs based their claim on the allegation that they are descendants of this Laskar Gazi. "It is contended that though the statements in these deeds of sale are admissible against defendants 4 and 5, they are no evidence against defendants 1, 2 and 3. As, however, all these defendants claim under the same title, evidence admitted against one may be taken into consideration as against them all. The second document to which an objection is taken is an uncorrected copy of the Record of Rights. This, I agree, should not be treated as evidence. As the entry in which the tank was described as Laskar Gazi's tank was subsequently expunged, it seems unlikely that much weight was given to this piece of evidence. There is other evidence on the record which is sufficient to support this finding. "As regards nonjoinder, it appears from the judgment of the Munsif that in the first Court no objection was taken that any person other than the Maharaja was a necessary party to the suit. I see no reason for holding that the plaintiffs are not entitled to the decree obtained by them. I therefore, dismiss the appeal with costs."

Mookerjee, J.—This is an appeal, under Cl. 15 of the Letters Patent from the judgment of Newbould, J., in a suit for recovery of possession of a tank on declaration of title. The plaintiffs alleged that the disputed tank had been excavated by their ancestor Laskar Gazi Mozumdar about a century ago, that it had always been known by his name and had been owned and possessed by members of the family from generation to generation and that they themselves were in peaceful possession when they were forcibly dispossessed by the defendants in 1911. They accordingly instituted this suit on 27th November 1911 for recovery of possession on establishment of title. The defendants contended that the tank was not known by the name of Laskar Gazi and was never held by his descendants. They asserted that it had been abandoned by the previous owners, had become silted up and had ultimately been settled with them on 24th October

1911 by the proprietor of the estate, the Maharaja of Tipperah. The trial Court held that the plaintiffs had failed to establish their alleged ancestral right to the tank and that their claim, even if well founded, was barred by limitation. Upon appeal, the Subordinate Judge reversed the decision as upon the question of title as also of possession he found in favour of the plaintiff. On second appeal to this Court, the decree of the Subordinate Judge was assailed on the ground that he had based his conclusion upon two pieces of evidence not admissible in law. Newbould, J., overruled this contention and dismissed the appeal. The objections urged before him have been reiterated in this Court.

One of the substantial points in controversy between the parties was, whether, as alleged by the plaintiffs, the tank was known by the name of Laskar Gazi. Besides oral testimony, the plaintiffs relied upon two pieces of documentary evidence, namely, first, an entry in a draft Record of Rights and secondly, a recital contained in a conveyance of an adjoining piece of land executed by defendants 4 and 5 in favour of a stranger on 7th October 1894. The Subordinate Judge has relied upon both these documents, and the question for consideration is whether they are admissible in evidence against the defendants.

As regards the entry in the draft Record of Rights to the effect that the tank is known by the name of Laskar Gazi, there can be no room for the controversy that it was not admissible in evidence. *Gulab Kuer* v. *Ram Ratna Pandey* (1). No reference should, consequently, have been made to the entry in the draft record, specially as it transpires that the entry was omitted from the record finally published on 7th December 1898, to which alone the presumption of correctness applies.

The circumstances mentioned however does not vitiate the judgment of the Subordinate Judge, because it is plain that the lower appellate Court arrived at the conclusion on the merits independently of the evidence improperly admitted: *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry* (2). As regards recital in the conveyance, the position is somewhat different and requires closer examination. On 27th August 1894, defendants 4 and 5 acquired title by purchase to a parcel of land on the border of the tank now in dispute. On 7th October 1894 they sold that land to one Hamidunnessa Bibi. In the schedule of boundaries in that conveyance they stated the land then transferred was bounded by the tank of Laskar Gazi. The conveyance was produced at the trial by the scribe, was duly proved and was admitted in evidence without objection. The Subordinate Judge has used the recital as valuable evidence, not only against defendants 4 and 5 who executed the conveyance, but also against the other defendants who were not parties to that transaction. There can be no room for controversy that the admission is good evidence against the makers of the conveyance, but the question arises whether it is admissible against the other defendants. These defendants, it will be observed, are jointly interested in the land now in dispute, along with defendants 4 and 5; in fact, they claim under a common lease from the landlord and have, on basis thereof, taken a common defence to defeat the suit of the plaintiffs.

But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction. They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them merely because since the date of the alleged admission they have jointly acquired the property now in suit. In our opinion, this contention is well founded, as S. 18, Evidence Act, is of no assistance to the plaintiffs. The principle which regulates the reception in evidence of an admission by one defendant as against another defendant, was formulated in the cases of *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi* (3), *Chalho Singh* v. *Jharo Singh* (4) and *Meajan Matbor* v. *Alimuddin Mea* (5). The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the others whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in

1. A I R 1915 Cal 262=27 I C 229.
2. (1881) 7 Cal 293.
3. (1885) 11 Cal 588.
4. (1912) 39 Cal 935=18 I C 61.
5. (1917) 44 Cal 130=34 I C 571.

dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.

The requirement of the identity in legal interest between the joint owners is of fundamental importance: *Blenkinsopp* v. *Blenkinsopp*(6). On this principle, the position has been maitained that the joint ownership must have existed at the time the statement was made. Thus, in *Blakeney* v. *Fergusson* (7), it was ruled that the admissions of one person cannot be admitted in evidence against another on the ground of a joint interest in the subject, unless the interest is a subsisting one at the time of the admission, and, where the interest is derivative, it must have been acquired after the admission was made. To the same affect is the rule enunciated in *Kilburan* v. *Rtichie* (8), that the declaration of two joint owners is admissible against the other, if made at a time after the joint interest came into existence; if made before they became joint owners, the declaration is not admissible. The distinction is based upon obvious good sense. The admission of one co-plaintiff or co-defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation; if the rule were otherwise, it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be, because of some privity of title or of obligation: see the observations of Erskine, L. C., in *Morse* v. *Royal* (9) and Ellenborough, C. J., in *R.* v. *Hardwick* (10). The vital point for consideration accordingly is whether there is such privity of obligation or title between two persons as to justify the use of the admission of one against the other; and plainly this must be determined by reference to the relation between the parties at the time the admission is made. As a matter of probative value, the admission of a person (such as one joint owner) having precisely the same interest at stake as another (his co-owner) will, in general, be likely to be equally worthy of consideration; there being an identity of legal liability, the two persons may be deemed one so far as affects the propriety of discrediting one by the statement of the other. This reason however ceases to be applicable where, as in the case before us, the admission was made at a time when the parties had no community of interest. The inference is thus irresistible that the recital in the conveyance of 1894, though admissible against defendants 4 and 5, is not admissible as admissions against the other defendants under S. 18, Evidence Act.

The question next arises whether the recital in the conveyance is admissible against these defendants on any other principle. The decisions in *Abdullah* v. *Kunja Behari Lal* (11), *Imrit Chamar* v. *Sirdhar Panday* (12) and *Natwar* v. *Alkhu* (13) show that the statement is admissible under S. 32 (3), Evidence Aet. The statement by the vendors, that their land then conveyed was limited by certain boundaries, was an admission that their proprietary interest did not extend over any land outside the boundaries mentioned. The entire statement was consequently admissible: *Higham* v. *Ridgway* (14), *Connor* v. *Fitzgerald* (15), *Percival* v. *Nanson* (16), *Smith* v *Blakey* (17) and *Reg.* v. *Exeter Guardians* (18). The principle is that the statement is accepted, not merely as to the specific fact against the interest, but also as to every fact contained in the same statement. Here however the plaintiffs have to face has unexpected difficulty. The statement can be made admissible under S. 32 (3) only if the conditions mentioned in the introductory words of the section are fulfilled, and those conditions admittedly have not been fulfilled in this case. Consequently the plaintiffs cannot avail themselves of S. 32 (3) and there thus seems at first sight no escape from the position that while the appeal must be dismissed so far as defendants 4 and 5 are concerned, the case must be remitted for reconsidera-

6. (1846) 10 Beav 143=2 Phillips 607.
7. 14 Ark 641.
8. 2 California 145=56 Am Dec 326.
9. (1806) 12 Ves Jun 355=33 E R 134.
10. (1809) 11 East 578=103 E R 1129.
11. (1911) 12 I C 149.
12. (1912) 13 I C 120.
13. (1913) 18 IC 752.
14. (1808) 10 East 109=103 E R 717.
15. 11 L R Ir 106.
16. (1851) 7 Ex 1=21 L J Ex 1.
17. (1867) 2 Q B 326=8 B & S 157.
18. (1869) 4 Q B 341.

tion at the instance of the other defendants after exclusion of the recital in the conveyance. On careful consideration however of all the circumstances of the case another aspect of the matter emerges for examination.

It is plain that if the plaintiffs had cited defendants 4 and 5 as witnesses, the recital in the conveyance executed by them could have been received in evidence to impeach their credit under S. 155 (3) or to corroborate their testimony under S. 157. Now in the case before us no objection was taken to the reception of the conveyance in evidence by any of the defendants. If such objection had been taken, it would have been open to the plaintiffs to avoid the difficulty by citing defendants 4 and 5 as witnesses and by proceeding under S. 155 (3) if they repudiated their admissions. It is perfectly true, as pointed out by Sir Richard Couch in *Miller* v. *Babu Madho Das* (19), that an erroneous omission to object to evidence, which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But it is equally well settled that the Court will not entertain for the first time in appeal an objection that a document, which per se is not inadmissible in evidence has been improperly admitted on evidence. *Girindra Chandra Ganguli* v. *Rajendra Nath Chatterjee* (20), *Priya Nath* v. *Mahendra Kumar* (21). It is plain that the case before us falls within the latter principle. Assuming for a moment that we accede to the contention of the appellants other than defendants 4 and 5, we shall have to confirm the decree of the Subordinate Judge in favour of the plaintiffs against those defendants. and to set aside his decree as regards the other defendants; we shall then have to remit the case in part to the Subordinate Judge, allow the plaintiffs an opportunity to make the conveyance legally admissible in evidence, and if they fail to do so, to take the chance of success upon the balance of evidence. The plaintiffs will forthwith proceed to cite defendants 4 and 5 as witnesses, and they will be in a position to do so, with reasonable safety, as the claim of these defendants will have been finally negatived by our decree. When these defendants are examined as witnesses the plaintiffs will be free to introduce the conveyance into evidence to corroborate or contradict them as the contingency may require. The Court will then have to re consider the case upon practically the same evidence as had formed the basis of the decision now under appeal. No useful purpose is likely to be served by the adoption of such a course in a litigation which has already lasted for nearly six years. We are consequently of opinion that in these circumstances the decree of Newbould, J., should be confirmed and this appeal dismissed with costs.

Beachcroft, J.—I agree.

V.B./R.K. *Appeal dismissed.*

19. (1897) 19 All 76=23 I A 106 (P C)
20. (1897) 1 C W N 530
21. (1911) 10 I C 376

S. N. Das
Advocate High Court
Jammu & Kashmir

A. I. R. 1918 Calcutta 975

FLETCHER AND NEWBOULD, JJ.

Baikantha Nath Dey and *others*—Plaintiffs—Appellants.

v.

Mohesh Chandra Dey—Defendant—Respondent.

Appeal No. 189 of 1915, Decided on 17th August 1916, from order of Dist. Judge, Bankura, D/- 19th March 1915.

Transfer of Property Act (1882), S. 91—Purchaser of share of equity of redemption can redeem entire mortgage.

A purchaser of a share of the equity of redemption other than the mortgagee is entitled to redeem the entire mortgage. [P 976 C 1]

Gunoda Charan Sen and *Mohani Mohan Chatterjee*—for Appellants.

Satish Candra Ghose and *Mohini Nath Bose*—for Respondent.

Fletcher, J.—This is an appeal against an order of the learned District Judge of Bankura, dated 19th March 1915, modifying the order of the Munsif of 3rd Court at Bishenpur. The suit was brought by the plaintiffs as the purchasers of the equity of redemption in a certain property. The defendant was the mortgagee under an usufructuary mortgage. It is found both by the lower Courts, and not denied, that the time for redemption has arrived. The learned Munsif decreed redemption. On appeal to the learned District Judge he remanded the case to the first Court. The first point on which the learned Judge remanded the case was that the plaintiffs as he held, were entitled to redeem only in respect of an undivided 2/3rds share in the property subject to the mortgage. The learned Judge acting on the decision in the case of *Girish Chunder Dey* v.

Juramoni De (1), came to the conclusion that the plaintiffs were entitled to redeem only a portion of the property. The decision on which the learned District Judge acted was, in my opinion, a wrong decision. The case on which the learned Judges who decided the case reported as *Girish Chunder Dey* v. *Juramoni De* (1) rested their decision, namely, the case of *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2), does not justify that decision. In the case of *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2) the mortgagee had become the purchaser of a portion of the equity and, of course, a case of that nature is clearly distinguishable from the case where there has been a severance of the equity of redemption amongst parties other than the mortgagee. The sections of the Transfer of Property Act are quite clear on the point and the law is also quite clear. There are many decisions opposed to the decision reported as *Girish Chunder Dey* v. *Juramoni Dey* (1). It is sufficient to refer only to the cases of *Huttasanan Nambudri* v. *Parameswaran Nambudri* (3) and *Mora Joshi* v. *Ramchander Dinker Joshi* (4). The observations of the Judicial Commitee of the Privy Council in the case reported as *Norendra Narain Singh* v. *Dwarka Lal Mundur* (5) are also clearly opposed to the decision reported as *Girish Chunder Dey* v. *Juramoni De* (1). The sections of the Transfer of Property Act are also opposed to such a decision.

The law as stated in the text books, so far as I am aware, is to the effect that in an ordinary case, the partial owner of the equity of redemption is entitled to redeem the whole mortgage. Nobody has ever heard that proposition doubted before and I think the decision in *Girish Chunder Dey* v. *Juramoni De* (1) was founded on a misreading of the decision reported as *Nawab Azimat Ali Khan* v. *Jowahir Sing* (2). I think that, even accepting, although it is not necessary to decide that in this case, the learned Judge's finding that the plaintiffs have have acquired only a 2/3rd share of the equity, the plaintiffs are notwithstanding that entitled to redeem the entire mortgage.

1. (1901) 5 C W N 83.
2. (1869-70) 13 M I A 404 (P C).
3. (1899) 22 Mad 209.
4. (1891) 15 Bom 24.
5. (1877-78) 3 Cal 397=5 I A 18 (P C).

Then it is said that a point arises on the construction of the mortgage whether this case is not premature, because the redemption, according to the terms of the deed, is to take place on payment of the principal sum on the expiration of 1319 B. S., that is, "the Yamasiray in 1320 B. S." Exactly what the meaning of "Yamasiray in 1320 B. S." is, I do not know and, notwithstanding that we are assisted in this case by Bengali gentlemen who appear both for the plaintiffs and the defendant, they do not pretend to know what it means. Whatever Yamasiray in 1320 is, on the most liberal construction it must have long since expired. A discussion as to the meaning of the term will be purely academic and I think there is no use sending the case back for a decision as to what "Yamasiray in 1320 B. S." is. In the result, the order of remand made by the learned District Judge must be set aside and the decree of the Munsif for redemption restored. The costs of this appeal and the costs of the appeal in the lower appellate Court will be paid by the defendant to the plaintiffs. The order of the Court of first instance as regards costs will stand. We assess the hearing fee in this Court at two gold mohurs. Two months' time from the date of the arrival of the record in the Court of first instance is allowed to the plaintiffs to pay the money due to the defendant on his mortgage.

Newbould, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 976

TEUNON AND NEWBOULD, JJ.

Brojendra Kishore Roy Choudhury—Decree-holder—Appellant.

v.

Dil Muhmud Sarkar and *others*—Judgment-debtors—Respondents.

Appeal No. 86 of 1917, Decided on 4th February 1918, from order of Sub-Judge, Mymensingh, D/- 16th December 1916.

Limitation Act (1908), Art. 182 (5)—Step-in-aid — Objection by judgment-debtor to execution—Evidence directed to be produced—Decree-holder filing list of witness—His conduct is to be taken as step-in-aid of execution.

A decree-holder applied for the execution of his decree and the judgment-debtor put in an objection to execution. The Court directed both parties to adduce evidence in support of their respective cases on a certain date. On that date the decree-holder filed a list of his witnesses who were present in Court, and intimated to the

Court that he was ready to proceed with his case:

Held: that the conduct of the decree-holder implied an application to the Court to take the evidence which he was prepared to adduce to repel the objection of the judgment-debtor and should be taken to be an application to the Court to take some step-in-aid of execution: 38 *I C* 536, *Rel. on.* [P 977 C 1, 2]

Jogesh Chandra Roy for *D. N Chackravarty* and *Ramani Mohan Chatterjee*—for Appellant.

Debendra Nath Mandal—for Respondents.

Judgment.—This is an appeal against an order of the Subordinate Judge of Mymensingh dismissing an application for execution on the ground that it is barred by limitation. The decree is dated 31st March 1908. The first application for execution was on 20th January 1911, the second on 22nd August 1914 and the third or the present application on 6th October 1915. There is no dispute that if the second application was within time the third application was also within time from the date of the second, and the only question therefore that has been argued before us is whether the second application for execution filed on 22nd August 1914, was or was not barred by the three years' rule of limitation. Now, it appears that after the first application for execution had been made, the judgment-debtor put in an objection to the effect that the properties attached and sought to be sold were not transferable, and secondly, that the said properties were his own personal and individual properties and not the properties of the father, the original judgment-debtor. On that objection proceedings continued from 7th June to 8th January 1912 and we find that on 25th November 1911, both parties having in the meanwhile been directed to adduce evidence in support of their respective cases, the decree-holder filed a list of witnesses and intimated to the Court that he was ready to proceed with his case. On the application of the judgment-debtor the case was however adjourned to 16th December in order to enable the judgment debtor to produce one of his witnesses. We are of opinion that this act of the decree-holder, namely, the filing of the list of witnesses and intimating to the Court that he was ready to proceed with the case, implied an application to the Court to take the evidence which he was prepared to adduce and to repel the objection taken by the judgment-debtor. In effect, therefore, we think that on a reasonable interpretation, this should be taken to be an application to the Court to take some steps-in-aid of execution; and in this view we are fortified by the decision reported as *Pran Krishna Das* v. *Protap Chandra Dalai* (1).

We, therefore, decree this appeal and remand the case to the original Court with directions that the decree-holder be now at liberty to proceed with the execution. As however this appeal has succeeded on a point not taken in either of the Courts below we make no order as to costs. Let the record be sent down to the lower Court without delay.

V.B./R.K. *Appeal allowed.*

1. (1917) 38 I C 536.

A. I. R. 1918 Calcutta 977

MOOKERJEE AND WALMSLEY, JJ.

Bireswar Mookerjee and *others*—Judgment-debtors—Petitioners.

v.

Ambika Charan Battacharjee—Decree-holder—Opposite Party.

Rule Nisi No. 241 of 1917, Decided on 19th June 1917, against the order of Sm. C. C Judge, Serampore, in Exn. Case No. 630 of 1916.

(a) Civil P. C. (1908), O. 21, R. 2 —Uncertified payment does not extend limitation

An uncertified payment under or adjustment of a decree cannot operate to prolong the period of limitation for an application for execution of the decree under the Limitation Act. [P 978 C 1]

(b) Limitation Act (1908), S. 21—Hindu brother is not lawful guardian in presence of mother.

A part payment of a debt by the eldest brother of a Hindu infant during the lifetime of the latter's mother cannot be said to be made by a "lawful guardian" within the meaning of S. 21, as under the Hindu law, in the absence of the father, the mother is entitled to be the guardian of her infant sons in preference to their brother. [P 978 C 1]

Amarendra Nath Bose—for Petitioners.

Judgment.—The question for determination in this rule is whether an application presented on the 7th June 1916 for execution of a decree for money, made on 24th November 1909, is or is not barred by limitation. The application is prima facie barred by limitation under Art. 182, Sch. 2, Lim. Act. The decree-holder consequently seeks to escape the bar of the limitation by reference to

two payments alleged to have been made by the eldest brother of the petitioners on 8th October 1912 and 9th June 1913 respectively. The petitioners argue, first, that as the payments were not certified they cannot be taken into account; and secondly, that if taken into account, they are of no avail under S. 21, Lim. Act. In our opinion, these contentions are well-founded and must prevail.

As regards the first contention, it is not disputed that neither of these payments was certified to the Courts; consequently, under O. 21, R. 2, sub-R. (3), Civil P. C., the paymants cannot be recognised by any Court executing the decree. This view is supported by the decision in *Jogendro Nath Sarkar* v. *Probhat Nath Chatterjee* (1), *Kutubullah Sarkar* v. *Durga Charan Rudra* (2) and *Bhajan Lall* v. *Cheda Lall* (3). It may be observed that O. 21, R. 2 (3) of the Code of 1908 is different in terms from S. 258 of the Code of 1882. The present Code provides that a payment which had not been duly certified shall not be taken into account by any Court executing the decree. The previous Court provided that a payment which had not been certified should not be recognised as a payment or adjustment of the decree. This alteration in language justifies the inference that an uncertified payment or adjustment cannot now operate to prolong the period of limitation for an application for execution of a decree under the Limitation Act. This interpretation is perfectly legitimate, and if adopted, will induce decree-holders to certify payments made to them out of Court. As regards the second contention, we are of opinion that the payments which were made by the eldest brother of the petitioners, who were infants, while their mother was alive, cannot be said to have been made by a "lawful guardian" within the meaning of S. 21, Limitation Act. It is well-settled that, under the Hindu law, in the absence of the father, the mother is entitled to be the guardian of her infant sons in preference to their brother. [*Mt. Muhtaboo* v. *Gunesh Lal* (4). The Rule is made absolute and the order for execution as against the petitioners is set aside.

V.B./R.K. *Rule made absolute.*

1. A I R 1914 Cal 253=21 I C 926.
2. (1912) 13 I C 821.
3. A I R 1914 All 112=24 I C 215.
4. 10 Beng S. D A R 329.

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*A. I. R. 1918 Calcutta 978

CHATTERJEA AND WALMSLEY, JJ.

Rajeswari Dasi and *another*—Plaintiffs—Appellants.

v.

Benoda Sundari Dasi and *another*—Defendants—Respondents.

Appeal No. 3011 of 1914, Decided on 21st December 1916, from appellate decree of Sub-Judge, Jessore, D/- 4th June 1914.

***(a) Limitation Act (1908), S. 20—Acknowledgment of lien on property by judgment-debtor after its attachment does not save limitation against auction-purchaser.**

An auction-purchaser of a property in execution of a money-decree is entitled to have the property purchased by him in the condition in which it was at the time of attachment. Therefore, an acknowledgment of a lien on the property made by the judgment-debtor after its attachment cannot prevail against the auction-purchaser although such acknowledgment ii made before attachment may save limitation as against the auction-purchaser. [P 979 C 1 2]

(b) Evidence Act (1872), S. 69—Mortgage bond—Attesting witnesses and scribe dead—Witness called to prove handwriting of attesting witness not saying that he saw mortgagor signing or that signature on deed was that of mortgagor—Proof of mortgage bond was defective.

Where all the attesting witnesses of a mortgage-bond including the scribe were dead and a witness was called who proved the handwriting of the attesting witnesses and who said that he was present at the execution of the document, but did not say that he saw the mortgagor signing his name nor did he say that the signature on the document was the signature of the mortgagor:

Held: that there was a defect in the proof of the mortgage-bond under S. 69. [P 979 C 1]

Sashi Sekhar Bose—for Appellants.

Surendra Chandra Sen—for Respondents.

Judgment.—This is a suit upon a mortgage bond Ex. 1 said to have been executed by Bhim Karmakar, the deceased father of defendant 1, in favour of Jadumandal, the husband of plaintiff No. 1, on 9th August 1891. On 18th March 1898 defendant 1, executed a kobala in respect of some lands in favour of Jadumandal and in this document marked Ex. 2 made an admission of the earlier mortgage of 9th August 1891. On 21st March 1898 one Basant purchased property No. 1 in execution of a money-decree against defendant 1, and sold the same to defendant 2, on 12th August 1898. The suit

giving rise to this appeal was brought on 16th March 1910 and would be barred by limitation unless the acknowledgment by defendant 1, in Ex. 2, can save it. Then arises the question whether Ex. 1, has been proved in accordance with law. All the attesting witnesses including the scribe are dead. One witness Hazarilal has proved the handwriting of the attesting witnesses: he says he was present at the execution but does not say that he saw Bhim signing his name, nor does he say that the signature of Bhim on the document is the signature of Bhim. There is, therefore, a defect in the proof of the document under S. 69, Evidence Act. Does the admission in Ex. 2 cure this defect? Defendant 2, claims under a purchase from Basant, who purchased at an auction sale the right, title and interest of defendant 1. Is the admission of defendant 1, binding on defendant 2, that is to say, is the auction-purchaser or his transferee bound by the admission of the judgment-debtor made before his purchase? It was said by the Judicial Committee of the Privy Council in the case of *Dinendronath Sannial* v. *Ramkumar Ghose* (1) that the auction-purchaser "derives title by operation of law adversely to the judgment-debtor" but their Lordships held in a later case, *Mahomed Mozuffer Hossein* v. *Kishori Mohan Roy* (2), that the auction-purchaser is bound by an estoppel binding upon the judgment-debtor. Sir Charles Sargent, C J., in the case of *Ali Sahib* v. *Kaji Ahmed* (3), held after reference to the former case, that

"although the title is derived from the judgment-debtor against his will, the purchaser's liability to be ejected nonetheless arises from the title which he has derived from the judgment-debtor."

The auction-purchaser was held to have derived his liability through the judgment-debtor. An acknowledgement, therefore, by a judgment-debtor may save limitation against the auction-purchaser. There is a further question, however, that arises in this case, and that is that the acknowledgment was made only three days before the auction-sale and must, therefore, have been made after attachment; does that make any difference? I think it does. The auction-purchaser is entitled to have the property purchased by him in the condition in which it was at the time of the attachment. The judgment-debtor is debarred by S. 64, Civil P. C., from making any private transfer of any interest in the property after attachment. But for the acknowledgment, the lien on the property attached would have expired before the present suit: the effect of allowing the acknowledgment to prevail would be to give a longer life to the lien, that is, to place a larger burden on the property than it bore at the time of the attachment I think, that the acknowledgement in this case made as it was after attachment, cannot prevail against the auction-purchaser, defendant 2. In this view of the case the appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

1. (1881) 7 Cal 107=8 I A 65 (P C).
2. (1895) 22 Cal 909=22 I A 129 (P C).
3. (1892) 16 Bom 197.

A. I. R. 1918 Calcutta 979

MOOKERJEE AND BEACHCROFT, JJ.

Kailas Chandra Dutta and *others* — Defendants—Appellants.

v.

Padma Kishore Roy and *others*—Plaintiffs—Respondents.

Letters Patent Appeals Nos. 100 and 101 of 1914, Decided on 23rd April 1917, against decrees of D/- Chatterjee, J., in Appeals Nos. 4155 and 4156 of 1910.

(a) Civil P. C. (1908), S. 100 — Custom — Proof of existence of, is question of fact.

A decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact, with which the High Court cannot interfere in second appeal. [P 980 C 2]

(b) Custom— Existence when question of law and when existence can be challenged in second appeal stated.

But although the question of the existence of an alleged custom is a question of fact, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received or that relevant evidence has been excluded, or that there is no evidence of the alleged custom, or that the finding as to the existence of the custom is based on legally insufficient evidence, or that the facts found do not constitute evidence of the alleged custom or that in the determination of the question in controversy legal principles or tests have been erroneously applied, e. g, that the Court has not correctly appreciated the essential attributes of a custom or has overlooked the distinction between a custom and a usage.

[P 981 C 2; P 982 C 1]

(c) Civil P. C. (1908), S. 100 — Custom — Validity of and whether proved by facts on record is question of law.

The question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage or whether a custom is reasonable and valid, is a question of law, which may be discussed in second appeal. But the mere question of the sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. [P 982 C 1]

(d) Civil P. C. (1908), S. 100 —**Custom, Existence and Proof of, when may be determined in second appeal, stated.**

Under S. 100 (1) (a), (b), the High Court is not entitled in second appeal to determine whether the evidence of the existence of an alleged usage is or is not credible, though it is competent to determine, whether the usage proved by evidence to exist, does or does not possess the force of law. Though the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by evidence is a question of fact. [P 982 C 2]

Jadunath Kanjilal, *Birendra Chandra Das* and *Jogendra Kumar Dey*— for Appellants.

Upendra Kumar Roy — for Respondents.

Mookerjee, J.— These appeals have been preferred, under Cl. 15 of the Letters Patent, against the judgments of Digambar Chatterjee, J., in two suits for recovery of possession of land. The plaintiffs alleged that the lands in dispute constituted non-transferable occupancy holdings and yet the tenants had transferred them to the defendants. The plaintiffs consequently prayed that the defendants might be ejected as trespassers. The defendants contended that the holdings were transferable by custom and local usage. Thereupon an issue was raised in these terms:

"Where raiyati land are transferable by usage and custom without the consent of the landlord."

The Court of first instance ruled, on the authority of the decision in *Peary Mohan Mukerjee* v. *Jote Kumar Mukerjee* (1), that to prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages, as the essence of usage of transferability is that transfers made to the knowledge of, but without the consent of, the landlord are valid and must be recognized by him. The Court examined the evidence from this point of view and came to the conclusion that it was quite insufficient to establish the alleged custom or usage. The Court held expressly that the evidence showed that the names of transferees were not recorded in the office of the landlord unless a bonus was paid and that even when bonus was offered by the transferee to the landlord, the latter had the option either to accept or refuse the same. In this view the Court decreed the suits. Upon appeal by the defendants, the Subordinate Judge confirmed the findings of the trial Court and held that the evidence did not go to show that occupancy holdings were transferable by custom or usage. With reference to instances of transfer adduced by the defendants, the Subordinate Judge observed that, as ruled in the case of *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt* (2), a growing usage of transferability was of no effect against the landlord and that the usage to be effective must have already grown up: *Buzlul Karim* v. *Satish Chandra* (3). In this view, the Subordinate Judge dismissed the appeals. On second appeal to this Court, D. Chatterjee, J., has held that the appeals were concluded by the findings of fact arrived at by the lower appellate Court. On the present appeals, Dr. Jadu Nath Kanjilal has argued that the evidence on the record is sufficient to establish the existence of the alleged custom or usage of transferability, and he has invited us to read the whole of the evidence on the record. In support of the course we have been asked to adopt, reference has been made to the decision in *Vishnu* v. *Krishun* (4) and *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (5).

We have the authority of the Judicial Committee for the proposition that a decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact. In the case of *Muhammad Kamil* v. *Imtiaz Fatima* (6) the plaintiff contended that the rights of the parties were regulated by the Mahomedan law of inheritance; the defendants set up a family custom whereby female heirs were excluded. The trial Court held that the alleged custom was not established by the evidence and this conclusion was confirmed by the Judicial Commissioner on appeal. Sir Arthur Wilson observed that the existence of the custom was a question of fact, and as the Courts in India had concurred in their judgment as to this question, their Lordships saw no reason why they should not follow their usual practice of accepting concurrent findings of fact. Precisely the same language was used by Lord Collins in another case de-

1. (1907) 11 C W N 83.

2. (1908) 12 C W N 878.
3. (1911) 10 I C 325.
4. (1884) 7 Mad 3.
5. (1906) 29 Mad 24.
6. (1909) 31 All 557= 13 O C 183= 4 I C 457= 36 I A 211 (P C).

cided by the Judicial Committee, *Anant Singh* v. *Durga Singh* (7). There the question arose whether succession in a Hindu family was regulated by a special family custom or by the ordinary Mitakshara Law. The Judicial Commissioners, disagreeing with the trial Court, held that the evidence adduced by the plaintiff was not sufficient to establish the special custom. The Judicial Committee held that the question involved was one of fact only and they saw no reason whatever to differ from the opinion of the Judicial Commissioners. The view that the question as to the existence of a custom is a question of fact is supported by numerous decisions of high authority in English Courts. Thus in *Nelson* v. *Dahl* (8) Sir George Jessel, M. R., observed that the question whether there was a specified custom or usage in the Baltic wood trade was a question of fact and like all other customs it must be strictly proved. In *Postlethwaite* v. *Freeland* (9), Lord Blackburn held that the question whether an alleged custom of the port was established by the evidence was rightly left to the Jury. To the same effect is the decision in *Goodwin* v. *Robarts* (10). Similarly, Channel J., observed in *Moult* v. *Halliday* (11), that the question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the Courts take judicial notice of it. A similar view has prevailed in this Court for at least half a century. Thus in *Hureehur Mookerjee* v. *Judoonath Ghose* (12), Jackson, J., held that the question whether the disputed tenure was transferable by custom, was a question of fact on which the lower Court alone could pass a decision, and on which the High Court could not interfere on second, appeal. To the same effect is the judgment of Glover, J., in *Jay Kishen Mookerjee* v. *Doorga Narain Nag* (13). Again Kemp, J., observed in *Syud Ali* v. *Gopal Dass* (14), that a finding upon a question of custom after going into evidence was a finding on a question of fact with which the High Court could not interfere in second appeal. Precisely the same view was taken by Farran, C. J., in *Bai Shirinbai* v. *Kharshedji* (15), where he ruled that sitting in second appeal, it was not open to the Court to arrive at an independent finding as to whether the evidence established, as the Courts below concurrently held it did, the existence of a custom amongst Parsis which validated and rendered binding marriages contracted between children of tender age.

But, although the question of the existence of an alleged custom is a question of fact, it is conceivable that the decision may involve an error of law so as to justify the interference of the High Court in second appeal. Thus, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received as in *Palakdhari Rai* v. *Manners* (16), and *Durga Charan Mahto* v. *Raghunath Mahto* (17), or that relevant evidence has been excluded, as in *Dalglish* v. *Gazuffer Hassain* (18), and *Sariatullah Sarkar* v. *Pran Nath Nandi* (19). The decision may also be successfully attacked on the ground that there is no evidence of the alleged custom, or, as it is sometimes said, that the finding as to the existence of the custom is based on legally insufficient evidence *Peary Mohan Mukerjee* v. *Jote Kumar Mukerjee* (1), *Hashim Ali* v. *Abdul Rahman* (20), *Ram Bilas* v. *Lal Bahadur* (21). The decision may again be assailed on the ground that the facts found do not constitute evidence of the alleged custom *Durga Charan Mahto* v. *Raghunath Mahto* (17), *Hanumantamma* v. *Rami Reddi* (22), *Mirabivi* v. *Vellayanna* (23), and *Subhadra* v. *Tribhuan Dat* (24). The decision may, further, be liable to attack on the ground that in the determination of the question in controversy, legal principles or tests have been erroneously applied, for instance that the

7. (1910) 32 All 363 = 13 O C 163=6 I C 787= 37 I A 191 (P C).
8. (1879) 12 Ch D 568. on Appeal *Dahl* v. *Nelson Dankin*, (1881) 6 App Cas 38.
9. (1880) 5 App Cas 599.
10. (1875) 10 Ex 337.
11. (1898) 1 Q B 125.
12 (1868) 10 W R 153.
13. (1869) 11 W R 348.
14. (1870) 13 W R 420.
15. (1898) 22 Bom 430.
16. (1896) 23 Cal 179.
17. A I R 1914 Cal 289=20 I C 810.
18. (1896) 23 Cal 427.
19. (1899) 26 Cal 184.
20. (1906) 28 All 698.
21. (1908) 30 All 311.
22. (1882) 4 Mad 272.
23. (1885) 8 Mad 464.
24. (1912) 15 I C 247.

Court has not correctly appreciated the essential attributes of a custom: *Mahamaya Debi* v. *Haridas Haldar* (25), *Desai Ranchhoddas* v. *Rawal Nathubbai* (26), *Prodyote Kumar Tagore* v. *Rakhal Chandra* (27), or of a usage *Dalglish* v. *Gazuffer Hassain* (18) and *Palakhdari Rai* v. *Manners* (16), or has overlooked the distinction between a custom and a usages: *Nelson* v. *Dahal* (8) Consequently, the question, whether the fact found in any given instance prove the existence of the essential attributes of a custom or usage, is a question of law which may be discussed in second appeal: *Durga Charan Mahto* v. *Raghunath Mahto* (17), *Lalman* v. *Nand Lal* (28). Obviously, the question whether a custom is reasonable or valid, is a question of the law: *Hurry Churn Dass* v. *Nimai Chand* (29), *Gurai Kar* v. *Kuarmoni Singha* (30). Subject to these qualifications it is plain that the mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal: *Sreemutty Kurani Dassi* v. *Sajoni Kant Singh* (31), *Hashim Ali* v. *Abdul Rahman* (25), *Rao Giriaj Singh* v. *Lala Hargobind Sahai* (32), *Mukund Murari Dass* v. *Krishna Dhone Ghose* (33), *Ganesh Dat Singh* v. *Sukhraj Singh* (34), *Lalman* v. *Nandalal* (28) and *Mahadeo Prasad* v. *Nabi Bukhsh* (35).

We are not unmindful that a contrary view was adopted in the case of *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (5), in which it was ruled that it is the duty of the Court in second appeal, when a question of custom is raised, to examine the evidence not merely with a view to ascertain whether all the essential elements have been proved to exist but also whether the evidence is credible. We respectfully dissent from this view, which, in our opinion, finds no support from S. 100 (1) (a) (b), Civil P. C., 1908. No doubt, a second appeal lies to the High Court on the ground that the decision is contrary to, or has failed to determine some material issue of, "usage having the force of law." But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law. In so far as the contrary view was taken in the cases of *Ram Harakh Tewari* v. *Isardat Tewari* (36), *Shahbaz Khan* v. *Rahiman* (37), *Kakarla Abbayya* v. *Raja Venkata Pappayya Rao* (5) and possibly also to some extent in *Vishnu* v. *Krishnan* (4), we are not prepared to accepte them as correct expositions of the law. The substance of the matter is that while the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by the evidence is a question of fact. In the case before us no question of law obviously arises upon the facts found by the lower appellate Court in concurrence with the Court of first instance, and we are clearly of opinion that Digambar Chatterjee, J., properly declined to examine the oral and documentary evidence, with a view to determine whether the Subordinate Judge was correct in his conclusion as to its insufficiency to establish the alleged custom or usage. The appeals fail and must be dismissed with costs.

Beachcroft, J.—I agree.

V.B./R K. *Appeals dismissed*

25. A I R 1915 Cal 161=42 Cal 455=27 I C 400.
26. (1897) 21 Bom 110.
27. (1910) 37 Cal 322=5 I C 243.
28. A I R 1914 Oudh 123=17 O C 1=20 I C 894.
29. (1884) 10 Cal 138.
30. (1915) 29 I C 312.
31. (1908) 12 C W N 539.
32. (1910) 32 All 125=4 I C 304.
33. (1911) 9 I C 839.
34. (1912) 14 I C 12.
35. A I R 1914 Cal 854=25 I C 104.
36. (1909) 3 I C 558.
37. (1911) 11 I C 536.

A. I. R. 1918 Calcutta 982

CHATTERJEE AND RICHARDSON, JJ.

Harendra Chandra Bhattacharjee—Plaintiff.

v.

Gagan Chandra Das—Defendant.

Reference No. 9 of 1916, Decided on 5th June 1916, made by 2nd Munsif, Tipperah.

Limitation Act (9 of 1908), S. 20—Decree-holder s, certifying payment does not affect S. 20—If not in writing by judgment-debtors it does not extent period.

The provisions of S. 20, Lim. Act, are in no way affected by the decree-holder making an application to certify payment under a decree. [P 983 C 1]

A payment by the judgment-debtor of a certain sum on a decree for money which does not bear interest cannot operate to give a fresh start to

the period of limitation under S. 20, Lim. Act, even if the decree-holder in his application for execution certifies that payment as payment of interest, unless that payment appears in the handwriting of the judgment-debtor or his agent duly authorized in that behalf, so that it might be taken as having been made in part payment of the principal under that section. [P 984 C 1]

Upendra Kumar Roy—for Decree-holder.

Judgment.—This is a reference made in connexion with an application for execution of a decree passed on 19th December 1911. This application was the second application for the execution of the decree, and it was made on 28th January 1916—more than three years after the first application which was made on 7th January 1913. The decree-holder, however, aileged that there was a payment of Re. 1 by the judgment debtor on 27th August 1915, that is within three years of the first application for execution. It has been found by the Munsif that the payment of Re. 1 was, in fact, made by the judgment-debtor as alleged by the decree holder. But there is nothing to show that it was paid by way of interest and the decree did not bear any interest. We are of opinion that, although the decree-holder may either apply to certify the payment before execution or may do so in his application for execution of the decree, the provisions of S. 20, Lim. Act, are in no way affected by it. The claim in the original suit, no doubt, included interest; but that interest had been rightly held by the Munsif to have merged in the decree and, as the decree did not bear any interest, any payment made by the judgment-debtor must be taken to have been made in part payment of the principal, in which case it must appear in the handwriting of the judgment-debtor or by his agent duly authorized in this behalf, in order that a fresh period of limitation may run from the date of such payment under S. 20, Lim. Act. Let the records be sent back.

V.B./R.K. *Records sent back.*

A. I. R. 1918 Calcutta 983

MOOKERJEE AND CUMING, JJ.

Dokarijoddar and *others*—Defendants—Appellants.

v.

Nilmani Kundu—Plaintiff — Respondent.

Appeal No. 4126 of 1913, Decided on 2th July 1916.

(a) Limitation Act (1908), Arts. 137 and 138 — Applicability to execution sale, explained.

Article 137, applies to an auction-purchaser of the rights of a judgment-debtor not in possession at the date of the sale, while Art. 138 applies to an auction-purchaser of the rights of a judgment-debtor in possession at the date of the sale. In the former case a suit for possession of the land purchased must be brought by the auction-purchaser within 12 years from the date when the judgment-debtor is first entitled to possession: in the latter case the suit is in time if brought within 12 years from the date when the sale becomes absolute. [P 984 C 1]

(b) Limitation Act (1908) —Burden of proof —Suit for recovery of possession on strength of title acquired by purchase at execution sale—Plaintiff must show which article saves his suit from bar of limitation.

A plaintiff who brings a suit for recovery of possession of land on the strength of a title acquired by purchase at an execution sale, must show not only that he has a title but also a subsisting title which he has not lost by the prescriptive sections of the Limitation Act: in other words, he must show which Article of the Limitation Act saves his suit from the bar of limitation. [P 984 C 1]

Dwarka Nath Mitter—for Appellants.

Mahendra Nath Roy and *Kumar Sankar Roy*—for Respondent.

Mookerjee, J.—This is an appeal by the first four defendants in a suit for recovery of possession of land upon declaration of title. The Court of first instance found in favour of the plaintiff upon the questions of title and possession and made a decree accordingly. Upon appeal by the defendants the Subordinate Judge has affirmed the decision of the trial Court upon the question of title, and that portion of his judgment cannot, in our opinion, be successfully attacked in second appeal. But the appellants argue that his decision upon the question of limitation is erroneous, inasmuch as he has overruled the plea of limitation on the ground that

"there is no satisfactory evidence that the defendants had possession before the alleged date of dispossession and were in possession for upwards of 12 years."

In our opinion, this contention must prevail. The plaintiff seeks to recover possession of the disputed land on the strength of title by purchase at a sale in execution of a mortgage decree, which was held on 19th September 1899 and was confirmed on 9th November 1899. Symbolical possession was delivered to him by the execution Court on 17th February 1900. He alleges that the judgment-debtors were in possession at the date of sale and continued in possession

for a short time afterwards, and that when they vacated the land on or about 13th April 1901, he went to take possession and was met by the defendants. He did not, however, institute the present suit to eject the defendants till 29th June 1911. The defendants, on the other hand, allege that they have been in possession from a long time before the execution sale and that the claim is barred by limitation. It is clear that the suit is governed by either Art. 137 or Art. 138 or Art. 142, Lim. Act. As observed by Ranade, J., in *Gopal* v. *Krishna Rao* (1), Art. 137 applies to an auction-purchaser of the rights of a judgment-debtor not in possession at the date of the sale, while Art. 138 applies to an auction-purchaser of the rights of a judgment-debtor in possession at the date of the sale. In the former case the suit must be brought within 12 years from the date when the judgment-debtor is first entitled to possession; in the latter case the suit is in time if brought within 12 years from the date when the sale becomes absolute. It has sometimes been held that Art. 138 applies only to suits brought against the judgment-debtor or persons who have derived title from him, and not to suits brought against persons who repudiate the title of the judgment-debtor *Raghu Nath Bhagat* v. *Syed Samad Shah* (2), *Khirodа Kanta Roy* v. *Krishna Das Laha* (3). It may be observed that if this restricted construction be adopted, Art. 142 must be held applicable and would lead to the same result as would follow from an application of Art. 138.

In any event it is plain that the burden lies entirely upon the plaintiff to prove, not only that he has a title, but a subsisting title which he has not lost by the prescriptive sections of the Limitation Act; in other words, he must show which Article of the Limittaion Act saves his suit from the bar of limitation: *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nand Loll Singh* (4), *Gossain Dass Koondoo* v. *Siroo Koomaree Debia* (5), *Secy. of State* v. *Vira Rayan* (6). In the present case the plaintiff asserts that the judgment-debtor whose right, title and interest he purchased was in possession at the date of the sale and subsequently, the onus of proof is upon him and if he establishes the truth of his allegation, his suit is not barred whether Art. 138 or or 142 be applied; if on the other hand, he fails to prove that the judgment-debtor was in possession at the date of the sale, Art. 137 clearly applies; in that event, to save his suit from the bar of limitation, he must prove that his judgment-debtor became first entitled to possession within 12 years before the commencement of the suit, i. e., that the judgment-debtor lost possession on some date subsequent to 29th June 1899.

The Subordinate Judge clearly committed an error of law when he threw the burden of proof upon the defendants to establish that they had been in adverse possession for over 12 years. The fundamental point for determination thus is, whether or not the judgment-debtor was in possession at the date of sale. The finding of the Court of first instance upon this point was perfectly clear. The Subordinate Judge has not affirmed that finding; on the other hand he has given reasons which are obviously insufficient to support his conclusion, and are erroneous in law. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him in order that he may rehear the appeal on one point only, namely, the question of limitation. The costs of this appeal will abide the result.

V.B./R K. *Case remanded.*

1. (1901) 25 Bom 275.
2. (1908) 7 C L J 560.
3. (1910) 6 I C 467.
4. (1859-61) 8 M I A 199=1 W R 51 (P C).
5. (1873) 19 W R 192.
6. (1886) 9 Mad 175.

A. I. R. 1918 Calcutta 984

TEUNON AND NEWBOULD, JJ.

Brajendra Kumar Roy Chowdhury and *others*—Appellants.

v.

Sarajendra Nath Saha and *others*—Respondents.

Appeal No. 1175 of 1917, Decided on 3rd April 1918, from appellate decree of Sub-Judge., Dacca, D/- 23rd February 1917.

Landlord and Tenant—Rent—Exparte decree at rate of rent alleged in plaint does not operate as res judicata on question of rate of rent—Civil P. C. (5 of 1908), S. 11.

An ex parte decree in a rent suit, allowing the plaintiff's claim at the rate of rent alleged in the plaint does not operate so as to render the question of the rate of rent annually payable res judicata unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. [P 985 C 2]

D. N. Chakerbutty and *Suresh Chandra Talukdar* for *Rajendra Chandar Guha* —for Appellants.

Sib Chandar Palit—for Respondents.

Judgment —This appeal arises out of a suit for arrears of rent of a certain Sikmi Taluk. The plaintiffs who are the respondents before us claimed rent at the rate of Rs. 13-14-11½ gandas, while the defendants-appellants contended that the rent annually payable is Rs. 4-0-3¾ gandas. Both Courts have found that the true rent is Rs. 4-0-3¾ gandas, but differing from the Court of first instance, the learned Subordinate Judge has held that the decision in a previous rent suit between the parties operates as resjudicata and has therefore, decreed the claim of the plaintiffs-landlords in full. The previous rent suit was for the arrears of the years 1312 —1314 and of the first 3 kists of the year 1315. In the plaint and also in the account annexed to the plaint the rate of rent was alleged to be Rs. 13-14-11½ gandas and on this footing a sum of Rs. 52-2-13-2-2 was claimed as the rent due. The defendants, who were recent purchasers of the Sikmi, filed a written statement but subsequently failed to appear, with the result that the claim was decreed in full ex parte. In the written statement filed the defendants denied liability but did not take any explicit objection to the rate of rent alleged. It further appears that after decree the decretal amount was realised in execution proceedings from the judgment-debtors.

The question for our determination in this appeal then is whether in the circumstances we have set out, the previous decree operates so as to render the question of the rate of rent annually payable res judicata between the parties. On this question many decisions of this Court have been cited, and we are not prepared to say that they can all readily be reconciled. But for the purposes of our decision it is sufficient to say that we are unable to draw any distinction of substance between the present case and the case of *Madhusudan Shaha Mundul* v. *Brae* (1), decided by the Full Court on 27th February 1889 and reported as *Madhusudan Shaha Mundul* v. *Brae* (1). There, as here, there was in the plaint a statement of the alleged rate of rent, but there, as here, there was no prayer for a declaration as to the rate of rent as part of the substantive relief claimed. We, therefore hold that the prior ex parte decree does not operate as res judicata, and on this view we set aside the decree of the Subordinate Judge and restore the decree of the Munsif. This appeal is accordingly decreed with costs both in this Court and in the Court of first appeal.

V.B./R.K. *Appeal decreed.*

1. (1889) 16 Cal 300 (F B).

A. I. R. 1918 Calcutta 985

FLETCHER AND SMITHER, JJ.

Birendra Kishore Manikya Bahadur —Defendant—Appellant.

v.

Hashmat Ali and *others*—Plaintiffs—Respondents.

Appeal No. 1929 of 1916, Decided on 7th May 1918, from appellate decree of Offg. Dist. Judge, Noakhali, D/- 14th March 1916.

(a) Civil P. C. (1908), S. 86—Ruling prince being sued without consent of Government submitting to jurisdiction — Objection cannot be taken in appeal.

Where a Ruling Price having sovereign powers, submits to the jurisdiction of a British Court, no objection to the maintainability of the suit can be subsequently raised by him in the appellate Court on the ground that the consent of the Governor-General in Council had not been obtained under S. 86, Civil P. C., prior to the institution of the suit. [P 986 C 1]

(b) Specific Relief Act (1877), S. 22 — Suit for specific performance of contract to grant lease—Plaintiff's nondisclosure of previous default when making contract is not good defence.

Specific performance of a contract to grant a lease cannot be refused on the ground that the grantee did not disclose at or before the making of the contract, that in some previous transaction with the grantor he had defaulted in the performance of his obligation [P 986 C 1]

Gobinda Chandra De Roy—for Appellant.

Bhagirath Chandra Das—for Respondents.

Judgment.—This is an appeal preferred by defendant 1 against the decision of the learned District Judge of Noakhali, affirming the decision of the Munsif of Feni. The suit was brought to enforce specific performance of a contract to grant a lease. Two points have been raised before us in this appeal. The first is that the Court had no jurisdiction to try the case having regard to the provisions of S. 86, Civil P. C. Defendant 1 is a Ruling Chief and he has sovereign powers and no authority has been obtained from the Government of India to maintain the present suit against him.

Both in the primary Court and in the lower appellate Court that point was deliberately abandoned by the Maharaja's representatives and their view was that they required a decision of the Court without approaching the Government of India for a consent to maintain that suit. The course was obviously right because in a trivial suit of this nature, the total value of which is Rs. 75, it would not be to anybody's advantage that the case should be sent up to the Government of India for that purpose. However in any case, defendant 1 clearly submitted to the jurisdiction of the Court and it is much too late now to set up the objection that no authority has been obtained from the Government.

The other point is a point that has nothing in it. Defendant 1 says that specific performance ought not to be enforced against him on the ground of suppression of material facts and the material facts suppressed are these. Some years ago, the plaintiff in some transaction with the Maharaja became a defaulter and therefore it is said that he ought to have told the Maharaja's representatives that he defaulted before he entered into the present contract to take the lease. There was no such obligation on the plaintiff to disclose to the Maharaja the fact that, on some former occasion, he made a default. That was the Maharaja's look out or rather that of his representatives and they ought to have found out like any other people whether the plaintiff was a suitable person to enter into a bargain with. There is nothing in this point. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismssed.*

A. I. R. 1918 Calcutta 986

RICHARDSON AND BEACHCROFT, JJ.

Rupa Thakurani and *others*—Defendants—Appellants.

v.

Kumudnath Karmakar — Plaintiff—Respondent.

Appeals Nos 822, 835 and 836 of 1916, Decided on 16th January 1918, from appellate decrees of Sub Judge, Jalpaiguri, D/- 21st February 1916.

Limitation Act (1908), Ss. 5 and 14—Appeal—Bona fide prosecution in wrong Court is sufficient cause for extending time.

Although S 14, Lim. Act, does not apply to appeals, that section should be applied to appeals in this sense that the bona fide prosecution of a proceeding in a wrong Court is to be regarded as a proper ground or as sufficient cause within the meaning of S. 5, Lim. Act, for extending the time for filing an appeal. [P 986 C 2]

S. N. Banerjee and *Tarakeshwar Pal Chowdhury*—for Appellants.

Mohini Mohan Chakrabarty and *Brojo Lal Chakraburty*—for Respondent.

Judgment.—This is an appeal from the judgment and decree of the Subordinate Judge of Jalpaiguri, dismissing an appeal from the decree of the Munsif of Jalpaiguri on the ground that the appeal had been filed out of time. The Munsif's decree in the suit is dated 23rd December 1913. It appears that on 4th February 1914 the appeal from the Munsif's decree was filed in the Court of the District Judge of Dinajpur and Jalpaiguri. The appeal was admitted in the Court and a date was fixed for the hearing. Then the question seems to have been raised whether under the rules the appeal should have been filed in the Court of the District Judge or in the Subordinate Judge's Court. Time was taken to consider that question and on 1st May 1914, the District Judge having in the meantime informed himself of the rule in force, the appeal was returned to be presented in the proper Court, the Court of the Subordinate Judge. On the same day the appeal was filed in that Court. It has been rejected by the Subordinate Judge, on the ground that the prescribed period of limitation had been exceeded and there was no sufficient cause for extending it. In coming to that conclusion the learned Subordinate Judge has said that S. 14 of the Act, does not apply. That no doubt is true. But the principle of that section has been recognized by the Courts as applicable to appeals in this sense that the bona fide prosecution of a proceeding in a wrong Court has been regarded as a proper ground or as sufficient cause within the meaning of S. 5, Lim. Act, for extending the time for filing an appeal.

It is suggested for the plaintiff-respondent that the learned Subordinate Judge has, as a matter of fact, found that the presentation of the appeal to the Court of the District Judge was not bona fide. If that is what the learned Judge meant by tha language which he has used, it is difficult in the circumstances to accept the finding. All that he had before him apparently was the petition of the appellants explaining the cause of the delay

which had taken place in filing their appeal in his Court. No counter-petition or counter affidavit seems to have been filed on behalf of the respondent and the observations which the Judge has made, if they are to be regarded as a finding that the appellants' mistake in filing the appeal in the wrong Court was not a bona fide mistake, appear to rest on surmise and conjecture rather than on materials proper to support such a conclusion. It isdifficult to conceive that such a mistake, as was made in the present case, could have been otherwise than bona fide and judging from the order sheet it was not known even in the District Judge's office that under the notification issued by the High Court under Cl. (4), S. 21, Civil Courts Act, the appellants had no right at all to file the appeal in the District Judge's Court and that the only Court in which it could be filed was the Subordinate Judge's Court. Apparently the impression which prevailed in the District Judge's office when the appeal was filed was that the appellants were entitled to file the appeal either in one Court or in the other, and apparently it was on that ground that the appeal was admitted and that a date was fixed for its hearing. In the circumstances, in my opinion, this discretion allowed by S. 5, Lim. Act, has not been judicially exercised and the decree of the lower Court cannot be supported. The result therefore is that this appeal is allowed and the case remanded to the learned Subordinate Judge in order that the appeal may be heard by him on the merits. Costs will abide the result.

This judgment governs Second Appeals Nos. 835 and 836 of 1916.

Beachcroft, J.—I agree. The course which this case has taken illustrates the desirability of dealing with an application for extension of time promptly. The appeal was argued and dismissed on the preliminary point more than two years after it was originally filed with the result that more than four years will have elapsed from the date of filing before it is heard on the merits.

V.B./R.K. *Appeal allowed.*

A. I. R. 1918 Calcutta 987

WOODROFFE AND SMITHER, JJ.

Harihar Dutta Tewari and *others*—Plaintiffs—Appellants.

v.

Bhim Sanker Dutta Tewari—Defendant—Respondent.

Privy Council Appln. No. 6 of 1918, and Appeal No. 264 of 1914, Decided on 8th August 1918, for leave to appeal to Privy Council from decree of High Court in original decree No. 264 of 1914.

(a) Hindu Law—Partition—Some property omitted in former suit—No ignorance of property or fraud—Subsequent suit is barred by Civil P. C. (1908), O. 2, R. 2.

No fresh suit for partition can lie where parties, not through ignorance of property or fraud, but deliberately omit to include all the joint properties in a previous suit for partition [P 988 C 1]

(b) Interpretation of Statutes — Procedure —Hindu Law—Civil P. C. (1908).

Hindu law must be applied according to the rules of Civil P. C.; it cannot override express provisions as regards procedure laid down in the Civil P. C. [P 988 C 1]

Sarat Chandra Basak and *Bhagirath Chandra Das*—for Appellants.

Dwarkanath Chakrabarty and *Birendra Chandra Das*—for Respondent.

Woodroffe, J.—This is an application for leave to appeal to His Majesty in Council against two concurrent judgments of this Court, and both the value of the subject-matter in dispute and the question whether a substantial question of law is involved must be established. As regards the first point, the land of which possession by partition was sought was valued at Rs. 5,000. It is now stated to be a sum of Rs. 60,000 for the first time for the purposes of this application. Were it necessary to go into this question, we should have to direct an enquiry upon the matter. In my opinion, it is not necessary to go into this matter as the applicant has not made out that a substantial question of law is involved. In my opinion, the only question of law which arises is under the provisions of O. 2, R. 2, having regard to the finding of fact of both Courts. The case set up by the applicant for the non-inclusion in the former suit of the property now sought to be recovered was twofold, namely, ignorance and fraud. The Subordinate Judge found that this allegation of ignorance was not proved, and, therefore, we must take it that the existence of the property was known at the time of the previous suit, whatever may be the cause

for the non-inclusion in that suit. He also found as a fact that the alleged fraud had not been made out, and the question of fraud seems to have been abandoned at the hearing before the High Court. Then it appears from our judgment and that of the Subordinate Judge that no question was raised as to there being an identity of causes of action in the two suits. It has been suggested that this admission is not binding in law. I am not inclined to hold that it is a mere point of law, but it is a mixed question of law and fact.

It is argued that this is not a question of procedure at all governed by O. 2, R. 2, but that it is a question of Hindu law unaffected by the provisions of O. 2, R. 2. It is an entirely new argument raised before us for the first time and is not traceable in either the judgment of the High Court or the lower Court. We have, however, heard the arguments of the learned vakil for the applicant. He admits that any processual rule that is found in the Mitakshara is overridden by the provisions of the Code of Civil Procedure, but he contends that it is not a rule of procedure, and that the provisions contained in Cl. 1, S. 9, paras. 1 and 2, of the Mitakshara are rules of substantive law. I am not disposed to agree with him on this point, but even if his contention were correct that these were not rules of procedure but rules of law, the case does not fall within the rules, for Cls. 1 and 2, S. 99, Ch. 1 of the Mitakshara, refer to cases where the property which was not partitioned was discovered after partition, and it has not been found in the present case that there was any ignorance of these properties as alleged by the applicant. There was, therefore, no such discovery as is referred to in the text of Mitakshara. In the present case both ignorance and fraud have been negatived. I may observe that one of the grounds of appeal refers to the fact that at the time of the previous suit certain parties were minors. It was argued before the High Court on the appeal that O. 2, R. 2, did not apply because there were two minors in the former suit or at any rate it does not apply as against them.

The High Court then held, without admitting that there was any substance in the point, that the argument must be disallowed as it was raised for the first time in reply, and that there was no trace to be found in the grounds of appeal. The last statement appears, on a reference to the record, not to be correct. I may mention that the point has not been argued before us, and I refer to it now only for the purpose, of correcting the statement that it is not referred to in the grounds of appeal. In my opinion, therefore, the applicant has not made out that there is any substantial question of law, and it is, therefore, not necessary to go into the question of value. The application is refused with costs, five gold mohurs.

Smither, J.—I agree.

V.B./R.K. *Application dismissed.*

** A. I. R. 1918 Calcutta 988
Special Bench

SANDERSON, C. J., WOODROFFE, MOOKERJEE, CHITTY AND FLETCHER, JJ.

Tarit Kanti Biswas and *others*, In the matter of.

Decided on 27th June 1917.

**** (a) Contempt — Newspaper article — Obstruction or interference with course of justice is not necessary—If it is "calculated" to obstruct and interfere with due course of justice is sufficient.**

Per *Sanderson, C. J., and Mookerjee, J.*—In deciding whether an article published in a newspaper is or is not a contempt of Court, the question is not whether the article in fact obstructed or interfered with the due course of justice but whether it is "calculated" to obstruct and interfere with the due course of justice.

[P 992 C 1 P 1014 C 2]

An allegation against a litigant that he is attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is calculated to obstruct or interfere with the course of justice and is, therefore, a contempt. [P 992 C 1,2]

**** (b) Contempt—High Court has power to punish for contempt committed out of Court summarily.**

Per *Curiam*—The High Courts in India are superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same in India as in the superior Courts in England and the High Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges when the Court is not sititing. [P 995 C 1, P 1014 C 2, P 1015 C 1]

(c) Contempt—Printer and publisher are liable for contempt—Knowledge of contents not necessary.

The printer and publisher of a newspaper is liable for contempt even though he was not aware of the subject constituting such contempt.

[P 995 C 1 P 1018 C 2]

(d) Contempt—Jurisdiction should be exercised with great care and when case is beyond all reasonable doubt.

The jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised

when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself. [P 989 C 1]

*** * (e) Contempt—Civil and criminal contempt—Distinction between — Proceedings are not to vindicate personal interest of Judges but general administration of justice.**

Per *Woodroffe, J.* — In contempt cases the Court does not seek to vindicate any personal interest of the Judges but the general administration of justice, which is a public concern. Proceedings for contempt by scandalising the Court are not obsolete. [P 1001 C 1]

All proceedings, whether in respect of civil or criminal contempts, are of a criminal nature when their object is to punish by fine or imprisonment: But it does not follow that the procedure in such cases is in all respects the same as in an ordinary criminal case. In fact both the offence of contempt as also the jurisdiction and procedure under which it is tried are sui generis. There is but one rule of evidence which in India applies both to civil and criminal trials, and that is contained in the definition of "proved" and "disproved" in S. 3, Evidence Act. [P 1001 C 1,2]

Per *Mookerjee, J.*—Contempt by a speech or writing may be by scandalising the Court itself or by abusing parties to an action or by prejudicing mankind in favour of or against a party before the cause is heard. [P 1016 C 1]

A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt on the other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a criminal contempt, as the primary purpose is the vindication of the public authority by the punishment of an act committed against the majesty of the law, the proceeding conforms as nearly as possible to proceedings in criminal cases. In the case of a civil contempt the proceeding in its initial stages at least may be deemed as instituted at the instance of a party and thus to possess a civil character. But here also refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the persons who have defied its authority; at that stage at least the proceedings may assume a criminal character. [P 1017 C 1]

A proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive or remedial measure to enforce the rights of the litigants or for both these purposes combined. [P 1017 C 2]

(f) Contempt—Rumour as basis.

Per *Woodroffe, J.*—One cannot escape either contempt or libel merely by relying upon a rumour [P 1003 C 1]

(g) Contempt—Prejudicing or attempting to prejudice is contempt.

Per *Woodroffe, J.*—It is a contempt of Court to prejudice or attempt to prejudice a litigant before it and to interfere with the course of justice. [P 1004 C 1]

(h) Contempt—Directors of company carrying on newspaper, how far liabile for contempt, stated.

Per *Woodroffe, J.*—The question whether persons in the position of directors of a company carrying on a newspaper are responsible for contemptuous articles published in the paper must depend upon the facts of each case. [P 1006 C 1]

Per *Mookerjee, J.*—It cannot be held as a matter of law that the directors of a limited company which owns a newspaper are liable to be committed for contempt of Court on account of a libel published in the paper. [P 1020 C 1]

*** (i) Contempt — Construction — Meaning and intent are to be determined by fair interpretation of language used by general tone of writing—Disclaimer on publisher's part as to intentional disrespect is not sufficient defence.**

Per *Mookerjee, J.*—In ascertaining the true meaning of articles published in a newspaper and alleged to be contemptuous, the obvious course to pursue is to read the offending articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. The meaning and intent are to be determined by a fair interpretation of the language used and by a consideration of the general tone of the writing. Disclaimer on the part of the publisher as to intentional disrespect to the Court is not a sufficient defence when the purpose and meaning of the writing is obviously of a contrary import. No doubt if the language is fairly capable of an innocent interpretation, the Court will not read into it a sinister import. But if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully avoided by the use of a transparent artifice. [P 1010 C 2]

(j) Criminal Trial — Supplementary evidence.

Per *Mookerjee, J.* — Supplementary evidence cannot be given so as to prejudice the position of an accused. [P 1020 C 2]

*** (k) Evidence Act (1 of 1872), S. 74 (2)—Secondary evidence of returns filed with and in custody of Registrar of Joint Stock Companies is admissible—"Record" means collection of documents.**

Per *Woodroffe and Mookerjee, JJ.*—Secondary evidence of the returns filed with and in the custody of the Registrar of Joint Stock Companies is admissible, as such returns constitute public records of private documents within the meaning of S. 74 (2). [P 1005 C 1; P 1020 C 1]

The term "record" includes a collection of documents. [P 1020 C 1, 2]

(l) Contempt—Newspaper article — Publication of, in the Amrita Bazar Patrika—Construction—Articles should be read together to determine their scope and purpose even though they were proved not to have been written by same person—Articles were calculated to bring Court and the Chief Justice who was responsible for its administration into contempt, and not only to destroy confidence in Court but also to undermine and impair its authority.

A Division Bench (Mookerjee and Cuming, JJ.) held in appeal that the Calcutta Improvement Trust had no power under the Calcutta Improvement Act to acquire land compulsorily for the purpose of recoupment. In three other cases Greaves, J., sitting on the original side, decided that the Trust had such power. When the appeals from Greaves, J., were about to be heard by the High Court hearing appeals from the original side, the following two articles were

published in the Amrita Bazar Patrika newspaper in its issues of 18th and 22nd May 1917, respectively :

"There is a mischievous rumour afloat, which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Greaves, J., in connexion with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for anyone, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every ratepayer is safe in the hands of the Hon'ble Judges, and we do not think that any Official of the Trust can go so far."

"Something like consternation prevails on account of the proposed new constitution of the appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Cuming, J., and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Woodroffe, J. Rumour has it that for purposes of hearing Improvement Trust appeals the Bench is going to be strengthened by the appointment of Chitty, J. Now what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned, the contention, however, which we do not believe the Chief Justice will care to advance, why should there be a Special Bench of three and not a Full Bench of five, on which atleast two Indian Judges could find seats? As a matter of fact, as landowners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh*, 44 *Cal.* 219. Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust appeals:"

Held: (1) that the articles might legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person ;

[P 993 C 2]

(2) that the articles were calculated to bring the Court and the Chief Justice, who was responsible for its administration, into contempt, and not only to destroy confidence in the Court but also to undermine and impair its authority and that, as such, they constituted a contempt of Court.

[P 993 C 2]

Sanderson, C. J.—In this matter the Rule was issued by me as Chief Justice of this Court after consultation with the learned Judges in consequence of two articles which appeared in the Amrita Bazar Patrika newspaper on 18th and 22nd May 1917 respectively. The Rule was directed to Tarit Kanti Biswas, the printer and publisher of the newspaper, and to Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, Directors, and Gopal Lal Ghose and Mrinal Katni Ghose, the Managers of the Company called the Amrita Bazar Patrika Ltd., having its registered office at No. 2 Anando Chatterjee's Lane, Calcutta, and the Rule called upon them to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court alleged to have been committed by them by unlawfully publishing the two articles concerning the High Court and the Chief Justice in his administration thereof. The respondents to the Rule have all appeared by learned counsel.

The first question which it is necessary to consider is whether these articles or either of them constitute a contempt of Court. The appeals from Greaves, J., to which both the articles refer, are the appeals in the three cases mentioned at the head of the Rule. These case were decided by Greaves, J., sitting on the original side, and the appeals in which the Improvement Trust were respondents were about to be heard by the Court hearing appeals from the original side at the time of the publication of the the two articles in May 1917. The first article is as follows:

"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Greaves, J., in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for anyone, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate payer is safe in the hands of the Hon'ble Judges, and we do not think that any official of the Trust can go so far."

The reference to the Mookerjee and Cuming Bench is to an appeal which was disposed of by Mookerjee and Cuming, when he was temporarily acting as a Judge of the High Court in August 1916, when the decision was against the Im-

provement Trust. The second article is as follows:

"Something like consternation prevails on account of the proposed new constitution of the appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Cuming, J., and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Woodroffe, J., Rumour has it that for purposes of hearing Improvement Trust appeals the Bench is going to be strengthened by the appointment of Chitty, J., Now what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned, a contention, however, which we do not believe the Chief Justice will care to advance, why should there be Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact as landowners in Calcutta are mostly Indians and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust* v. *Chandra Kanta Ghosh* ( ). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of the Improvement Trust appeals."

It was admitted by the learned counsel for the respondents at the hearing of the Rule that the statements of facts contained in this article were in many material respects untrue. There was not an appellate Bench constituted to hear appeals "against the awards of the Improvement Trust" as the article assumes. Such Bench was not originally composed of Sir A. Mookerjee and Cuming, JJ., as stated in the article: such Bench had not latterly come to be presided over by the Chief Justice and Woodroffe, J, and it is untrue that Sir A Mookerjee had been withdrawn from the Court. Though these admissions have been made, it may be advisable to state the real facts. In August 1916, as already stated, Mookerjee, and Cuming, JJ. were sitting as a Division Bench on the appellate side and an appeal by the Improvement Trust from the Sub-Judge of the 24 Perganas, having come before them in the ordinary course, was disposed of by them. One of the questions was the alleged power of the Improvement Trust to acquire land compulsorily for the purpose of recoupment and the decision was against the Improvement Trust.

In July 1916, Greaves, J., sitting on the original side, had decided the same question in three cases in favour of the Improvement Trust, and in May of this year the appeals from Greaves, J.'s judgment in the three cases were about to be heard by Woodroffe, J., and myself, the Judges who were then taking the appeals from the original side. Under these circumstances the articles were published.

As regards the inclusion of Chitty, J., in the Court, no explanation is necessary: it would be sufficient for me to state that I, as Chief Justice, thought it desirable to have three Judges to hear the appeal. But the reason in this case must have been obvious to every one. It was within my knowledge, as it was within everyone's knowledge, that Mookerjee, J., had decided one and way and Greaves, J., had decided another way on the construction of the Act on which the cases depended. It was obviously, therefore, a matter on which difference of opinion was possible; moreover it was a case of general importance and in order to avoid a further disagreement which might occur if the Court was constituted of two Judges only, and to avoid the further proceedings and delay which would undoubtedly be consequent on such a disagreement, I thought it advisable to have three Judges instead of two, and accordingly, I requested Chitty, J., the next Judge in order of seniority who had not already had the matter before him, to sit with Woodroffe, J., and myself, and hear the appeals. I may mention here that in my opinion all appeals from a Judge sitting on the original side, except interlocutory appeals, should be heard by a Court constituted by three Judges, and when I first sat in this Court it was so constituted; but I found that the allocation of three Judges to that Court dislocated the work in other departments of the Court so much that I came to the conclusion with much reluctance that with our present staff of Judges I could not allocate more than two Judges to the original side appeals, except in special cases. These being the facts, I

1. (1917) 44 Cal 219=36 I C 749.

now proceed to consider whether the articles are a contempt of Court. I take the definition given by Lord Russell of Killowen in *Reg.* v. *Gray* (2):

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice, or the lawful process of the Courts, is contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterized as 'scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

With regard to the first article I have no doubt it constitutes a contempt of Court. It was admitted by the learned counsel appearing for the printer and publisher that it was a gross libel upon the Improvement Trust, one of the litigants. It alleges that it is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Greaves, J., in connexion with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice, which Bench is referred to thereinafter "as a counterpoise to the Mookerjee and Cuming Bench," which, as I have stated, had decided against the Improvement. Trust. It was urged that this should not be regarded as a contempt, because the matter which would be argued on the appeals was the constuction of an Act, and would be decided by Judges who would not be affected by such remarks.

The question is not whether the article in fact obstructed or interfered with the due course of justice, but whether it is "calculated" to obstruct and interfere with the due course of justice. No matter what the tribunal may be, I am at a loss to understand how it can be seriously argued that such a grave allegation against one of the litigants that he was attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is not calculated to obstruct or interfere with the course of justice. Further, the mere suggestion that such a thing is within the bounds of possibility is a grave reflection upon the Court and the persons responsible for its administration. I am not unmindful of the argument that the article refers to a "mischievous rumour which should be contradicted" and that confidence is alleged in the Hon'ble Judges. The fact that the article is based on a rumour, even if it existed, cannot, in my judgment, excuse the publication of it. It must have been known to the person responsible for the publication that it was absolutely impossible for a litigant to get a Bench constituted according to his own choice. It is, however, a well-known method of spreading a libel for the publisher, who does not wish to take responsibility for it, to say there is a rumour to this or that effect, but that he himself does not believe it. It was admitted by one of the learned counsel for the respondents that some words may have been inserted in the article by the person responsible therefor in order to protect himself in case of emergency, and having regard to the whole tenor of the article, I have very little doubt that this was the object of the writer in concluding in the manner referred to. If the matter had stopped there, although the paragraph was reprehensible and a clear contempt of Court, it might not have been necessary for the Court to take any steps of its own motion.

Article 2, however, appeared four days later on 22nd May. As already mentioned the facts therein stated are admittedly untrue; and consequently the insinuations based thereon are equally groundless. The only part of the article which is based on an alleged rumour is that Chitty, J., was to be appointed to the Bench, which was to hear the Improvement Trust appeals. For the rest of the statements in the article the author makes himself responsible. The statement that,

"something like consternation prevails on account of the proposed new constitution of the appllate Bench"

taken by itself is a grave allegation. Why should a Bench which is to be composed of the Chief Justice and two of the most experienced Judges of the Court cause consternation? But when it is taken with what follows it assumes a much more serious complexion. After misstating the

2. (1900) 2 Q B 36=69 L J Q B 502.

facts as to the previous constitution of the Bench and referring to the proposed inclusion of Chitty, J., it proceeds:

"Now what neither the public nor ourselves can understand is this special reason for such a special Bench."

It then proceeds to argue that the proper thing would have been to have a Full Bench on which at least two Indian Judges could have seats. Reading so far there may be some reason for doubt as to the meaning of the article, though the above allegations go to the length of alleging that for some reason which no one could understand, the Chief Justice was about to include Chitty, J., in the Bench, and that such constitution of the Bench had caused something like consternation. But I think all doubt is set at rest by what follows when the author makes himself responsible for the statement that Mookerjee, J., has been withdrawn from the Bench and that such withdrawal,

"has given rise to rather unsavoury impressions in the public mind since this proposed arrangement is to follow close upon the heels of his judgment in the case of the *Calcutta Improvement Trust* v. *Chandra Kant Ghosh* (1)."

Reading that in the ordinary way, can it mean anything except that Mookerjee, J., has been withdrawn from the Bench, taking the appeals against the awards of the Improvement Trust: that such Bench was originally composed of Mookerjee, J., and Cuming, J., that it is now composed of the Chief Justice and Woodroffe, J., that Chitty, J., is about to be included which is a special arrangement which neither the author of the article nor the public can understand, that if any special arrangement is necessary why not Indian Judges be included and that the withdrawal of Mookerjee, J., coming as it does so soon after his judgment against the Improvement Trust, has caused an unsavoury impression in the public mind. Consequently, something like consternation prevails at the proposed new constitution of the Bench.

I think it is clear that it means that Mookerjee, J., has been withdrawn from the Bench taking appeals against the award of the Improvement Trust and insinuates that it is because of his judgment against the Trust, and therefore an unsavoury impression has arisen. I fail to see any other meaning which can be attributed to it, and I have no doubt that this article, read by itself, constitutes a very serious reflection upon the administration of the Court, which everyone knows is in the hands of the Chief Justice. But if it is read in conjunction with the previous article, the above-mentioned meaning is made plain beyond dispute. I think the articles should be read together. They were published with only four days' interval, they refer to the same subject-matter, they are written in the same strain and in the same style, and each article appeared in the columns of the newspaper which are devoted to leading articles. When read together what do they mean? It is obvious to my mind they mean to suggest that a vigorous attempt had been made by the Improvement Trust to secure a Bench composed according to their choice and that the attempt has succeeded; that otherwise the proposed constitution of the Bench is inexplicable and something like consternation prevails. If this be the correct meaning, there is no doubt that it is calculated to bring the Court and the Chief Justice, who is responsible for its administration, into contempt and it is calculated not only to destroy confidence in the tribunal, but also to undermine and impair the authority of the Court. If so there is no doubt that it is a contempt of this Court.

There are two other matters to which I wish to refer. It was argued that the object of the second article was to procure the appointment of two Indian Judges or one Indian Judge to the Bench which was to hear the appeals, and the suggestion contained in the article was that as the land-owners in Calcutta were mostly Indians, and Indian Judges are likely to know more of conditions and practices prevailing, that it was but meet that Indian Judges should be associated with their European colleagues. The question at issue in the appeals depended on the construction of the sections of a certain Act, and had nothing to do with the conditions and practices, etc., relating to Indians. This however might be put down to ignorance on the part of the author of the article, though from the reference made in the article to such matters as the constitution of the Courts, Full Bench and other matters, the writer appears to be fairly familiar with the proceedings of the Court and the nature of the appeals in question. A further argument however was adduced by the

learned counsel for Moti Lal Ghose, viz. that the real object of the article was to get an Indian Judge, who possessed land, appointed to the Bench in question, because Indian Judges would approach the subject from a totally different point of view from that of European Judges, who do not possess land and who do not know where the shoe pinches.

This to my mind was an astonishing argument. I was not surprised therefore when Mr. C. R. Das, appearing for another of the respondents at a later stage of the hearing, dissociated himself from that argument and stated that in his opinion the above-mentioned argument would be the strongest ground for suggesting that Indian Judges should not be on the Bench in question. Assuming however that the learned counsel for Moti Lal Ghose was correct in his statement as to the meaning and object of the article, it is not only one which would be rightly and strongly resented by my Indian colleagues, but it also provides an additional reason for holding the article a contempt of Court: for it involves the suggestion that one of my Indian colleagues should be added to the Bench in question because he possessed land and would approach the question from a different point of view from a Judge who possessed no land and who would therefore be entirely independent and it thereby constitutes a very grave and unjustifiable reflection on my Indian colleagues. It is also to be noted that if this was the object, the author of the article was endeavouring to obtain the constitution of a Bench after his own heart, the very thing which he had professed to condemn so strongly when attempted, as alleged, by the Improvement Trust. Assuming, however, that the object of the article was to get an Indian Judge appointed, no matter for what reason, that does not justify the publication of the untrue statements of facts and the unworthy and groundless insinuations based thereon.

The other matter to which I refer is the passage at the end of the article in which the author expresses perfect faith in the Chief Justice. This, to my mind, is so inconsistent with the insinuations previously made in the articles, that it is impossible to conceive that it was genuinely intended. It is much in the same style as the conclusion of the previous article, and I do not think there can be any doubt as to the object of the auther in using these words, viz., to try and provide a means of escape for himself if he is taken to task for the previous matter contained in his article. No one has come forward to acknowledge the authorship of the articles or the responsibility of the publication, and we have, therefore, had no opportunity of hearing or considering any explanation from the individual, in person, who was so responsible. Consequently the meaning and the intention of the writer must be gathered from the articles themselves. They must be read as they stand giving to the words used their natural meaning. We have had many arguments and many commentaries upon the articles addressed to us by all the learned counsel on behalf of the respondents. I have considered them carefully, and though I should like to have come to the conclusion that the articles do not and were not intended to constitute an attack on the Court, I regret to say I am unable to come to that conclusion. It might possibly have been different if the author of the article or the person responsible for its publication had comeforward and personally explained what was in his mind; but he has not chosen so to do, and we must construe the articles as they stand, and I have no doubt that anyone reading them would come to the conclusion that a very serious aspersion was cast upon the Court and the administration thereof, and that consequently they do constitute a contempt.

If then the articles constitute a contempt the next question is, whether the Court has jurisdiction to deal with it by these proceedings. There can be no doubt as to this: it was held in 1883 in *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (3) by the Judicial Committee that the High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same in such Courts as in the superior Courts in England, and the jurisdiction was exercised by the High Court in that case. This jurisdiction was affirmed in 1913 in the case of *Governor of Bengal* v. *Moti Lal* (4), when Sir Lawrence Jenkins, C. J., said at p. 215 of 41 *Cal*:

3. (1884) 10 Cal 109=10 I A 171 (P C).
4. A I R 1914 Cal 9=20 I C 81 =41 Cal 173

"Now this Court is a Court of Record in all its jurisdictions, and it thus has power to commit for any contempt in relation to any of those jurisdictions."

Then Mookerjee, J., at p. 242 (of 41 *Cal*) said:

"Now, it is indisputable that a Court of Record has authority to punish for contempt. Sir Barnes Peacock, C. J., observed in *Abdool and Mahtab, In re* (5) that this Court by the express terms of the Letters Patent is a Court of record and there can be no doubt that every Court of Record has the power of summarily punishing for contempt;"

and indeed the learned counsel appearing for the printer and publisher of the newspaper admitted the jurisdiction of the Court but argued that in this case it should not be exercised. The suggestion that this jurisdiction is absolute and ought not to be exercised is futile, in view of the fact that it was exercised by this Court in 1883 and affirmed to be in existence in 1913. It was also exercised in England as recently as 1900 in the case of *Reg.* v. *Gray* (2) already referred to. The question remains then whether the Rule should be made absolute against the respondents or any of them. As regards the case of Tarit Kanti Biswas, the first respondent on the record, there is evinence that he was the printer and publisher of the newspaper. We have before us a certified copy of the return made by him under the Act (25 of 1867), his name appears in the newspaper as printer and publisher and he has himself put in an affidavit admitting that he occupies such position and that he printed and published the articles in question. As already stated, his learned counsel admitted the jurisdiction of this Court and further admitted his legal responsibility if the articles constituted a contempt. This responsibility could not be denied, for it has been held in many cases that the printer and publisher is liable for contempt even though he was not aware of the subject constituting such contempt, and the reason for that is given by Lord Morris, in *Mc Leod* v. *St. Aubyn* (6) as follows:

"A printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents."

Again it was pointed out by Stirling, J. in *American Exchange in Europe* v. *Gillig* (7) that the foreman printer (who was the person concerned in that case) is the person who is held out to the public as the publisher, and under these circumstances he is answerable for publishing the article complained of although he is ignorant of its contents. This has been the law since the well-known decision of Lord Hardwicke in the case of *St. James Evening Post* (8). I refer to the above-mentioned cases to show that in my judgment the learned counsel was correct in making the admission that this Court has jurisdiction in these proceedings, and that if the articles constitute a contempt of Court, the printer and publisher is legally liable in respect thereof. Having held that the articles are a contempt, it remains to be considered whether the Rule should be made absolute. The printer and publisher has put in an affidavit in which he alleges he did not read the articles when they were handed to him for publication, which was done in the ordinary course of his business. He admits that certain statements in Art. 2 are incorrect, and he then proceeds to argue that the publication was in the public interest. Para. 6 of his affidavit runs thus:

"6. That I further state that the said articles were published by myself in good faith and in the public interest and without any intention whatsoever of offending gainst the dignity or integrity of this Hon'ble Court or of prejudicing the due course and administration of justice in the matter of the appeals referred to in the said articles. 7. That long before the appeals referred to in the said article came on to be heard by this Hon'ble Court, it was well known among the public of Calcutta how the Calcutta Improvement Trust had objected to the hearing of the appeal in which the question of the powers of the Calcutta Improvement Trust was involved by any of the Indian Judges of this Hon'ble Court and how, as a matter of fact, they through their counsel, Mr. Langford James, adopted the very unusual course of applying in open Court to the Hon'ble the Chief Justice that the appeal case of *Trustees for the Improvement of Calcntta* v. *Chandra Kanta Ghosh* (1) should not be heard by Mookerjee, J., and how after the decision in the last mentioned case by the Mookerjee, J., and Cuming, J., they had unsuccessfully applied to the Government for legislation for the purpose of doing away with the effect of the said decision. In the circumstances recited the public were watching with deep interest the action of the Hon'ble the Chief Justice, in constituting the Court which would hear the appeals from Greaves, J., decision. 8. I further state that the said articles were published to give expression to public feeling in Calcutta and, as stated above, without remotest intention of scandalising this Hon'ble Court or of reflecting on the conduct of the

5. (1867) 8 W R Cr 32.
6. (1899) A C 549=68 L J P C 137 (P C).
7. (1889) 58 L J Ch 706=61 L T 502.
8. (1742) 2 Atk 469=26 E R 683.

Hon'ble the Chief Justice or of any other Judges of this Hon'ble Court."

If it be true that the public were watching with such deep interest the action of the Chief Justice in constituting the Court, it seems to me that fact enhances the serious nature of the publication of the articles. For the public in the ordinary course might not trouble its head about the constitution of the Court, and might not pay much attention to the articles; but if, on the other hand, the public really was interested in the matter, it would pay attention to them, and it was all the more incumbent upon the author and publisher to abstain from making false statements and groundless insinuations. I may have my doubts as to the "deep interest" alleged in the affidavit, but if it did exist, the seriousness of the publication is greatly increased. The learned counsel for the printer and publisher urged that his client would be sufficiently dealt with by the proceedings which had been taken and that the Rule should not be made absolute against him. I take into consideration all that the learned counsel urged and I sympathise with his argument that the editor, if there be one, or the person responsible for the publication ought in common fairness to have come forward and borne the burden in respect thereof; the fact that the printer and publisher does not disclose the name of the person responsible for the publication is a factor to be considered when deciding how the printer and publisher should be dealt with. In this case the printer and publisher has not disclosed the person responsible for the publication, whom of of course he must know, though he may not know the actual writer of the articles. On the contrary he has attempted to justify the publication by the paragraphs of his affidavit to which I have referred. It was said by Lord Hardwicke in the case already cited,

"nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented;"

and the reason for this must be obvious to every one. May attention has been drawn on other occasions to articles criticising the High Court. I have found that many of them were unjustifiable, because they were based on statements of facts which were incorrect: but the Court has not taken any notice of them because they were not worth the time of the Court. But this is a different matter the allegations contained in the articles exceed the bounds of any legitimate criticism and strike at the very root of the administration of justice. People who are familiar with the administration of the Court would know how impossible the allegations were, but among people who are not so familiar with the Court's administration such articles as those in question with their groundless insinuations may be very mischievous and pernicious. They contain grave misrepresentations of the proceedings and adminstration of this Court, and in my judgment we should be failing in our duty if we did not take such steps as are within our power to counteract the effect of them and to vindicate the Court and its authority. In my judgment, therefore, the Rule should be made absolute against Tarit Kanti Biswas, the printer and publisher. As regards the other four respondents, the evidence before us apart from the question of its admissibility on the technical grounds which were put forward during the argument, raised a strong prima facia case that they were responsible for the publication of the newspaper containing the articles.

The Amrita Bazar Patrika Co., Ltd., was incorporated in 1908, the original Directors being Sisir Kumar Ghose, Moti Lal Ghose and Gopal Lal Ghose, for the purpose of acquiring and taking over as a going concern the business of newspaper proprietors, printers and publishers then carried on, and in connection therewith the entire rights including the goodwill of the newspaper called the Amrita Bazar Patrika, then being published from No. 2, Ananda Chatterjee's Lane, in Calcutta, and all or any of the assets and liabilities of the proprietors of the business in connection therewith, and with a view thereto to enter into the agreement referred to in Cl. 3 of the Company's Articles of Association and to carry the same into effect with or without modification, with the usual subsidiary powers contained in the Memorandum of Association. The Company gave the statutory notices that it intended to carry on its business at No. 2, Ananda Chatterjee's Lane, which was to be deemed its registered office: that it possessed a printing press at 19 and 20, Bagbazar Street, which the Company purchased from Golap Lal Ghose. On 5th March 1917, the res-

pondents, Moti Lal Ghose, Galap Lal Ghose and Pijush Kanti Ghose were the Directors. Gopal Lal Ghose and Mrinal Kanti Ghose were the Managers, and it further appeared that Golap Lal Ghose acted as Financial Manager and Mrinal Kanti Ghose as Secretary. The address of all the four was given No. 2, Ananda Chatterjee's Lane. The Articles of Associa- (which were put in evidence by M. K. Ghose) provided that the business of the Company should be managed by the Directors, who might pay all expenses incurred in getting up and registering the Company and might exercise all such powers as are not by the Indian Companies Act required to be exercised by the Company in general meeting subject to the pro sions of the Act and of the Articles, etc.

It was obviously a family business converted into a limited Company. This is confirmed by the list of persons holding shares exhibited in Mr. Hechle's affidavit. The evidence shows that the Directors and Managers were living at the premises which are the registered office of the Company; that the newspaper was published at those premises; that it was the duty of the Directors to manage the business; there was no editor disclosed or any other person occupying a position similar to that of an editor who would be responsible for the publication and the contents of the newspaper. From these facts it would naturally be presumed that these respondents were actually engaged in the management of the newspaper and personally responsible for its publication. These Directors were occupying positions very different from those generally occupied by Directors of Companies, whose duties are restricted to attending periodical meetings and directing the policy of the Company. Two of the respondents, Pijush Kanti Ghose and Mrinal Kanti Ghose, however, have put in affidavits and it appears therefrom that Mrinal Kanti Ghose was away from Calcutta on private business at the time when both the articles in question were published; and that Pijush Kanti Ghose was away on private business when the second article was published and under these circumstances I think that the prima facie case against them may be said to have been met, and I do not think that either of them should be held responsible in these proceedings for the publication and that consequently the Rule should be discharged as against them. There are, therefore, two Directors left to manage the business of this newspaper at the material times, viz., Moti Lal Ghose and Golap Lal Ghose. Golap Lal Ghose in the evidence is described as Director and Manager and also also as Financial Manager.

Mrinal Kanti Ghose has sworn that Golap Lal Ghose has only to do with receipts and disbursements of the Company and keeps the accounts thereof. Under these circumstances, I think the prima facie case made against him may be rebutted, and that he should not be held responsible in these proceedings for the publication of the articles, even though it is not alleged that he was not at the premises when the paper was published at the material times, and, in my judgment, the Rule should be discharged against him. With regard to Moti Lal Ghose, the case is different: I think under the circumstances mentioned above, it may not unreasonably be presumed that he was responsible for or privy to the publication. It was the Director's duty to manage the business: such business was the publishing of the newspaper: one of the three Directors was away from Calcutta; another, it is sworn, had only the financial matters to attend to. Moti Lal Ghose, therefore, is the only Director to whom the particular duty of editing and publishing the newspaper can be ascribed. As already mentioned, he was not in the position of an ordinary Director. who makes periodical visits to the Company's premises at stated and regular intervals. He was living on the premises where the paper was published and carrying on the family business which had been turned into a limited Company. There is no editor disclosed, and even in the affidavits which have been put in by Pijush Kanti Ghose and Mrinal Kanti Ghose there is no specific reference to any editor. There is a general statement only, e. g., the affidavit by Pijush Kanti Ghose runs as follows:

> "Neither I nor my co-Directors exercise any control whatever over the content of the "Amrita Bazar Patrika" newspaper, but we perform duties and exercise such powers as are mentioned and defined in the Articles of Association of the Limited Company."

This is not a convincing statement. It is to be noted that it does not go the length of saying that the Directors did

not know of or were not privy to, the publication of the articles: if they did know of the inclusion of the articles and allowed the newspaper containing the articles to be published, they would be reponsible. Further the main duty of tne Directors "mentioned and defined in the Articles of the Company" is to manage the business of the Company, which business is the publication of the newspaper. Under such circumstances the natural presumption would be, I think, that Moti Lal Ghose, either was responsible for, or at all events, was privy to the publication of the articles. But it has always been held that the jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself. Moti Lal Ghose has made no affidavit nor has he offered any explanation of his position in connexion with the newspaper at No. 2, Ananda Chatterjee's Lane, and if the above-mentioned presumption of responsibility were drawn against him, I do not think he could complain. But I think it is just possible that he may not have been responsible for or privy to the publication of the article. Although no reference is made to the existence of an editor, or some person in the position of an editor, it is still possible that there may be one who is not before the Court. For there is the general statement by Pijush Kanti Ghose and Mrinal Kanti Ghose made on oath that the Directors do not exercise control over the contents of the newspaper.

Though this general statement be unsatisfactory, it cannot be wholly disregarded and it may be that the general control as to the contents of the newspaper may be vested in the hands of some person who occupies the position of an editor and who, for reasons known only to the respondents, has not been disclosed, and that consequently these articles may have been inserted without the responsibility or knowledge of Moti Lal Ghose. It is not likely that this was so, but still it is just possible and having regard to the principle that in a proceedings of this nature we should be scrupulously careful to see that the case is clear beyond all reasonable doubt, I think Moti Lal Ghose should be given the benefit of that doubt and that the rule should not be made absolute against him. In view of the attitude taken up by the respondent Directors, we considered whether a Rule should not be issued against the Company itself with respect to which the considerations, which affect the positions of the Directors, would not arise: but in view of the fact that the object of the proceedings, viz., the vindication of the Court and its authority, had been obtained by the proceedings already instituted, we came to the conclusion that it was not necessary to take up the time of the Court by adding the Company, which would necessitate a further hearing. Before leaving the case of the Directors, I desire to refer to the attitude adopted by them. If the articles were innocently intended, the natural thing would have been for the person responsible for them, or for their publication, to come forward and declare his intention: on the other hand, even if they were not innocently intended, one would have expected the person really responsible for their publication to come forward und take the responsibility on his own shoulders as was done in the case of two well-known newspapers in Calcutta on previous occasions: See *Banks and Fenwick, in the matter of* (9) and *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (3). They have chosen not to do so, but to leave the printer and publisher to bear the brunt of the matter.

It is further to be noted that, although it was evident that the Court, by issuing the Rule, regarded this as a matter reflecting upon the Court, although it has been admitted that the second article contained statements of fact which were entirely untrue, and consequently that the insinuations based thereon were groundless, although two of the respondents' learned counsel admitted that the article, to say the least of it, was a piece of great impertinence, not one word of apology has fallen from the Directors of the Company.

As regards the many technical points raised by learned counsel as to the admission of the evidence, I do not think it is necessary for me to discuss them: none of them affect the case of the printer and publisher. I would only say that I have had the opportunity of reading Woodroffe, J.'s judgment, and I agree

9. A I R 1918 Cal 752=45 I C 113.

with him that most of them were trivial and unsubstantial. The Court was occupied over these proceedings for two and a half days: some part of the time no doubt was taken up by the discussion of the meaning of the articles, but the greater part was devoted to technical objections relating to the evidence and to the question as to who was really responsible for the publication. This fact shows how essential it is that the legislature should provide for the registration of the editor or the person really responsible for the contents of a newspaper so that the responsibility might be placed in the proper quarter without any difficulties or delay. For the above-mentioned reasons, in my judgment, the Rule should be made absolute against Tarit Kanti Biswas, the Printer and Publisher, and it should be discharged as against the other respondents.

Woodroffe, J.—The argument before us (other than those of Mr. Norton for the printer) would suggest that the parties regarded this Rule as an opportunity for a legal tamasha, to use an expressive if not judicial term, rather than as a proceedings taken in the public interest to ascertain the true facts. Divorced from the lengthy and unnecessary discussions before us and freed of obstructive tactics, the matter is really quite a simple one and might have been decided with but little delay. In that case too our judgment might have been short but the exuberant argument calls for some answer. The parties before us are the directors, managers, and secretary of the Amrita Bazar Patrika, Ltd., a small Company seemingly a family business, which owns and runs a Calcutta newspaper called the Amrita Bazar Patrika. With them is joined their printer. Ordinarily of course a newspaper has an editor, but this company or some of its members have been very secretive on the question whether there is an editor, and if so, who he is. This is not the first time that the editor, if there be one has been kept in the background. Perhaps it was considered that such secrecy was a convenient policy in defence of proceedings against the paper. Whatever be the object, these persons have so for successfully concealed the fact and name of their editor. In the present proceedings it was not unreasonable for the Court to think that a summons to the drectors, managers and secretary was sufficient without notice on the company and that officers of the company would disclose the actual facts. What actually occurred at the trial has shown that no assistance can be expected from the company's officers and on a future occasion it will be necessary to consider whether the Court should not proceed against the company and its property. Such difficulties as we have experienced would be remedied were a law enacted compelling the registration of the names of editors just as the English Newspaper and Registration Act, 1881 (44 and 45 Vic. c. 6) compels the registration of the names of the proprietors. As the Court was not in possession of evidence whether there was an editor or who he was, proceedings were instituted against those persons who are empowered to manage the business of the company and against its printer.

On the 18th and 22nd May last, two aaticles appeared in this newspaper which seemed to the Chief Justice in consultation with the Judges of the Court to be a contempt. The writer circulates what he calls "mischievous rumours" and "unsavoury impressions" and makes statements which suggest that a litigant before the Court, namely, the Calcutta Improvement Trust, had been successfully intriguing to get a Bench of its choice to hear an appeal from the decision of Greaves, J. As such an intrigue could not succeed without the connivance of the Court, such a statement was scandalising the Court, as it is technically called. Nextly, as the allegation of such an intrigue touches the party said to be carrying on this intrigue the tendency of such writing is to prejudice that party. Thirdly the articles are calculated to interfere with the administration of justice, for the writer seeks to do, though in his own way, what he complains of in the case of the litigant Trust, namely, to influence the Chief Justice to form a Bench to hear the appeal in ques tion, the Bench to be of such composition as the writer approved. As it seemed to the Court that prima facie a contempt had been committed, a rule was served upon the persons mentioned to show cause, that is, they were given the opportunity of showing that the articles were not contemptuou and, if they were, that they were not responsible for them.

The parties whom we called for have come before us. Leaving aside the printer, their substantial contention (to be extracted from the general mass of objections and arguments) is that the business in which they are each engaged has nothing to do with the control of the contents of the paper; that is their work is not of an editorial character. One of them swears that he was out of Calcutta when both the articles were published and another that he was away from Calcutta when the second and chief article appeared. The printer says that he has no control of the contents of the paper and that he printed what was given him without first reading it. Two parties, Moti Lal Ghose and Golap Lal Ghose, have filed no answer at all. All parties have refused to state whether there is an editor, but they all contend that we are quite mistaken in supposing that the articles are a contempt. On the contrary, we are told that the writer of these articles was a man who had perfect faith and confidence in the Chief Justice and Judges; that he was solicitous for their honour and was only seeking to protect and counsel the Court from and in respect of certain "mischievous rumours" and "unsavoury impressions." In short he was the Court's benefactor who thought that if it would but follow his advice as to how it should conduct its business, it would escape the "unsavoury" imputations which the public were making against it. This was said by some of the learned counsel to be so clear that Mr. Jackson affirmed that no case could be found in all the reports which approached the present one in the weakness of the alleged contempt. If there be anything in all this, what should the parties have done? Each of the directors should have put in an affidavit exculpating themselves from being privy to the publication. The reading and examination of these affidavits might have taken half an hour. If these affidavits were accepted as truthful and the editor had been named, these parties other than the printer, would have been discharged within about half an hour of their appearance before us instead of as now after a protracted argument for three days.

We should have then expected that the parties would have named and produced their editor, the more particularly that the articles for which he would have been responsible are alleged to be of a wholly innocuous character, and their author to be one who cherishes the honour of this Court and would be its adviser and protector. But strange to say, this man of alleged good and disinterested motives is not named or produced. What had he or the parties to fear assuming that their argument as to the meaning of the articles is correct. Can it be said that notwithstanding such excellent intentions he was yet afraid that we might deal with him unjustly? If so, the writer's professions of his perfect faith and confidence in the Court are a pretence. If he had come here and had explained what, notwithstanding the form of his expression, he actually meant; if he had come here and said (as has been suggested by others in his absence) that he gave no credence to these rumours, that he personally made no suggestion against the Court, which in fact he was seeking to counsel and protect: if, I say, he had satisfied the Court of his innocence, then he too would have been discharged, and necessarily with him the printer. As a fact, the position taken up before us is "we refuse you all information. Prove what you can against us." Such affidavits as have been put in show that they have been elaborately drawn so as to keep out information. If, as in my opinion, there is a case made out, calling for an answer, it is obvious that the non-disclosure and non-production of the editor or writer leads to the inference that he or they are withheld because upon a true construction of the articles they do in fact constitute a contempt and that there is no reality in the argument which would have us hold that there was no contempt at all. If so, why all this secrecy and technical objections as to jurisdiction, procedure, nature of contempt, evidence and so forth?

It is first objected that we have no jurisdiction and if we have and if there was a contempt, the affidavits issued with the rule do not make any case calling for an answer, and if it did call for an answer on the assumption that the articles constituted a contempt, they are not a contempt in fact, and lastly, if they do constitute a contempt, two of the parties were not in Calcutta at the time of the publication of one or both of the articles.

As regards jurisdiction a number of stale objections were taken. It is not necessary to go into the history and

nature of contempt. It is too late now to contend that we have no other jurisdiction than that conferred by the Penal Code or that in exercising this jurisdiction we are Judges in our own cause. The jurisdiction has been approved many years ago by, amongst other Judges, their Lordships of the Privy Council. The second observation applies to all cases of contempt, and if it were given effect to, the Court would be deprived of its jurisdiction in every case. In the present one, the Court, as it is entitled to do, issued the rule of its own motion. The Court, however, in such cases does not seek to vindicate any personal interests of the Judges but the general administration of justice, which is a public concern. It is not a fact that proceedings for contempts by scandalising the Court are obsolete, as Mr. Jackson argued. There are, moreover, special reasons in this country why this jurisdiction should be maintained, which I need not here develop. I may, however, refer in this connexion to the observations in *McLeod* v. *Aubyn* (6). The point of jurisdiction has been laboured with a view to establish the point that the case before us should be decided as a criminal one. It is what is called a "criminal" contempt, but all proceedings whether in respect of civil or criminal contempts are, in my opinion, of a criminal nature in the sense that they are in poenam. that is, when their object is to punish by fine or imprisonment. It does not, however, follow that the procedure in such cases is in all respects the same as an ordinary criminal case.

It is obviously not. For if it were, the parties before us would have been in the dock and (not to speak of other matters) no affidavits could have been filed by or against them. In fact both the offences as also the jurisdiction and procedure under which it is tried are sui generis. As regards the question of proof, no case either civil or criminal should be tried and determined otherwise than according to the law governing it. It is not the fact that civil proceedings may be slack and criminal proceedings must be strict. A dereliction of duty may, of course, be of greater or less moment according to the nature of the proceeding in which it happens. As regards the standard of proof, I would repeat what was held in *Weston* v. *Peary Mohun Das* (10), that there is but one rule of evidence which in India applies to both civil and criminal trials and that is contained in the definition of "proved" and "disproved" in S. 3, Evidence Act. Whether the case is civil or criminal, a fact is only proved or disproved if it comes within the terms of that section. It may be conceded that the case against the persons before us must be proved strictly, which means according to law. That charge is that the two sets of parties before us, namely, printer and publisher of the newspaper "Amrita Bazar Patrika" and the directors and manager of the "Amrita Bazar Patrika, Ltd.," committed a contempt of Court by publishing and being privy to the publication of the articles of 18th and 22nd May set out in the affidavit of the Registrar.

The first question is whether these articles constitute a contempt of Court, and then, if so, who, if any, of the parties before us are responsible for it. Learned counsel who appeared for the various parties have offered different arguments as to the construction of the articles. The actual facts which are undisputed are that some cases were instituted against the Calcutta Improvement Trust on the original side of this Court before Greaves, J., which failed, that learned Judge holding that the Calcutta Improvement Act gave the Trustees a power to acquire land by way of recoupment. Another case against the same Trust came up for hearing on appeal from the Moffussil. Previous to the hearing by this latter Bench on the appellate side of the Court an application was made by counsel for the Trust to the Chief Justice for the transfer of the case from the last mentioned Bench on the ground that Mookerjee, J., was a landowner and, therefore, personally interested. That application was refused, on the ground that the learned Judge would himself determine whether the circumstances were such that he should hear the case or not. The objection was not repeated before the learned Judge himself and the case was then heard on the appellate side of the Court by Mookerjee and Cuming, JJ., who held that the trustees had no such powers. After that there was then an appeal to the Privy Council by the Trust

(10) A I R 1914 Cal 396=23 I C 25=40 Cal 898.

against the decision of Mookerjee and Cuming, JJ., and an appeal by the parties suing the Trust against the decision of Greaves, J., to this Court hearing appeals from the original side. The Judges who had been previously taking such appeals were the Chief Justice and myself. On the 18th May 1917, the first of the articles appeared. Its salient points are these: —It alleges the existence of a "mischievous rumour which should be contradicted." The writer does not himself contradict the rumour but gives it further currency. That rumour was stated to be that an attempt was being made by or on behalf of the Calcutta Improvement Trust "to get up" and "secure" a Bench after its "own heart" to deal with the appeal from the decision of Greaves, J., so that that Bench might act "as a counterpoise" to the Bench of Mookerjee and Cuming, JJ. Expressing confidence in the Judges the writer says that he does not think that any official of the trust "can go so far."

The Benches of this Court are appointed by the Chief Justice, it may be, in some cases, after consultation with the Judges. It is of course plain that a litigant could not "get up" or "secure" a Bench of his own "choice" and after his own heart except with the complicity of the Chief Justice or Judges. Of this the writer of the article is well aware; for he says that he is "sure the interest of every ratepayer is safe in the hands of the Hon'ble Judges," and he "does not think that any official of the trust can go so far." As I have said, the original side appeals were then being heard by a Bench of two Judges, namely, the Chief Justice and myself. A hearing of original side appeals by two Judges is not a convenient one nor in conformity with old practice, but it has been in existence for several years since Sir Lawrence Jenkins' time owing to the great bulk of work and the shortage of Judges to deal with it. It is not convenient because it is advisable that there should be a third Judge to turn the scale in cases of difference of opinon. As the appeals under consideration involved a question of great public interest and might involve a reference to a Full Bench, the Chief Justice with my concurrence determined to appoint a third Judge to meet the possible case of a difference of opinion and a practically infructuous hearing. A third Judge has been added to the usual Bench of two Judges on previous occasions. The third Judge added was Chitty, J., the next senior Judge to myself excluding Mookerjee, J., who had tried the Improvement appeal which raised the same question as that which the appellate Court hearing the appeal from Greaves, J's., decision had to determine. Before the constitution of the Bench was actually published, the second article of the 22nd May appeared. That article is based on a number of misstatements.

It wrongly assumed that there was an appellate Bench constituted to hear "appeals against the awards of the Improvement Trust." It wrongly states that this supposed Bench was composed of Mookerjee and Cuming, JJ. It then wrongly states that this Bench had latterly come to be presided over by the Chief Justice and myself. It then says that the "withdrawal" of Mookerjee, J., (which is not true) had "given rise to rather unsavoury impresions in the public mind" since this supposed "withdrawal" and supposed reconstitution of the Bench, followed "close upon the heels of his judgment" in the case I have mentioned. The suggestion involved in these alleged impressions is of course that Mookerjee, J., who is supposed to have had charge of Improvement Trust cases, was "withdrawn" because he had decided against the Trust. He could not himself "withdraw" of his own motion, nor can any one else but the Chief Justice who appoints the Benches. But why should he be so "withdrawn?" The first article suggests the reason, namely, that the Improvement Trust was endeavouring to get up snd secure a Bench after its own heart as a counterpoise to the decision of Mookerjee and Cum-Cuming, JJ. Then it says,

> "something like consternation prevails on account of the proposed new constitution of the Appellate Bench,"

that is, by the substitution of the Chief Justice and myself for Mookerjee and Cuming, JJ., the "withdrawal" of Mookerjee. J., which had given rise to rather "unsavoury impressions," the addition of Chitty, J., and the non-selection of any Indian Judge. It suggests that the presence of one or more of these was necessary because of their knowledge of local conditions. I may here observe that the printer sought to prove good faith by, amongst others, the allegation

that it was well known that the trust objected to their case being tried by any Indian Judges. The point before the Court in the trust cases was a pure question of law equally well triable by either an English or Indian Judge, unless we accept Mr. Jackson's strange argument (from which Mr. C. R. Dass dissented) that that Judge is best qualified to try such cases who is interested therein by reason of his possessicn of land in Calcutta. Reading this second article in connexion with the first, the inference to be drawn from it, in the absense of any explanation from its writer, is that the alleged machinations of the trust to secure a Bench "according to somebody's choice" had succeeded and that the Bench which was to hear the appeal from the decision of Greaves, J., was packed. Of course, there is no question but that if this was the suggestion, there has been a gross contempt of Court. Mr. Norton, who appeared on behalf of the printer and publisher, contended that the two articles should not be read together. There is no substance in this. But he frankly conceded that if the two articles be read together then they were capable of the above-mentioned interpretation, though he did not admit that that was meant, and suggested that the writer did not understand the meaning of the word "unsavoury." But how can we say that when the writer and editor are not before us?

Mr. Jackson's argument lends support, though perhaps unconsciously, to the construction I. give to these articles. For he has endeavoured to re-construct what he called the atmosphere in which they were written with a view to show that the writer acted in the public interest and in good faith. But when a person has written nothing which is prima facie an offence a plea of good faith is unnecessary. It is only relevant on the assumption that the articles do on their face appear to be contemptuous. It is then said that the writer was only repeating rumours to which he himself did not gave credence. One cannot escape either contemtp or libel merely bv alleging that there was a remour. This is a common way in which libels are spread. The existence of a rumour, if there was one in fact, is no justification in itself for its repetition. Moreover the writer associates himself with these alleged public suspicions. Thus he says, "now what neither the public nor ourselves can understand", and so forth. And in further dealing with the matter he refers to a contention which the Chiel Justice will not "care to advance."

Then it is said that the writer was merely stating the existence of these "unsavoury impressions in the public mind" in the interest of the Court so that they might be contradicted. It is said that he has more than once expressed his perfect faith and confidence in the Chief Justice and Judges. That is so. It is an obvious question to ask why, if the writer meant no offence but was only acting for the Court's good, he was not brought forward. What had he to fear? Will it be suggested that the fear is that nevertheless the Court might deal with him unjustly? If so, this is, as I have said, the strongest argument against the sincerity of his professions of faith and confidence in the Judges. In my opinion, it is not possible to accept an argument that the writer meant no offence and was merely acting in protection of the Court from unsavoury public impressions, when he is not even named, much less brought forward. Moreover the article itself does not, in the absence of any explanation from him, support this view. It states certain alleged rumours. It misstates the facts which are supposed to be the cause of these rumours. It does not contradict these rumours and say and show that there is nothing in them. It, on the contrary, gives them circulation. The writer associates himself with those who are said to entertain these alleged unsavoury impressions. He writes in a way open to the inference that the alleged manœuvres of the trust had succeeded. It may be that these expressions of faith and confidence and so forth were inserted, to use an expressive phrase of Counsel, for the "protection" of the writer. It is possible that if the editor or writer had appeared before us, he might have succeeded in showing that, however apparently unfavourable to him the language of these articles is, yet in fact no offence was intended. But he is not produced and we must give them what seems to us their natural meaning. It has been held that even where the writer knew

that proceedings were still pending, the fact that he did not desire or intend to prejudice the case is immaterial (except as to the extent of his punishment) if the Court be satisfied that such was the obvious and necessary result of his words. *Daw* v. *Eley* (11), *Martindale, In re* (12) and *Townshend (Marquis), In re* (13). In the absence of the editor or writer, I can only and do infer the intent from a consideration of the natural meaning of the words used and the impression which I believe they would convey to the ordinary reader of them. In the present case the articles not only scandalise the Court but are otherwise a contempt. For it is a contempt to prejudice or attempt to prejudice a litigant and to interfere with the course of justice. Here the trust is a litigant in this Court and it is suggested that it has been attempting to influence the course of justice by trying to "get up" a Bench of its "choice" of which allegation there is no proof whatever. Nextly, the writer of the article himself seeks to control the formation of the Benches in his own way by putting forward alleged unsavoury impressions in the public mind based on a number of wholly unfounded statements, adding that as soon as the Chief Justice understands the supposed public feeling in this matter, his Lordship would form a Bench of a nature which the writer approved. In my opinion, the articles do constitute a contempt of Court.

I now pass to the question as to which, if any, of the parties before us are responsible for it. Mr. Norton for the printer and publisher, Tarit Kanti Biswas, has conceded that if we hold that there is a contempt, then his client is liable though he pleads for mitigation of punishment—a matter with which I deal later. This liability is obvious, because scienter is attributable both to printer and editor. Neither can escape liability by alleging that he did not know that the contemptuous words had been inserted in his newspaper. *Chesshire* v. *Strauss* (14), *Rex* v. *Parke* (15) *Rex* v. *Davies* (16), *Jones, Ex parte* (17). As regards the others, the affidavit of Mr. Hechle the Registrar shows that the paper is, according to the imprint, printed and published at the Patrika press, 19 and 20, Bagbazar Street, and issued by the Patrika Post Office, Calcutta. This Patrika Press works for the "Amrita Bazar Patrika Company, Ltd.," which was incorporated with the object amongst others of carrying on the business of newspaper proprietors by printing and publishing newspapers and taking over the rights in the previously existing Amrita Bazar Patrika newspaper. The registered office of the company is No. 2, Ananda Chatterjee's Lane, Calcutta. A certified copy of the annual summary shows that Moti Lal Ghose, Golap Lal Ghose and Pijus Kanti Ghose are directors and Golap Lal Ghose above mentioned and Mrinal Kanti Ghose are managers. It will be observed that all these persons are named Ghose and they all give the same address, which happened also to be that of the registered office of the company. The total number of shares taken up is 766. Of these only 16 were issued for cash, probably for the expenses of incorporation, and 750 for a consideration other than cash. These shares of Rs. 100 each are held by 15 persons. The Ghose directors and managers hold 369 shares, three other persons of the name of Ghose hold 234 shares. There are four lady proprietors holding 112 shares and against the name of the first the father's name is given as Moti Lal Ghose. It is not clear from the summary whether the latter stands in the same relation to the other three ladies. There is one person of the name of Datta who holds 51 shares. The addresses of all these persons (the ladies and N. G. Datta included) is given as No. 2, Ananda Chatterjee's Lane, showing that this is a place of residence as well as being the registered office of the company. It is obvious on this evidence that these persons are related, that they live at the same address which is the registered office, and that the company is merely a small family business incorporated.

All the persons cited, except Mrinal Ghose, are directors. The latter is described as manager (with Golap Lal Ghose) and also as secretary. That Pijus Ghose and Mrinal Ghose are director and manager respectively, is also admitted in their affidavits. As regards Moti Lal Ghose and Golap Lal Ghose who have

11. (1869) 7 Eq 49=38 L J Ch 113.
12. (1894) 3 Ch 193=64 L J Ch 9.
13. (1906) 22 T L R 341.
14. (1896) 12 T L R 291.
15. (1903) 2 K B 432=72 L J K B 839.
16. (1906) 1 K B 32=75 L J K B 104.
17. (1806) 13 Ves (June) 237=83 E R 283.

filed no affidavits, a number of technical, and in my opinion trivial, objections have been taken. The first objection taken by Mr. C. R. Das is that there is no proof that they are directors, notwithstanding that their co-director and secretary have sworn that they are, and they have themselves declined to give any information on any point to the Court. The argument is based on the contention that certified copy of the summary, filed on 9th May 1917 of share capital and shares, etc., as they stood on 5th March 1917, purporting to be signed by Golap Lal Ghose as financial manager, was not admissible. Mrinal Ghose's affidavit states that Golap Ghose is a director and financial manager, but Mr. C. R. Das contended that this is not admissible against him nor (it must follow) against Moti Lal Ghose. It is not necessary to go into this last objection, for I think that the summary was a public record of a private document, of which a certified copy is admissible, Evidence Act, Ss. 74, 75, 65 (e). It has been argued that "record" in S. 74, Cl. 2, refers only to the case where the public office itself makes a copy, that is, record of a private document, and keeps it. If it does, it is certainly a public record. But "record" does not merely mean this. The word record also means a collection of documents. S. 74 (2), refers to private documents made by private persons and kept as a record in public offices to which the public have generally access. If this were not so, how could the public get such document? The originals being in the custody of a public office the latter would not part with them, and not being a public document no certified copy could be given. The next objection is that if the certified copy is admissible, there is no proof of the signature of Golap Ghose. Assuming that the mere production of a certified copy is not such proof where proof is necessary, it is not necessary here. Such certified copy is proof that some person giving the name of Golap Lal Ghose and describing himself as financial manager of the company signed such document. As that document was accepted by the Registrar of Joint Stock Companies, it is common sense to assume that he was satisfied that it was a return by the financial manager of the company. The objection, therefore, in substance is that the Golap Lal Ghose who purports to sign this document is not or at any rate has not been shown to be the identical Golap Lal Ghose for whom Mr. C. R. Das has pleaded before us. It is admitted that the objection is technical. That is true, but we must see if the alleged technicalities are sound and we must give as much play to common sense as the law permits. The rule was served on Moti Lal Ghose and Golap Lal Ghose as directors of the company. These are the persons whom we wished to see, not anybody else. The persons so served came here. If they were not the persons described in the summons they need not have come here. They can only be heard in these proceedings on the supposition that they are what the rule states them to be. It is not open to anybody and everybody to come and show cause against this rule. Mr. C. R. Das's title to be heard at all is dependent on the assumption that he represents the person described in the rule. The unreal nature of the objection is enhanced by the fact that the secretary of the company has sworn in these proceedings that Golap Ghose and Moti Lal Ghose are Directors. If it be, as contended, that we cannot refer to this affidavit when dealing with the case of Golap Ghose and Moti Lal Ghose (a matter I do not decide), this does not make the taking of such an objection any the more sensible. Objections should, even when legal, have some relation to reality.

The third legal objection is that assuming that the return is proof of the state of affairs on 5th March 1917 and shows that these two persons were Directors on that date, it does not follow that they were Directors when the Rule was issued on 30th May 1917. It is to be observed, firstly, that apart from any presumption of continuance, the summary was filed on 9th May, only three weeks before the issue of the Rule, which was not likely to be done had there been any change between 5th March and that date. Further under S. 87, Companies Act 7 of 1913, changes of directorship are required to be notified by the Company, and had there been any change, it would have appeared in the affidavit of Mr. Hechle, the Registrar, as the result of his recent enquiry in the matter. Nor is it likely that the Registrar of Joint Stock Companies would issue to an enquirer a certified copy of a return which had been changed. This

objection is as unreal as the rest. I have no doubt whatever that Moti Lal Ghose and Golap Ghose are Directors apart from the affidavit of the Secretary of the Company who states that they are .in fact such. According to the articles of association produced with the affidavit of Mrinal Ghose, the business of the company is to be managed by the Directors, that business being, according to the Memorandum of Association, the carrying on of the Amrita Bazar Patrika newspaper. But here again with further luxury of objection it is protested that we cannot look at the Articles of Association of the Company of which these two persons are Directors and which have been actually produced by the Secretary of the Company with his affidavit. It is sufficient to say that the affidavit of the Rule states who are Directors; the nature of the company and the facts proved indicate that its business must be carried on by them; and the provisions of this article are the same as and are indeed copied from S. 75, Sch. 1, Table A of Act 7 of 1913, the provisions of which, unless otherwise arranged, apply to all Companies. The table of the earlier Act is on this point substantially the same. It has been therefore proved as against the parties named as Directors that they are such.

The question whether persons in the position of Directors are responsible must depend on the facts of each case. In *In re Judd* (18) the Directors of Judd & Co. used to print and deliver a newspaper to another company who published the same. They did not, it was held, sell or deliver, a fact which would relieve them from even civil liability. In *Ex parte Green* (19) the manager of a Limited Company which disseminated paragraphs amounting to contempt of Court was held responsible. In that case the manager denied that he had seen the matter before it was published and that, in general, it was no part of his duty to supervise the reading out of news. The affidavit of the party taking proceedings spoke only to his "information and belief" as to the responsibility of the manager. This was held to be prima facie sufficient and on the letters and affidavit, he was held guilty. In one case it was held that the individual liability had not been directly established and in another that it had been. Doubtless, in the case of an ordinary large newspaper Company where the Directors meet together once a week to transact business in the Board rooms, the ordinary inference might be (in the absence of direct evidence) that they were not conscious of the publication of a particular article, for in the case supposed they would have appointed an editor.

The facts in the present case are very different and peculiar. In *Governor of Bengal* v. *Moti Lal* (4) a statement resting on information and belief that Moti Lal Ghose was editor was ruled out as not being legal evidence and the fact that Moti Lal Ghose did not in that proceeding deny the allegation was held immaterial. No disclosure was made as to whether there was an editor or who he was. Ordinarily, of course, a newspaper has an editor, but we have no legal evidence of that in this case and the affidavits filed by one of the Directors and the Secretary, and the printer, do not even mention the existence of such a person.

The company, as I have said, appears to be a small family affair composed, in the main, of Ghoses, whose address is that of the registered office of the company which is also given as that of some ladies one of whom at least is the daughter of Moti Lal Ghose. Three of these Ghoses including Moti Lal Ghose are Directors and another Ghose is Secretary. The Articles of Association direct, not that the business shall be under their control, but that they shall manage the business. That business is shown to be the carrying on of the newspaper Amrita Bazar Patrika, which is "now being published from No. 2, Ananda Chatterjee's Lane." Some one must see to the literary part of this business. In the absence of evidence as to there being a separate editor, prima facie, the Directors who are authorised to manage the business are the persons who do so in all its aspects. They must have authorised the circulation of the paper. Had there been reliable evidence that there was an editor who was some person other than the defendants even though his name was not disclosed, prima facie the responsibility for the articles would have lain with the editor, though of course the Directors or other persons would also have been liable who were shown to be privy to the publication. Here there is evidence that the management of this

8. (1889) 37 W R 143=59 L T 993.
19. (1891) 7 T L R 411.

business is entrusted to the Directors. That business includes every department of it, financial, literary and so forth, for there is nothing to prevent one or other of the Directors being also editor. This is the inference which arises on the facts here proved. If the Directors have in facts delegated any of these functions to some other person, it is for them to show that fact. I am of opinion, therefore, that the affidavit in support of the motion disclosed a prima facie case against the Directors as such and calling for an answer from them. As regards the permanent Manager and Secretary, I deal later. Having regard to the facts proved I need not further consider their case here.

But assuming that the affidavit accompanying the rules does make a case calling for an answer, the matter does not rest there. Pijus Kanti Ghose has put in an affidavit and has sworn that neither he nor his co-director exercises any control over the contents of the newspaper and exercise "only such powers as are mentioned in the article." Who does control the paper is not stated. A similar statement is made in the affidavit of Mrinal Kanti Ghose. Nextly, the affidavit of Pijus Kanti Ghose swears that he was away from Calcutta on the date of the second or chief article. Therefore he is shown not to have been directly privy to it. Similarly, the affidavit of Mrinal Kanti Ghose states that he exercises no control over the contents of the newspaper, that his duties are to keep the minutes, registers and records of the Company, to issue notices and to make returns. Further, he swears that he was absent from Calcutta on both the dates when the articles appeared. He has therefore also met the case against him. There remains the cases of Golap Lal Ghose and Moti Lal Ghose, neither of whom has given any answer. The above-mentioned affidavits state that Golap Lal Ghose also has no control over the contents of the paper, and this statement is supported by the fact that the return the latter made to the Registrar of Joint Stock Companies shows that he is Financial Manager.

Ordinarily, therefore, he would attend to this side of the business and probably to this only. There lastly remains amongst the directors the case of Moti Lal Ghose. He also has not filed an affidavit and we are told less about him than anyone else. The affidavits offered to us seem to be of what is called a "tricky" character. The wording is in the present tense. As was pointed out by my brother, Fletcher J., they might not support a prosecution. They do not deal with the condition of things when the articles were published. They do not state precisely what powers the Directors do exercise, or whether there is an editor. The statement that the Directors have no control over the contents does not show that they were not aware of the articles before they were published and circulated by their authority. Had there been no affidavits, I would have been disposed to adjudge that Moti Lal Ghose was in contempt; even after the reading of these affidavits, my mind has been in doubt, for the affidavits are deliberately drawn to keep all information from the Court and are, as above stated, otherwise unsatisfactory. Moti Lal Ghose has filed no affidavit. Though it has been objected by counsel (Mr. C. R. Das) for one of the parties that we cannot consider as against any particular party the affidavits offered in defence by other parties (a point I need not consider), still I am unwilling as against Moti Lal Ghose to rest the case on any such technicality.

I cannot shut my eyes to the fact that there are three sworn statements before us that neither the Directors, Financial Manager, Secretary or Printer have control over the contents of the newspaper. As I said, I have had my doubts as to the sufficiency of this statement. Moti Lal Ghose (whose case I regard with strong suspicion) is, however, entitled to the benefit of them. As some one must have such control, we must now assume after the reading of these affidavits that there is an unnamed editor who is not before the Court. I conclude then that the affidavits offered in reply to the Court's rule are such that it should be discharged against the parties to these proceedings other than the printer and publisher, Tarit Kanti Biswas. We might, without all this complex argument, have come to the same conclusion within half an hour if all the parties had sworn that they were not responsible and disclosed the name of the editor who, subject to any explanation he might make, was liable. As already stated it is conceded by his counsel, Mr. Norton, that the printer is liable provided that the articles constitute a contempt. He has, however, argued that the case is not of so serious a character as to call for the

exercise of this jurisdiction, and if it is, he lastly pleads that the position of his client should excite our pity and that we should discharge him without penalty.

In my opinion, the case does call for the exercise of this jurisdiction by reason of the articles scandalizing the Court having a tendency to prejudice the parties and to interfere with the administration of justice. As regards the action to be taken and penalty to be awarded, each case must depend on its own facts. As regards the second point, I cannot yield to the suggestion that merely because a man is a printer and publisher he should escape scot-free. Did we hold this, it would be open, as in this case, for the parties to exculpate themselves by affidavit and to suppress all information as to who was in fact responsible. The printer might also be put up to refuse such information and be told,

"it is all right, say you are only the printer and ask for pity and then we shall all be excused."

Our jurisdiction would thus become largely illusory. I do not say that there may not be cases where the Court will deal leniently with the printer, but this is not one. In the first place, he states in his affidavit that it was known to him that the matter dealt with by these articles was the subject of concern to the public "who were watching with deep interest" the action of the Chief Justice in constituting the Court to hear the appeal from the decision of Greaves, J. He then says that the articles were published to give expression to public feeling in Calcutta and that the "articles were published by myself in good faith and in the public interest." This statement is, on its face, in conflict with para. 3 of his affidavit, where he says that he did not read the articles before publication nor did he consider at any time prior to their publication their meaning or purport. If this be true, how could they have been published by him in good faith and in the public interest? According to his own statement, he was aware that the subject was creating public interest, and he is prepared to swear that the articles were published to give expression to public feeling. If there were, in fact, such an interest, there was the greater necessity for caution on his part in seeing what he published with reference to it. His statement that in fact he did not see the articles before publication is weakened by the attempted justification that they were published "by myself in good faith and in the public interest," though it is of course possible that this inconsistency was due to bad drafting.

As, however, the affidavits are in general astutely drawn, we cannot well assume this. He denies that the articles are a contempt and seeks to justify himself. In this he fails. Nextly, he says that he has no control over the contents of the newspaper and that they were handed to him for publication in the usual course of his business. He carefully refrains from saying who gave him the articles, whether it was the editor who did so, or who he was. His counsel justifies this refusal on the ground of loyalty to his employers. If he esteems that loyalty above his public duty to inform the Court who committed this alleged offence, he cannot complain that we do not show him indulgence. He joins with the others in refusing information and if, apart from such refusal, he is liable, he must take the consequence. The Courts in England have held [as for example in *American Exchange in Europe* v. *Gillig* (7)] that this refusal by the printer to give up the name of the editor is a matter which will weigh with it in determining whether a penalty shall be awarded against the printer or not. Mr. Norton has complained (I thought with that moderation which rarely goes with real zeal) that his client should be left to suffer because his employers have not produced their editor. In the *Englishman Contempt* case [*Re, Banks and Fenwick* (9)] Captain Fenwick, the editor of that paper, came forward to bear the brunt of what was in reality done by him or his order, on which the Rule was withdrawn against the printer. Sir Barnes Peacock observed that in doing that Captain Fenwick had only done

"that which every honourable gentleman who fills the editor's chair would do, in not allowing a publisher of a paper to take the consequence of articles written and published by his order by not coming forward to avow the authorship."

This was also done by Babu Surendra Nath Banerjee in the well-known *Bengali Contempt* case [*Surendra Nath Banerjee* v. *Chief Justice of Bengal* (3)], where Garth, C. J., said that Babu Surendra Nath Banerjee had properly done his best to protect his printer. There is no disposition, however, upon the part of any one in this case to adopt this proper and honourable course. But the printer him-

self does not deny that he is ignorant who the editor is and he himself through his counsel declines to give his name. There are some cases in which one might sympathise with the printer, but here he has not only declined to give up the editor's name, but has otherwise associated himself with the other parties in the case and has sought to justify both himself and them in what I hold to be a contempt, and he must, therefore, take the consequences such as they are. In, however, adjudging the penalty I have not wholly left out of count the fact that he is the printer, for, had the editor been found guilty of contempt, he would, in my opinion, have been subject to much heavier punishment. The defence to these proceedings except as to the construction of the articles—a legitimate argument—was ill advised and a waste of time. If the Directors, Managers and Secretary were not personally responsible for the contempt, they had only to frankly state the facts on affidavit and disclose who was so liable. The printer similarly, who in law is liable, might have stated the persons from whom he got the articles he printed and thus have personally freed himself from all further action against him. We should then on the supposed facts have only had to deal with the person primarily liable, namely, the editor. He could, then, if he had wished, have personally put forward the plea here advanced that the articles nave been misunderstood and that on the contrary he was moved by a desire to act in the interest of the Court and to protect it from "mischievous" and "unsavoury" rumours. If this were the fact, he would have nothing to fear from the Judges who, according to the argument before us, had the complete confidence of the writer of these articles.

Even if these articles were ill expressed and capable of a bad interpretation, their effect might have been negatived by the public avowal of their author that for him they had no such meaning. These proceedings might have thús been disposed of within an hour or less, with the result that either all parties might have been freed of penalty or if penalty were awarded it would have fallen on the party primarily liable namely, the editor. On the contrary all the parties before us have adopted a hostile attitude to the Court, have refused all information, concealed the name of the editor and put forward every technical objection to defeat an enquiry which has thus been prolonged over three days with unnecessary delay and expense to the public and the parties concerned. For this the parties, by the course they have adopted, are responsible. This course further has strengthened the inference which is to be drawn from the natural language of the articles in the absence of explanation from their writer. It is not in such absence to be supposed that the intentions of the writer and editor of these articles were as innocent as the argument before us suggests and that the name of one who was, it is said, only seeking to protect this Court from unsavoury rumours and to give it what he thought good advice, should be kept concealed. It is absurd also to suppose that the party responsible would himself, if innocent, carefully avoid his presence in the Court, which it is said he honoured and was seeking (however ill-considered his language might be) to counsel and protect. I therefore concur in the order which the Chief Justice has made.

Mookerjee, J.—On 18th May 1917 the following paragraph appeared in the editorial columns of the Amrita Bazar Patrika:—

"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Greaves, J., in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart, as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every ratepayer is safe in the hands of the Hon'ble Judges and we do not think that any official of the Trust can go so far."

Four days later, on 22nd May, the following paragraph appeared in the editorial columns of the same paper:—

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court, before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Cuming, J. and how latterly it has come to be presided over by the Hon,ble the Chief Justice and Woodroffe J. Rumour has it that for purposes of hearing Improvement Trust appeals, the Bench is going to be strengthened by the appointment of Chitty. J. Now, what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contenped

that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned—a contention, however which we do not believe the Chief Justice will care to advance —why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats. As a matter of fact as land-owners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust* v. *Chandra Kanta Ghosh* (1). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, His Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Impovement Trust Appeals."

On 30th May 1917 the Chief Justice, after previous consultation with the other members of the Court, directed the issue of a rule on Tarit Kanti Biswas (the printer and publisher of the Amrita Bazar Patrika), Moti, Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, Directors, and Golap Lal Ghose and Mrinal Kanti Ghose Managers, of the Company called the Amrita Bazar Patrika, Ltd., to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court committed by the publication of the two articles mentioned concerning the High Court and the Chief Justice in his administration thereof. The materials whereupon the rule was issued were contained in two affidavits sworn by the Registrar on the Original Side and the Registrar on the Appellate Side as to the actual publication of the articles in the paper and the position the opposite parties occupied in relation to the paper and the Company, which were its proprietors. The opposite parties have appeared in Court in person and have been represented by counsel; three of them, Tarit Kanti Biswas, Pijus Kanti Ghose and Mrinal Kanti Ghose, have filed affidavits which will require examination hereafter. On the elaborate arguments addressed to the Court the following points emerge for consideration, namely, first, what is the true meaning of the two articles mentioned; do they constitute contempt of Court; secondly, if the articles constitute contempt of Court, has this Court jurisdiction to punish the offenders summarily, and should such authority, if any, be exercised in the present instance; thirdly, what is the true nature of the present proceedings; it is civil or criminal in character, and fourthly, have the opposite parties or any of them been proved to be so connected with the publication of the articles as to render them liable to punishment for comtempt of Court.

As regards the first question, namely, the true meaning of the two articles set out above, there can, in my opinion, be little room for doubt, notwithstanding the able and ingenious arguments, which have been addressed to us. The obvious course to pursue in a case of this description is to read the offending articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. Ths general rule of interpretation cannot be formulated in more precise terms, because objectionable language may take an infinite variety of forms: this much is clear that it is incumbent on the Court in all cases, to consider the general tone of the writing. The meaning and intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt. Disclaimer on the part of the publisher as to any intentional disrespect to the Court is consequently not a sufficient defence, when the purpose and meaning of the writing is obviously of a contrary import. No doubt, if the language is fairly capable of an innocent interpretation, the Court will not be astute to read into it a sinister import. [*Govenor of Bengal* v. *Moti Lal* (4), *Townshend* (*Marquis*) *In re* (13), *Martindale, In re* (12) and *Daw* v. *Eley* (11).] But if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully evaded by the use of a transparent artifice. Tested from this point of view, how do these articles stand? The first article makes reference to an alleged rumour which the writer describes as mischievous and worthy of contradiction. The rumour is stated to have been to the effect that a vigorous attempt was being made to get a Bench constituted according to the choice of somebody to hear the appeal from the judgment of Greaves, J., in a suit in connexion with the acquisi-

tion of surplus land by the Calcutta Improvement Trust.

The writer expresses his belief that no official of the Trust, far less the Chairman could go so far as to make an at tempt of this character, and that it was not possible for anybody to secure a Bench after his own heart as a counterpoise to what is called the Mookerjee and Cuming Bench. The writer concludes with an assurance that the interest of every citizen is safe in the hands of the Judges. If this article had stood by itself, it might perhaps have been argued with seeming plausibility that, however much open to reproach on the ground of indiscretion and impropriety, the writer had no intention to commit a contempt of Court. But the second article, which is written in a very different tone, shows convincingly the true intent and purpose of the first article.

The question however was raised before us, whether the two articles should be read together. It was contended that they should not be so read, as there was nothing to indicate that they had emanated from the same individual. In my opinion, the two articles may legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person. They obviously relate to the same topic and were published in the editorial columns of the same newspaper, there was a very brief interval of time between them and the first obviously led up to the second, though not expressly mentioned therein. The first article has, I think, a sinister import, and conveys the insinuation that one of the litigant parties in the appeals about to be heard was endeavouring to have a Bench constituted according to its choice. There is no room for controversy that imputation of this character constitutes a contempt of Court. Contempt by speech or writing may be by scandalising the Court itself or by abusing parties to actions or by prejudicing mankind in favour of or against a party before the cause is heard; as has been said, there is nothing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before they are finally heard and thus to attempt to obstruct or interfere with the due course of justice. *St. James Evening Post case* (8), *Cann* v. *Cann* (20), *American Exchange in Europe* v. *Gillig* (7), *R.* v. *Gray* (2), *Rex* v. *Davies* (16) and *Mc Leod* v. *St. Aubyn* (6). But, from my point of view, it is really immaterial whether the two articles are considered separately or are regarded as component parts of one aggregate, for even if there were any real doubt as to the purpose of the first, there can be no serious dispute as to the meaning of the second.

The Second article, when carefully analysed, may be resolved into the following propositions: (1). That the appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard was originally composed of myself and Cuming, J., (2). That I had been withdrawn from this Bench, and that the withdrawal had given rise to rather unsavoury impressions in the public mind, as it followed close upon the heels of the judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), to which I was a party. (3). That this appellate Bench had latterly come to be presided over by the Chief Justice and Woodroffe, J., (4). That there was a rumour that the appellate Bench so constituted was about to be strengthened by the appointment of Chitty, J., and this proposed new constitution of the appellate Bench had created something like consternation. (5). That if the Bench was to be composed of more than two Judges, it should consist of not three but five Judges, of whom two at least should be Indian Judges, because land-owners in Calcutta (who were principally affected by the operations of the Calcutta Improvement Trust) were Indians, and Indian Judges were likely to know more of conditions and practices prevailing here than European Judges. These statements constitute a tissue of falsehoods, and, to my mind, one of the most conspicuous features of this trial is that not only has not even the semblance of an attempt been made to establish the truth of these allegations, it has actually been conceded that they are vitiated by a fundamental error. No Bench composed of myself and Cuming J., had, at any time, been constituted to hear appeals against what are inaccurately termed the awards of the Im-

20. (1754) 2 Ves (Sen) 520=2 Dick 795=28 E. R 332.

provement Trust. The plain truth is that last year, when Cuming, J., and myself were in charge of the Bench which had to take cases of what is called the first group of the Districts, the appeal of the Calcutta Improvement Trust against Chandra Kanta Ghosh came up before us, inasmuch as the appeal had been preferred from the decision of a Subordinate Judge of the 24-Pergannahs.

The appeal belonged to our group, was heard by us in due course, and was dismissed. We had at no time been constituted a Special Bench to hear appeals in all cases in which the Improvement Trust was concerned and there is no foundation whatever for the first proposition that the appellate Bench, before which appeals against the awards of the Improvement Trust were to be heard, was originally composed of myself and Cuming, J., Consequently, the suggestion contained in the second proposition that I bad been withdrawn from the appellate Bench, which in fact had never been constituted, is equally groundless. Here I may observe that as under S. 108, sub-S. 2, Government of India Act, 1915, the duty devolves upon the Chief Justice to determine, from time to time, what Judges of the Court are to constitute the several Division Courts, the second proposition necessarily involves an imputation against the Chief Justice that he had withdrawn me from the Appellate Bench he had previously constituted composed of myself and Cuming, J., to hear appeals in cases in which the Calcutta Improvement Trust was concerned. There is clearly the further imputation that the Chief Justice had taken this action by reason of my judgment in the appeal preferred by the Improvement Trust against Chandra Kanta Ghosh. As the Appellate Bench had never in fact been constituted in the manner stated by the writer, the charge that I had been withdrawn therefrom for the reason assigned was evidently baseless. The third proposition, namely, that the Appellate Bench had been constituted of the Chief Justice himself and Woodroffe, J., in supersession of the previously constituted Bench composed of myself and Cuming, J., was consequently equally unfounded; as a matter of fact, long before the constitution of the Bench to hear the appeals from the Original Side, Cuming, J., had ceased to be a member of this Court.

The fourth proposition refers to the rumour that the Appellate Bench presided over by the Chief Justice and Woodroffe, J., was about to be strengthened by the appointment of Chitty, J., and that something like consternation prevailed on account of the proposed new constitution of the Bench. As I read the article, the consternation was due, not so much to the fact that the Chief Justice and Woodroffe, J., composed the Bench, as to the fact that the Bench was about to be strenghthened by the appointment of Chitty, J. This implies most unmistakably that a just decision, that is, a decision just in the estimate of this impartial writer, could not be expected from a Bench so constituted. If language has meaning, this was clearly a libel on Chitty, J., if not also upon the other two members of the Bench. The fifth proposition involves a libel upon Indian Judges but in the opposite direction. No doubt, it is very artfully suggested that Indian Judges should be on the Bench to hear this class of cases, because they are likely to know more of conditions and practices prevailing here than European Judges. But, as was well known, the matter in controversy in the appeals had not the remotest connexion with a knowledge of local conditions and practies. The point in issue was a dry question of law as to the true interpretation of a legislative enactment. The writer however unmistakably insinuates that land owners in Calcutta (who are principally affected by the operations of the trust) are mostly Indians, and Indian Judges on the Bench might be expected to give a decision in their favour. I do not appreciate the distinction between an insinuation that a European Judge is likely to decide in favour of the executive, because he is a European, and an insinuation that an Indian Judge is likely to decide in favour of Indian land-owners, because he is an Indian. To my mind, the two statements are equally reprehensible as libels on the Judges of this Court.

I cannot, in this connection, pass by in silence the observations of Mr. Jackson as to the constitution of the Bench which actually heard the appeals from the judgment of Greaves, J. The Court is called upon, in the present Rule, to consider the true character of the allegations contained in the twc articles published in the Amrita Bazar Patrika, and to determine whether

they do or do or not constitute a contempt of Court. We have no concern whatever with the question, whether the Chief Justice, who alone is charged with the duty to constitute Division Court, has in this particular instance exercised wisely or otherwise the discretion vested in him by law. The remarks of Mr. Jackson on this subject were absolutely irrelevant for the determination of the question before the Court, and exhibited, I feel constrained with regret to hold, an unusual and unwarranted lapse from that decorum which we are accustomed to associate with the transaction of public business in a Court of Justice. I cannot but deem it significant that the other counsel engaged in the case expressly dissociated themselves with special care from the comments made by Mr. Jackson in this behalf. Here I may observe that in the judgment just delivered by the Chief Justice, he has taken pains to explain the reasons which moved him to constitute the Bench as he did; Woodroffe, J., also has touched on the subject and expressed opinion thereon. But, for obvious reasons, which need not be dilated upon, I must respectfully decline to examine the question. Besides, the exercise of discretion by the Chief Justice in the matter of constitution of a Division Court to hear the appeals against the judgment of Greaves, J., is, under the law, not liable to be reviewed by this Bench and is not subject to our approbation or disapprobation. I desire, consequently, to guard myself most carefully from the discussion of a question, which, notwithstanding what fell from Mr. Jackson, does not, in my judgment, properly arise even as a side-issue in these proceedings; such a discussion is not likely to advance any useful purpose, because it cannot be of real assistance in the solution of the very narrow issue comprised in the scope of our enquiry, namely, the real import of the two articles published in the *Amrita Bazar Patrika* and whether, on a fair interpretation, they did or did not constitute a contempt of this Court; upon that matter, which alone it is our function to decide, I feel no reasonable doubt.

I desire, however, to repudiate most emphatically the astonishing assertion made by Mr. Jackson that landless Judges, as he called them, were, merely because they were landless, less competent and less trustworthy as interpreters of a statutory enactment than Judges of any other class, and that Indian Judges, because they might possibly be proprietors of land, were for this purpose more capable and reliable as expounders of the law than their European colleagues. But to return to the two articles: it seems to me indisputably plain that the implication of the second article, whether taken along with or independently of the first, is that, at the instance of persons interested in the Calcutta Improvement Trust, the Chief Justice has constituted a Special Bench to ensure a decision favourable to the Trust in the appeals against the judgment of Greaves, J. This brings me to the question which is the crux of the whole matter, namely, whether an imputation of this character constitutes a contempt of Court. It is not necessary for our present purpose to give an exhaustive enumeration of acts which amount to contempts of Court. It is sufficient to state that scandalous attacks upon Judges, calculated to cause an obstruction to public justice, do constitute such contempts. Blackstone, in a celebrated passage of his Commentaries (Vol. 4, p. 285) which will be found quoted in *Governor of Bengal* v. *Moti Lal* (4), specifies, in his description of contempts of Court, contempts which arise

"by speaking or writing contemptuously of the Court or Judges, acting in their judicial capacity and which demonstrate a gross want of that regard and respect, which, when once Courts of Justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost amongst the people."

Sir John Wilmot, C. J., in *Rex* v. *Almon* (21) justifies a similar view in a passage which may be usefully recalled here:

"By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. The King is de jure to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King 'concerning his justice.' The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels

21. (1765) Wilm 243 at p. 255=97 E R 94.

by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."

It is needless to multiply early instances of the application of this doctrine, which will be found collected in 3 Howell State Trials, 1074—1080, and 8 Howell State Trials, 50. Amongst modern instances reference may be made to the observations *In the matter of a Special Reference from the Bahama Islands* (22) *Reg.* v. *Staffordshire County Court Judge* (23), *Reg.* v. *Gray* (2), *Rex* v. *Davies* (16), *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (3), *Sashi Bhushan Sarbadhicary, In the matter of* (24), *Tayler's case* (25), and *Banks and Fenwick, In the matter of* (9). The principle deducible from these cases is that punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the Tribunal be undermined or impaired. The contention has been advanced, however, that if this be the true reason for the rule, it is necessary to establish, as a matter of fact that the actual effect of the publication has been an obstruction to public justice, and that, in the absence of such proof, it cannot he held that there has been a contempt of Court.

In support of this position, reliance has been placed upon the decisions in *R.* v. *Freeman's Journal* (26) and *King* v. *Dolan* (27). The cases mentioned do not support this proposition, which is, on the other hand, negatived by the decisions in *Reg.* v. *Gray* (2), *Hunt* v. *Clarke* (28), *In re Pall Mall Gazette Jones Flower* (29), *Grimwade* v. *Cheque Bank Ltd*, (30) these show that a contempt of Court is committed by libellous attacks on a Judge for what he did judicially, if such attacks are likely or tend in any way, to interfere with the due administration of justice. As Elliott, J., well puts it in *People* v. *Stapleton* (31), it would be as reasonable to require proof of actual hinderance in the administration of justice by reason of a libellous attack on a Judge in his judicial capacity as for a person who has made a violent assault on another to plead that he has committed no offence because he has not succeeded to overcome his victim. It is not only important that the trial of causes shall be impartial and that the decisions of the Courts shall be just; it is equally important that causes shall be tried and judgments rendered without bias, prejudice or improper influence of any kind. He who scandalises the Court or a Judge in relation to a particular litigation, commits an offence, not merely against the rights of those litigants, but also against public justice: *In the matter of a Special Reference of the Bahama Islands* (22). It is a public wrong, a crime against the State, to undertake, by libel or slander on the Judges, to impair confidence in the administration of justice That a party indulges in calumny of the gravest character, and, consequently, does not succeed in his endeavour to shake the confidence of the public in the Court, surely does not alter the quality of his act or make it any the less reprehensible. From this standpoint, it is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actualy under trial, or recently adjudged; in each instance, the tendency is to poison the fountain of justice, to create distrust, and to destroy the confidence of the people in the Courts, which are of prime importance to them in the protection of their rights and liberties: *Reg* v. *Gray* (2). Upon my construction of the second article, read with or without reference to the first, I hold that it undoubtedly constitutes a contempt of Court.

As regards the second question, there is no room for controversy that this Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges, when the Court is not sitting. By Cl. 1, of the Letters Patent of 1862 and Cl. 2. of the Letters Patent of 1865,

22. (1893) A C 138.
23. (1888) 57 L J Q B 483.
24. (1907) 29 All 95=34 I A 41 (P C).
25. A I R 1918 Cal 713=44 I C 930.
26. (1902) 2 I R 82=6 Ir L R 628.
27. (1907) 2 I R 260=9 I L R 647.
28. (1889) 58 L I Q B 490.
29. (1894) 11 T L R 122.
30. (1897) 13 T L R 305.
31. (1893) 18 Colorade 568=23 L R A 787.

the Court was constituted as a Court of Record; and, as a superior Court of Record, it has summary jurisdiction to punish for contempt of Court. This was affirmed in respect of the Superior Courts at Westminster by Wilmot, C. J., in *Rex* v. *Almon* (21) and his opinion has been quoted with approval in a long line of decisions, the most notable whereof is, perhaps, the judgment of Cockburn, C. J., in *Reg* v. *Lefroy* (32). Mr. Jackson contended that this view will not stand scrutiny and may properly be described as "law taken for granted." In this connexion, he invited our attention to a celebrted passage from the judgment of Denman, L. C. J., in *Reg* v. *O'Connell* (33):

> "A large portion of that legal opinion, which has passed current for law, falls within the description of "law taken for granted;" if a statistical table of legal propositions should be drawn out, and Col. 1 headed law by statute, and the second, law by decision, a Col. 3, under the heading of 'law taken for granted' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine—the mere repetition of the cantilena of lawyers, cannot make it law unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

But the question remains, whether the proposition that a Superior Court of Record has power to punish summarily for contempt of Court, can appropriately be treated as "law taken for granted." I am not unmindful that a learned writer (Mr. John Charles Fox in the Law Quarterly Review, Vol. 24, pp. 184, 266), has maintained the view that the opinion expressed by Wilmot, C. J., in *Reg* v. *Almon* (21) is not historically accurate. Let us assume that this criticism is well established on the ancient authorities and that while originally the superior Courts of Common law had jurisdiction to punish only disobedience to the King's writ summarily by fine and imprisonment upon attachment, they had jurisdiction only on indictment or bill to punish contempts in facte and other obstructions to the administration of justice, such as libelling the Court or the Judge. Let us assume also that the development of the summary jurisdiction to punish contempts has been of slow growth and that the earliest recorded case of libel or slander on the Court or a Judge by a stranger unconnected with the service of process, which was punished summarily by attachment, cannot be traced to a period anterior to 1720. Surely, this cannot but be regarded now as a matter of other than antiquarian interest. We have abundant "competent authority" "not irreconcilable to clear legal principles," in support of the view that a Superior Court of Record does possess the power to punish summarily contempts of Court of the description now before us. Sir Barnes Peacock, C. J., maintained and applied this principle in *Abdool & Mahtab* In re, (5) and *Re William Tayler* (25), which, upon a full review of the authorities, was re-affirmed in *Governor of Bengal* v. *Moti Lal* (4).

We have also the prouncement of the Judicial Committee to the same effect in *Mc Dermott* v. *Judges of British Guiana* (34), where they confirmed the view indicated in the earlier cases of *Smith* v. *Sierre Leone* (*Justices of*) (35) and *Rainy* v. *Sierra Leone* (*Justices of*) (36). As regards the power of Indian High Courts in a case of this charater, we have two decisions by the Judicial Committee, namely: *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (3) and *Sashi Bushan Sarbadhicary*, In the matter of, (24). In the former case it was ruled that the High Court had power to punish in a summary manner, by fine or imprisonment or both, a contempt of Court, which in that case, as in the present, consisted in the publication out of Court of a libel on one or more of the Judges. In the latter case, the Judicial Committee held that there was no doubt that the publication of the libel in question constutited a contempt of Court, which might have been dealt with by the High Court in a summary manner, by fine or imprisonment or both. In my opinion, these repeated pronouncements by the Judicial Committee conclude the matter, so far as "competent authority" is concerned, and no useful purpose can be served by an examination of the historical basis of the opinion expressed by Wilmot, C. J.

That the possession of this power by a

32. (1873) 8 Q B 134=42 L J Q B 121.
33. (1844) 8 E R 1061=65 R R 59.
34. (1863) 2 P C 341=5 Moo (n s) 466 (P C).
35. (1841) 3 Moore 361=13 E R 147.
36. (1853) 8 Moore 47 (P C).

Judicial Tribunal (however cautiously and sparingly it may have to be exercised) is not also "irreconcilable to clear legal principle" is beyond serious controversy; indeed, the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice, is essential to the preservation of order in judicial proceedings, to the maintenance of the authority of a Court and to the enforcement of its judgments; it is a necessary incident and attribute of a superior Court, without which it could no more exist than without a Judge: see the cases reviewed in *Governor of Bengal* v. *Mati Lal* (4). It was argued, however, on the authority of the decision of the Judicial Committee in *Mc Leod* v. *St. Aubyn* (6) that committals for contempt of Court by scandalising the Court itself had become obsolete in England.

It may be observed here parenthetically that this very decision of the Judicial Committee is an authority for the proposition that, as laid down by Lord Hardwicke in *St. James Evening Post case* (8), the publication of scandalous matter in respect of the Court itself is a contempt and that power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. I do not read the statement, that committals for contempt of Court by scandalising the Court itself had become obsolete in England, as destructive of the authority of .the earlier decisions on the subject. Indeed, the proposition taken literally seems to go too far and it is significant that, in the very next year, proceedings were taken in England for contempt of Court in the case of *Reg* v. *Gray* (2). There can, I think, be no doubt that where the circumstances clearly demand action of this description, the Court will not hesitate to exercise its undoubted power to punish on summary process the contempt of scandalising it and thereby attempting to interfere with the due course of justice. No doubt, as Lord Morris observes in *McLeod* v. *St. Aubyn* (6), Courts may be satisfied sometimes to leave to public opinion attacks or comments derogatory or scandalous to them. But I do not accede to the argument that it is invariably prudent for the Court to assume an attitude of indifference or to institute regular criminal proceedings against the offender. In this connexion, reference may appropriately be made to the weighty words of Kent, C. J., in *Yates* v. *Lansing* (37):

> "Whenever we subject the established Courts of the land to the degradation of private prosecution, we subdue their importance and destroy their authority. Instead of being venerable before the public they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society and to overthrow those institutions which have hitherto been deemed the best guardians of civil liberty."

See also the very pertinent observations of Marshall, J., in *State* v. *Shepherd* (38) quoted in *Governor of Bengal* v. *Mati Lal* (4). In my opinion this Court has undoubted jurisdiction to deal summarily with persons who have committed contempt by scandalous attack upon the Judges, and such power should be exercised in the present instance. When I hold this, I do not overlook the assertion of the printer and publisher that the articles before us were published by him in good faith and in the public interest. The sincerity of this plea appears to me to be open to the gravest doubt. But, even on the assumption that this allegation is literally true, I desire to add that, while I do not underrate in the least degree the importance of the liberty of the press, I cannot hold it expedient that any class of the community should be privilged to attack the Courts so as to interfere with the rights of litigants or to embarrass the administration of justice. The publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of Courts, and provided the publications are true and fair in spirit, there is no law to restrain the freest expression of the disapprobation that any person may entertain of what is done in or by the Courts. But liberty of the press must not be confounded with license or abuse of that liberty, and though it may be true that where the liberty of the press and freedom of public comments end, there tyranny begins, it is at least equally true that where vituperation begins, there the liberty of the press ends: and the inherent power of the Superior Courts of the Record to punish any publication calculated to interfere with the administration of justice cannot be deemed in any way restricted by considerations of the kind urged by the printer and publisher. As regards the third question, namely, what is the true nature of the present

37. (1810) 5 Johnson 282.
38. (1900) 113 Geo 114=15 L R A 225.

proceedings, is it civil or criminal in character, the matter is of practical importance from the point of view of the mode of trial to be adopted. In the case of *Governor of Bengal* v. *Moti Lal* (4) I had occasion to examine fully the distinction between a criminal and a civil contempt, which is of a fundamental character. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law and as the primary purpose of the punishment is the vindication of the public authority the proceeding conforms as nearly as possible to proceedings in criminal cases. In the case of a civil contempt on the other hand, the proceeding in its initial stages at least when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant, may be deemed instituted at the instance of the party interested and thus to possess a civil character. But, here also refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority: at that stage at least the proceedings may assume a criminal character. In this manner the dividing line between acts which constitute criminal and others which constitute civil contempt may become indistinct in those cases, where the two gradually merge into each other: see *St. James Evening Post* case (8), *Scott* v. *Scott* (39), *Lichmere Charlton's* case (40), *Wallace In re* (41), *Davies In re* (42), *Onslow's* and *Whalley's* case (43) and *Skipworth's* case (44). A careful scrutiny of the cases in the books shows, however, that much confusion exists in the reported decisions as to whether or not contempt proceedings are civil or criminal where the contempt is committed in relation to a civil proceeding, and it is consequently desirable to investigate briefly the true test for differentiation.

39. (1913) A C 417=82 L J P 74.
40. (1837) 2 My& Cr. 316=40 E R 661.
41. (1866) 1 P C 283 =4 Moore P C (n s 140.
42. (1888) 21 Q B D 236.
43. (1873) 9 Q B 219.
44. (1878) 9 Q B 230.

The power to punish for contempt is inherent in the very nature and purpose of Courts of Justice. It subserves at once a double purpose namely, as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined. By reason of this twofold attribute, proceedings in contempt may be regarded as anomalous in their nature possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of judicial power. Hence, such proceedings have somtimes been styled sui generis. That they are largely of a criminal nature inasmuch as the Court has power to convict and punish for the wrong committed, cannot be disputed and yet it must be recognized that in some respects, by reason of the end subserved, they partake of the nature of a civil remedy. This dual characteristic has given rise to many controversies, specially when questions have arisen as to right of appeal from the order passed as in *Reg* v. *Barnardo* (45), *Barnardo* v. *Ford* (46), *Helmore* v. *Smith* (47), *A. G.* v. *Kissane* (48), *Hunt* v. *Clark* (28), *Reg* v. *Staffordshire County Court Judge* (23), *O'Shea* v. *O'Shea* (49), *Bessette* v. *Conkey Co.* (50), *Christensen Engineering Co., In the matter of* (51), *Warden* v. *Searls* (52), *Gompers* v. *Buck's Stove Co.* (53), the applicability of rules of evidence: *Celluloid Co.* v. *Chrolithian Co.* (64), *Bullock Co.* v. *Westinghouse Co.* (55), *Ex parte Gould* (56), the finality of the judgment: *Fischer* v. *Hayes* (57) and *Re Mullee* (58), liability for payment of costs, *Cornish, In re* (59), *Martindale*

45. (1889) 23 Q B D 305=58 L J Q B 553.
46. (1892) A C 326=61 L J Q B 728.
47. (1886) 35 Ch D 449=59 L J Ch 145.
48. (1893) 32 Ir L R 220.
49. (1890) 15 P D 59=59 L J P 47.
50. (1904) 194 U S 324=48 Law Ed 997.
51. (1904) 194 U S 458=48 Law Ed 1072.
52. (1887) 121 U S 14=30 Law Ed 858.
53. (1911) 221 U S 418.
54. (1885) 24 Fed 595.
55 (1904) 63 C C A 607=194 U S 636.
56. (1893) 99 Cali 360=21 L R A 751.
57. (1881) 19 Blatch 13
58. (1869) 7 Blatch 23=17 Fed Cas 9911:
59. (1898) 9 T L R 196.

In re (12) and *Day* v. *Longhurst* (60), right of trial by Jury; *Tinsely* v. *Anderson* (61), *Re Debs* (62) and *Eilenbecker* v. *District Court of Plymouth County, Iowa* (63), and other like matters. The difficulty in each case is to determine when a particular proceeding assumes the criminal rather than the civil aspect, or when of both, and if the latter which feature must control. The question has been repeatedly and elaborately discussed by the Supreme Court of the United States: *Kearney Ex parte* (64), *New Orleans* v. *New York Mail Steamship Co.* (65), *Chiles, In re* (66), *Hayes* v. *Fischer* (67), *Warden* v. *Searls* (51), *Ex. Debs In re* (62), *O'Neal* v. *United States* (68), *Christensen Engineering Co. In the matter of* (51), *Bessette* v. *Conkey Co.* (50), *Doyle* v. *London Guarantee Co.* (69) and *Gompers* v. *Buck's Stove Co.* (53). The view deducible from these decisions is in general agreement with what is indicated above, namely, a proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive and a remedial measure to enforce the rights of the litigant or for both these purposes combined. This must be so, since it necessarily results from the nature of the power to punish for contempt that whatever the primary purpose of such a proceeding may be, it is always within the power of the Court to make its judgment, in part, at least, punitive or vindicatory in character; in other words where the sole purpose sought by intiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may nevertheless, in its discretion, add a punishment by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate, I think it undeniable that the proceeding must be regarded from its inception to the point of judgment as of a criminal nature, or at least potentially so, since until the judgment is given, it cannot be known what its character will be. It is the judgment therefore which must eventually in any case determine the character of the proceeding, and this leads to the conclusion that logically, perhaps, instead of characterising contempt proceedings as criminal or remedial according to circumstances, it is contempt judgments that should be so classified. In any view there is no room for controversy that where, as here, the contempt consists in an attack upon the Court, the proceedings instituted to vindicate its dignity, are of criminal nature, even though the attack has been made in connexion with civil suits or appeals, either actually decided or pending or about to be taken up for disposal: *Governor of Bengal* v. *Moti Lal* (4).

As regards the fourth question, we have to consider separately the liability of each of the five persons who have been called upon to show cause why they should not be committed for contempt of Court. Tarit Kanti Biswas has filed an affidavit to the effect that he is the printer and publisher of the Amrita Bazar Patrika and that in such capacity he printed and published the articles mentioned. He states however that he exercises no control whatever over the contents of the newspaper, that he did not read the articles when they were handed over to him for publication, that he did not consider at any time prior to publication, their meaning or purport, that he inserted them in the paper in the usual course of business, that he acted bona fide and was not actuated by a disrespectful or other improper feeling or motive towards the Court or the Chief Justice, and that he did not intend to excite contempt or to reflect in any way upon the integrity or dignity of the Court or of the Chief Justice in his administration thereof. Notwithstanding this defence there can be no doubt as to the liability of the printer and publisher; for as Lord Morris observed in *McLeod* v. *St. Aubyn* (6), a printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents. Indeed, this has been the settled law ever since the decision of Lord Hardwicke in *St. James Evening Post* case (8), which was followed by Lord Erskine in *Jones, Ex parte* (17), and by Stirling, J., in *American Exchange in Europe* v. *Gillig* (7), *Cheshire* v. *Strauss*

60. (1892) 62 L J Ch 334=2 R 234.
61. (1898) 171 U S 101=43 Law Ed 91.
62. (1895) 158 U S 564=39 Law Ed 1092.
63. (1890) 134 U S 31=33 Law Ed 801.
64. (1832) 7 Wheat 38=5 Law Ed 391.
65. (1874) 20 Wall 387=22 Law Ed 354.
66. (1875) 22 Wall 157=22 Law Ed 819.
67. (1880) 102 U S 121=26 Law Ed 95.
68. (1903) 190 U S 36=47 Law Ed 945.
69. (1907) 204 U S 559.

(14), *Rex* v. *Parke* (15), *Emmens* v. *Pottle* (70), *Rex* v. *Davies* (16), *Daw* v. *Eley* (11), *Tichborne* v. *Tichborne* (71), *Cheltenham & Swansea Ry. Carriage and Waggon Co., In re* (72) and *Litter* v. *Thomson* (73). The rule must consequently be made absolute against the printer and publisher. With regard to his allegation that he had no intention whatever to offend the dignity or integrity of the Court and that in reality he was helpless in the position he occupied as a servant of the company, one cannot but feel that the value of such assurance is considerably discounted by the fact that he has given no information to the Court.

I am not unmindful that as ruled *In the matter of a Special Reference from the Bahama Islands* (22), he was under no legal obligation to assist the Court in any way, and to disclose the name of the person primarily responsible for the articles; still his conduct serves to throw doubt in a considerable measure on the genuineness of his profession that he had no intention to prejudice the due course of administration of justice or to cast any reflection on the Judges of this Court. He must accordingly take the consequences of his act, and cannot reasonably urge that he has established a claim for specially considerate treatment: See the observations of Stirling, J., in *American Exchange in Europe* v. *Gillig* (7). As regards the other four defendants, it is necessary to state that they have not all taken up the same attitude in this matter. counsel on behalf of Moti Lal Ghose declined to answer, as he was entitled to do, the question put by me, whether he was in reality one of the Directors of the Company as stated in the return of Golap Lal Ghose alleged to have been filed under S. 32, Companies Act, 1913. Pijush Kanti Ghose has filed an affidavit in which he admits that he is one of the Directors of the Company, but that neither he nor his co-directors exercise any control over the contents of the newspaper and perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association. He further alleges that he was absent from Calcutta from the 21st May to the 4th June and was not here on the date when the second article appeared. Mrinal Kanti Ghose has filed a similar affidavit, in which he admits that he is the Secretary of the Company. He further alleges that Moti Lal Ghose, Gopal Lal Ghose and Pijush Kanti Ghose are Directors of the Company, that Golap Lal Ghose is also the Financial Manager, that neither he nor the Directors nor the Financial Manager exercises any control whatever over the contents of the paper and that the Directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association (extracts wherefrom are appended to the affidavit).

He enumerates also the duties of the Secretary and of the Financial Manager, and finally adds that he was absent from Calcutta from the 4th May to the 22nd May and was not here on either of the two dates when the articles mentioned appeared. Golap Lal Ghose has not filed any affidavit, and on his behalf, counsel has contended that there is no legal evidence whatever to connect him in any way with the publication of either article. This argument is based on three grounds, namely, first, that secondary evidence of the return alleged to have been filed under S. 32, Companies Act, was not admissible; secondly, that even if secondary evidence were held admissible, evidence was requisite to prove that the original had been filed by Golap Lal Ghose who is Director and Financial Manager of the Company and has been called upon to show cause, and, thirdly, assuming, but not admitting, that he was a manager on 5th March 1917, as stated in the return, there is no evidence that he was manager on either of the dates when the offending articles were published. Before I deal with these objections and their effect upon the rule, I may make the preliminary obervation that the materials which were placed before the Court when the rule was issued amply justified the action then taken, indeed, made it in a manner incumbent upon the Court to follow the course actually adopted. These materials showed that the Amrita Bazar Patrika was the property of a company called the Amrita Bazar Patrika Limited, incorporated under the Companies Act, 1882, on 19th November 1908, that one of the objects for which the company was established was to acquire and take over as a going concern the business of news-

70. (1885) 16 Q B D 354=55 L J Q B 51.
71. (1867) 7 Eq 55 note=15 W R 1072.
72. (1869) 8 Eq. 580=38 L J Ch 330.
73. (1839) 2 Beav 129=48 E R 1129.

paper proprietors, printers and publishers then carried on in connexion with the paper. that the registered office of the company was at No. 2, Ananda Chatterjee's Lane, where the newspaper was published and where many of the shareholders and Directors who were closely related to each other lived, and that on 5th March 1917 the Directors and Managers were the persons mentioned in the rerurn filed by the Secretary under the provisions of the Companies Act. In these circumstances, there was a strong prima facie case against the defendants that they were connected with and responsible for the publication of the articles in question

But although these materials were sufficient to justify the issue of a rule, on careful scrutiny and on examination of the allegations in the affidavits filed in answer to the rule, I see no escape from the conclusion that an order cannot properly be made sgainst any of the defendants other than the printer and publisher. With reference to the legal objections just enumerated, I am not prepared to accede to the contention that secondary evidence of the returns in the custody of the Registrar of Joint Stock Companies is not admissible.. S. 65, Cl. (e), of the Evidence Act provides that secondary evidence may be given of the contents of a document when the original is a public document within the meaning of S. 74. S. 74, sub-S.2, provides that public records kept in British India of private documents are public documents. The question consequently reduces to this, whether the returns in the custody of the Registrar of Joint Stock Companies constitute public records of private documents. The observation of Lord Blackburn in *Sturla* v. *Fraccia* (74) is of no assistance in the solution of this question and does not show that a public record of a private document is limited to an entry made in a book by a public officer, which reproduces the contents of the document and thus constitutes a written memorial made by the public officer authorized by law to perform that fuction. The term "record" as appears from the Oxford Dictionary Vol. 8, p. 266) has a more comprehensive meaning and includes a collection of documents. When, as in the case of the Companies Act, the legislature has provided that returns are to be lodged with a public officer, these returns, when transmitted to and filed by him, do constitute public records of private documents within the meaning of S. 74, sub-S. 2, although they are not copied out by the Registar of Joint Stock Companies into a volume kept for the purpose; they are undoubtedly intended for reference and used by the public. But though this objection is of no avail, the second exception is well founded for although secondary evidence may be admissible, the party who produces the evidence is not relieved of his obligation to prove the execution of the document, just as if the original had been produced, unless the case is covered by S.'90,Evidence Act, or the legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution, as, for example, in S. 60, Registration Act. Consequently, as against Moti Lal. Ghose and Golap Lal Ghose there is no legal evidence to establish that the former is a director and the the latter a Manager of the Company The statements made by Pijush Kanti Ghose and Mrinal Kanti Ghose, in the affidavits filed by them at the hearing, cannot fairly be used to the detriment of other defendants as the proceeding is in the nature of a criminal trial. Besides, as pointed out in the case of *Governor of Bengal* v. *Moti Lal* (4) on the authority of the decision in *Reg.* v. *Stanger* (75), supplementary evidence cannot be given so as to prejudice the position of the accused. To the same effect are the observations made by Wright, J., *Hooley In re, Hooley, Ex parte* (76) when he was asked to grant leave to amend a notice of motion to commit a company for contempt of Court :

"That is not the way in which the Court deals with matter of this kind affecting the liberty of the subject. Applicants must come with their machinery ready."

The procedure should be at least equally strict and adherence to the forms of the law at least equally scrupulous, when the Court finds itself in the position of prosecutor and Judge and an unexpected lacuna in the evidence transpires during the trial. The Court must act with great caution in strict conformity with the requirements of the law and avoid a perhaps not unnatural tendency to supplement the evidence [*Martin* v. *Macko-*

74. (1889) 5 A C 623.

75. (1871) 6 Q B 352=40 L J R B 96.

76. (1899) 6 Manson 44=79 L T 706.

nochie (77)]. As regards the third legal objection, however, I am not convinced that there is any substance in the argument. S. 87, Companies Act, requires that notice of changes among the Directors or Managers shall be filed from time to time. The certified copy of the return furnished by the Registrar of Joint Stock Companies must, therefore, be presumed to embody the latest changes. Consequently, if the return had been duly proved, it would have furnished prima facie evidence of the names of the directors and managers on the day the copy was supplied. But this point is immaterial, as, in my opinion, there is no legal evidence to connect Moti Lal Ghose and Golap Lal Ghose with the publication of the articles. There remains for examination the cases of Mrinal Kanti Ghose, and Pijush Kanti Ghose who admit that they are directors. But they assert in their respective affidativs that none of the directors nor the financial manager exercises any control whatever over the contents of the paper.

There are no materials at the disposal of the Court sufficient to contradict these statements made on oath; consequently, the denial is, in the circumstances, a sufficient answer to the rule. I cannot but observe, however, that in the further assertion in the affidavits of these two persons that the directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association detracts to some extent at least from the value of the previous statement. The Articles of Association show that the business of the company is required to be managed by the directors, while the Memorandum of Association shows that the object for which the company was established was to acquire and take over as a going concern the business of newspaper proprietors, printers and publishers then carried on in connexion with the "Amrita Bazar Patrika." Consequently, the Memorandum and Articles of Association taken together may imply that it was the duty of the directors to manage the publication of the paper, and from this point of view they might be held responsible for the publication of the articles mentioned. This inference might possibly be strengthened by the circumstance that the existence of an editor is not mentioned, not even so much as suggested, in these proceedings. But although the case may, in these circumstances, be one of strong suspicion, it is impossible to hold that, notwithstanding the categorical denial to the contrary, it has been established beyond doubt that the directors were responsible for or connected with the actual publication of the two articles.

We cannot possibly hold as matter of law that the directors of a limited company which owns a newspaper are liable to be committed for contempt on Court on account of a libel published in the paper [*Reg.* v. *Judd* (18)]. The decision in *Green, Ex parte, Robbins, In the matter of* (19) cannot be treated as an authority for a general proposition of law that where a limited company disseminates amongst newspapers matter amounting to contempt of Court, their manager, merely because he was the manager, was liable to be committed. The decision rested, I think, on the facts admitted or established before the Court, which showed that the manager was in fact responsible for all the paragraphs sent out to newspapers. Nor can we apply to the case before us the presumption which at one time was applied in England as to the responsibility of the proprietor of a newspaper for libels published in his paper. The view that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in misconducting a newspaper, enunciated by Lord Kenyon in *R.* v. *Walter* (78), and re-stated by Lord Ellenborough, C. J., in *R.* v. *White* (79), and by Lord Tenterden, C. J., in *R.* v. *Cutch* (80), has long been obsolete in England [*R.* v. *Holbrook* (81)], and should unquestionably not be applied in this country in a case of the description now before us, even though it be held applicable to trials for defamation under the Penal Code : *Ramasami* v. *Lokanada* (82) and *Harisarvothama Rao* v. *Emperor* (83). After anxious consideration of all the materials on the record, I have thus arrived at the conclusion that the Rule must be discharged also as against Mrinal Kanti Ghose and Pijush Kanti Ghose.

77. (1878) 3 Q B D 730.

78. (1799) 3 Esp 21=16 R R 808.
79. (1829) 1 Moo & Malk 271.
80. (1829) 1 Moo & Malk 433 at p 437.
81. (1878) 3 Q B D 60.
82. (1886) 9 Mad 387.
83. (1909) 32 Mad 338=2 I C 193.

I cannot consider the result of this trial satisfactory from the vital point of view indicated by Lord Hardwicke in *St. James Evening Post* case (8), namely, that there cannot be anything of greater consequence than to keep the streams of justice clear and pure so that parties may proceed with security both to themselves and their characters. The persons responsible for the grave contempt of Court which has been committed have not been brought to justice. This is not a matter for legitimate surprise as the Court has not the machinery at its disposal for the discovery of the offenders and the materials available from the public records have proved insufficient for the purpose. At the same time the offenders have preferred to keep themselves in the dark and have not adopted the eminently honourable course which was pursued in two other instances in this Court and which evoked the just commendation of Sir Barnes Peacock and Sir Richard Garth respectively : *Banks and Fenwick In the matter of* (9) and *Surendranath Banerjee* v. *Chief Justice of Bengal* (3). They have not had the courage to come forward to avow their responsibility and either to justify their action or to express contrition for their misconduct. Even the directors of the company have contented themselves with a disavowal of their responsibility and have expressed no regret whatever for the articles published in a newspaper owned by the company.

In these circumstances it is undoubtedly worthy of consideration whether legislative provision should not be made to compel registration of the name of the editor and proprietor of a newspaper precisely in the same way as that of the printer and publisher. (See 44 & 45 Vict. C. 60.) It may finally be observed that, on recurrence of a case of this character, the Court may find it necessary to proceed against the company, as has been done in some recent instances. No doubt, the view was maintained at one time that a corporation could not be held liable for contempt of Court, as by reason of its impersonal nature it could not be attached : *Guilford* v. *Mills* (84). But the weight of modern authority is apparently against this doctrine, and the view has been maintained that proceedings by way of contempt would lie against corporations as well as individuals : in the case of individuals, the process is by attachment of the person, followed by fine or imprisonment or both; in the case of corporations, the process is by fine followed by sequestration or distraint : *R.* v. *Birmingham Gloucester Ry. Co.*, (85), *London* v. *Lynn* (86), *Spokes* v. *Banbury Local Board* (87). The decision of Wright, J., in *Hooley, In re, Hooley, Ex parte* (76), is seemingly an authority only for the proposition that a limited company cannot be committed to prison for contempt: it does not decide the question whether such a company may not be fined for contempt of Court and the fine recovered by distraint or sequestration. In the Courts of the United States, the liability of a corporation for contempt of Court has been affirmed by a large preponderance of authority: *Bloomington Church* v. *Muscatine* (88), *West Jersey Co.* v. *Board of Public Works* (89), *U. S.* v. *Munplus Ry. Co.* (90), *Re Westminster Realty Corporation* (91), *Union* v. *People* (92), *Stratton* v. *Merswether* (93), *Schreiber* v. *Garden* (94), *State* v. *Baltimore Ry. Co.* (95). One of the most recent cases in which the question is examined as one of principle is that of *Fiedler* v. *Banbrick Bros.* (96), where, upon an elaborate review of earlier decisions, the conclusion was rerched that corporations, though not liable to be imprisoned, were liable to be fined by way of punishment for contempt of Court. (See also Rapaljee on Contempts, S. 48, and High on Injunctions, S, 1460). It is not necessary for me to decide finally on this occasion the liability of corporations to be punished for contempt of Court in their corporate capacity; but in view of the turn events have taken in the present proceedings it is desirable to point out that when a grave contempt of Court has been committed by a newspaper owned by a company, the immunity from punishment which the offenders may imagine they enjoy by reason of

84. (1866) 2 Keb 1.

85. (1842) 3 Q B 223=2 G & D 235.
86. (1789) 1 H Bl 206.
87. (1865) 11 Jur (n s) 1010=35 L J Ch 105.
88. (1855) 2 Iowa 69.
89. (1896) 58 N J L 536=37 Atl 578.
90. (1881) 6 Fed 237.
91. (1908) 108 N Y Sup 551.
92. (1887) 121 Illinois App 647.
93. (1913) 154 Ky 839=159 S W 613.
94. (1912) 137 N Y Sup 747.
95. (1913) 73 W Va 1=79 S E 834.
96. (1912) 162 Missourie App 52=142 S W 1111.

stolid silence is most probably of an illusory character. My conclusion on the whole is that the Rule must be made absolute against the printer and publisher, but discharged against all the other defendants.

Chitty, J.—I have had the advantage of reading the judgment just delivered by my Lord the Chief Justice and Woodroffe, J., and I entirely agree with what they have said generally about the case, and the orders to be passed with regard to the several respondents. I wish, however, to state, with regard to Babu Moti Lal Ghose that I should have been disposed to hold him responsible for the articles in question, as one who has been proved to be a director of this company and who in that capacity has been called upon by this Court to show cause, and has shown none. As the majority of the Bench are in favour of giving him the benefit of the doubt, I do not desire to press my opinion further. I, therefore, concur in the order above to be passed. Fletcher, J., who is unavoidably absent to-day, desires me to say that he too was prepared to hold Babu Moti Lal Ghose responsible, but under the circumstances he also concurs in the order to be passed.

Order

Sanderson, C. J.—Tarit Kanti Biswas! The members of the Court are unanimously of opinion that in printing and publishing the two articles in question in the Amrita Bazar Patrika newspaper you were gulity of a contempt of Court. The serious nature of it has been referred to in the judgments which have been delivered, and it is not necessary, therefore, for me to recapitulate what has already been said. In the earlier part of your affidavit you state that you did not read the articles when they were handed to you for publication and that you inserted them in the usual course of your business as printer and publisher. Later, however, in your affidavit you proceeded to try and justify the publication of the articles by alleging that they were published by you in good faith and in the public interest, a position which we consider inconsistent with that of a man who puts forward the case that he printed and published the articles in ignorance of their contents. Weare all of opinion there was not the smallest justification for the publication of such untrue statements and unjustifiable imputations as were contained in the articles. If the person responsible for the publication of these articles had come forward and had taken the responsibility upon himself, or if you had disclosed to the Court the person who was really responsible for the publication, which must have been within your knowledge, although you might not have known the actual writer of the article, it might have been possible for us to treat the offence in your case with such leniency as your learned counsel prayed for. The person really responsible, however, has not been disclosed but you, being the printer and publisher, whose identity could not be concealed and whose legal liability could not be denied, are left by your employers to bear the brunt of this matter.

We have taken all these matters into consideration. The contempt of Court, however, in our judgment was of such a nature that in the interest of the administration of justice it is impossible for us to pass it over without some penalty. It is essential to vindicate the authority of the Court and to make it clear that articles such as those in question constituting a grave contempt of Court cannot be published with impunity. Tarit Kanti Biswas! The judgment of the Court is that you, Tarit Kanti Biswas, do pay to the Accountant-General of this Court a fine of Rs. 300 before 4-30 p. m. to day, and that you be detained until such hour, or until such time as the fine is paid; and if the fine is not paid as herein directed, you be lodged on the civil side of the Presidency Jail until the said fine is paid or until the further order of this Court.

V.B./R.K. *Order accordingly.*

A. I. R. 1918 Calcutta 1023

FLETCHER AND SHAMSUL HUDA, JJ.

Mohamed Ashraf—Plaintiff—Appellant.

v.

Umed Ali Sarkar and *others*—Defendants—Respondents.

Appeal No. 756 of 1915, D/- 27th May 1918, from the appellate decree of Dist. Judge, Chittagong, D/- 6th January 1915.

Accretion—Suit to recover land as accretion—Plaintiff must establish specific nature of accretion.

In a suit to recover khas possession of certain plots of land as being contiguous accretions to other plots belonging to the plaintiff, the plaintiff must establish the nature of the accretion.

Mohendra Nath Roy, *Dhirendra Lal Kastgir* and *Chander Sekher Sen*—for Appellant.

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned District Judge of Chittagong, dated the 6th January 1915, affirming the decision of the Munsif of Patya The plaintiff brought the suit to recover khas possession of certain plots which he said, were contiguous accretion to some other plots belonging to him. The defendant 1 claimed under a settlement from the Secretary of State who is the defendant 2, the property being khas mahal of the Government. The learned Judge has made this finding. He has found that the plaintiff has failed to establish that these are contiguous and it is quite clear, under the terms of the law which is not disputed, that the plaintiff must establish that these are contiguous accretions. What has been attempted to be shown in this case, is this. It is said that the learned Judge has summed up the facts of the case wrongly. It is not suggested that he has misdirected himself to the question of law. But it is said that he has been confused on the facts of the case. I do not think so. The learned Judge has taken a clear and definite view of the facts and whether we agree with that view or not, is not a matter for consideration. The learned Judge was the final Judge of facts and his findings on questions of fact cannot be interfered with. Then, there is another point taken and that is this: Under the terms of the solenama entered into between the parties, the defendant 1 had undertaken to give to the plaintiff a half share of any land that accreted to his holding and so, on one view or the other, the plaintiff, at any rate, would get a half share. That, of course, really involves the same question that has been raised on the first point, namely, whether these lands are contiguous accretion or not. The learned Judge seems to have considered that they were not contiguous accretions. That being so, all we can say, is that it has not been shown that the provisions of the solenama have come to operation. In the result, the present appeal fails and must be dismissed with costs. One set of hearing fee will be divided between the two sets of respondents who have appeared.

Shamsul Huda, J.— I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 1024

CHATTERJEA AND RICHARDSON, JJ.

Digendra Chundra Sen and *another*—Defendants—Appellants.

v.

Nritya Gopal Biswas and *others*—Plaintiffs—Respondents.

Appeal No. 3567 of 1914, Decided on 22nd June 1917, from appellate decree of Dist. Judge, Faridpur, D/. 13th July 1914.

Bengal Court of Wards Act (1879), S. 55—Suit by manager without sanction, cannot be proceeded with, though it can be filed in anticipation of this sanction.

Although the proviso to S. 55, Court of Wards Act, gives the Manager power to file a suit on behalf of the Ward in anticipation of sanction from the Court of Wards, to prevent the suit from being barred by limitation where there is very little time left to obtain the sanction, yet such a suit cannot be proceeded with, unless the requisite sanction is obtained and filed in Court. [P 1025 C 1]

Where a manager of the Court of Wards instituted a suit on behalf of the Ward on 18th April 1911 without the sanction of the Court of Wards in order to prevent the claim from being barred by limitation and a Commissioner was appointed for local investigation in the suit who gave his report on 9th April 1912, and the sanction of the Court of Wards was obtained on 27th November 1912 and filed in Court on 5th September 1913:

Held: that the proceedings taken subsequently to the filing of the plaint must be set aside as being without jurisdiction and the case remanded to the Court of first instance for a trial de novo. [P 1025 C 2]

Surendra Chandra Sen and *Dawijendra Nath Mukerjee*—for Appellants.

Ram Charan Mitra and *Akhoy Kumar Banerjee*—for Respondents.

Judgment.— This appeal arises out of a suit by the plaintiffs, who are Wards, under the Court of Wards. The suit which was instituted by their next friend Mr. Monier, Manager of the Court of Wards, was one for recovery of possession of certain lands on establishment of the plaintiffs' title thereto. It appears that there was a partition of the estate within which these lands were situate, between the plaintiffs and defendant 1. The partition took place in Chait 1305, corresponding to April 1899. The plaintiffs' case was that these lands were part of the estate which fell to their share, that they went under water and then rose again in Kartik 1306 corresponding to October 1899. The suit was instituted on 18th April 1911 (the Court having been closed from 13th to 17th April 1911) and within 12 years from 1st Baisakh 1306, corresponding to 13th April 1899. It was, however, instituted without the

authority of the Court of Wards. S. 55, Court of Wards Act provides that

"no suit shall be brought on behalf of any Ward by Manager unless the same is authorized by some order of the Court, provided that a Manager may authorise a plaint to be filed in order to prevent the suit from being barred by the law of limitation; but such a suit shall not be afterwards proceeded with except under the sanction of the Court."

It appears that after the suit had been instituted, the plaintiffs applied for summons on their witnesses and a commissioner was appointed for local investigation. He submitted his report on 9th April 1912. The Manager did not obtain sanction of the Commissioner until 27th November 1912 and the sanction was actually filed in Court on 5th September 1913. The Court of first instance dismissed the suit entirely. On appeal, the learned District Judge partly decreed the suit and defendant 3 who is a tenant under defendant 1 and defendant 14 who is a tenant under defendant 3 and his coSharers, have appealed to this Court. Two contentions have been raised in this appeal. The first is that the suit having been instituted without the authority of the Court of Wards, should be dismissed and secondly, that, at any rate, the suit having been proceeded with without the sanction of the Court, the proceedings should be set aside and the case tried de novo. So far as the first question is concerned, we think that the suit should not be dismissed. No doubt, S. 55 says that no suit shall be brought on behalf of any Ward by a Manager unless the same is authorized by some order of the Court, but, at the same time, it provides that a Manager may authorise a plaint to be filed in order to prevent a suit from being barred by the law of limitation. The law, therefore, gives the Manager power to file a suit in anticipation of the sanction when the suit would otherwise be barred by limitation. Such a course should be adopted where there is very little time left to get the authority of the Court of Wards. In the present case there was, no doubt, some time between the date of the institution of the suit and the date on which 12 years would expire from the time — when the cause of action is said to have arisen.

The land, however, was chur land and it is always difficult to fix the precise time when any chur appeared above water and formed into land. As a matter of fact, a portion of land was held by the lower appellate Court to have been barred by limitation. Under the circumstances we think that the Manager was justified in instituting the suit on 18th April 1911, which was within 12years of the date of the partition, instead of taking the risk of having the suit being held barred if instituted within 12 years of the re-formation of the land. Under the special circumstances of the case we think the suit is one which comes under the proviso to S. 55. In the case of *Dinesh Chunder Roy* v. *Golam Mustapha* (1) the suit which was instituted without the authority of the Court of Wards was held to have been rightly dismissed by the lower appellate Court. But in that case the sanction was filed only in the appellate stage, and there were no special circumstances as there are in the present case, in which moreover, the sanction was filed before the actual trial commenced. The appellants, however, we think, are entitled to succeed on the second ground. Although the proviso to S. 55 lays down that the Manager may authorise the plaint to be filed in order to prevent a suit from being barred by limitation, it expressly provides that such suits shall not be proceeded with except under the orders of the Court. We find that, in the rules made by the Board of Revenue under S. 70, Court of Wards Act and printed at p. 93 of the Bengal Wards' Manual 1909, it is stated that

"authority from the Manager need not be filed but the Commissioner's authority to institute a suit should be filed as soon as it has been obtained, and when the suit is filed in anticipation, the circumstances should be stated and the Court asked to stay proceedings till it is received. The suit should be filed in anticipation only when such filing is necessary to save limitation."

In the present case, although the suit was instituted on 18th April 1911, the Court was not asked to stay proceedings, and it was after the Amin had submitted his report, which was partly favourable to plaintiffs, that the sanction was obtained on 27th November 1912 and it was not filed in Court until 5th September 1913. This was contrary to the rules framed by the Board of Revenue. But apart from that, S. 55 clearly says that though the plaint may be filed in order to prevent a suit from being barred by limitation, the suit shall not be proceeded with except under the orders of the

1. (1889) 16 Cal 89.

Court. That being so, all the proceedings which were taken subsequently to the filing of the plaint were without jurisdiction and must, therefore, be set aside, The result is that the decrees of the Courts below must be set aside and the suit remanded to the Court of first instance for a trial de novo. The proceedings are to be taken from the stage of the filing of the plaint. The respondents must pay the costs of the appellants in all the Courts.

V.B./R.K. *Decrees set aside.*

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* A. I. R. 1918 Calcutta 1026

MOOKERJEE AND CUMING, JJ.

Sashishi Mohan Shaha and *another*—Plaintiffs—Petitioners.

v.

Kumud Kumar Biswas and *others*—Defendants—Opposite Parties.

Civil Rule No. 364 of 1916, Decided on 16th June 1916 against order of Munsif, 2nd Court, Alipore, in Suit No. 273 of 1916.

*** Stamp Act (2 of 1899), S. 33—Jurisdiction of Court to impound document—Insufficiently stamped documents in bound book not relating to claim—Court cannot impound such documents as they were not 'produced in the performance of his function' within Civil P. C. (1908), O. 7, R. 14—Plaint.**

In a suit for recovery of money due on a hat-chita, the plaintiffs, when presenting their plaint, produced in Court under O. 7, R. 14, the hat-chitta bound in a volume which contained many other hat chitas, with a prayer that the hat-chita on which their claim was founded should be detached and placed on the record and the remainder of the volume should be returned to them. The Munsif on examination of the volume, finding that none of the hat-chitas was properly stamped, proceeded to impound all of them under S. 33, Stamp Act:

Held: that the Munsif had no jurisdiction to impound the hat-chitas other than the one which formed the basis of the plaintiffs' claim, as they were not produced nor came before him in the performance of his functions: 25 *Mad* 525, *Dist.* [P 1027 C 1]

Dwarka Nath Chakravarty and *Troylokha Nath Ghose*—for Petitioners.

Ram Charan Mitra—for Secy. of State.

Judgment.—This Rule calls upon Secy. of State for India in Council to show cause why an order made under S. 33, Stamp Act, in circumstances to be presently stated, should not be set aside or modified. On 27th March 1916 the petitioners instituted a suit in the Court of the Second Munsif at Alipore for recovery of money due on a hat-chita. Under R. 14, O. 7, Civil P. C., the plaintiffs were bound to produce the hat-chita in Court when the plaint was presented. The hat-chita was in a bound volume which contained a large number of hat-chitas executed by other persons in favour of the plaintiffs. The entire volume was brought into Court when the plaint was filed. The plaintiffs prayed that the particular hat-chita, whereon their claim was founded, should be detached and placed on the record, and the remainder of the volume should be returned to them. An examination of the hat-chita, which was the foundation of the suit, disclosed that it was not properly stamped. The Munsif examined the other hat-chitas in the volume and came to the conclusion that the other documents were not properly stamped. He accordingly proceeded to impound all the hat-chitas under S. 33, Stamp Act. The question in controversy is, whether the Munsif was competent to impound the hat-chitas on which the claim of the plaintiffs was not founded. Sub-S. 1, S. 33, Stamp Act, provides that every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an Officer of Police, before whom any instrument chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same. Before action can be taken under this sub-section, it must be established that the instrument in question was produced or came before the officer in the performance of his function. The case for the petitioners is that they did not produce before the officer any hat-chita other than the one upon which their claim was founded. The Munsif took action at a stage, when there was no material to enable him to question the correctness of this allegation; consequently; the case is not covered by the first of the two alternatives mentioned in S. 33. Nor can we say that the other hat-chitas came before the Munsif in the performance of his functions.

In the performance of his functions as a Judicial Officer the only hat-chita which came before him at that stage was the hat-chita wherein the claim was founded. We cannot speculate whether if the trial had proceeded, the plaintiffs might not have possibly relied upon the other hat-chitas in support of their case. If they had done so, it could well be maintained that those hat-chitas were produced be-

fore the Munsif or came before him in the performance of his functions. But that stage was never reached. In our opinion, on the materials before us, it is impossible to say that the Munsif had jurisdiction to impound the hat-chitas other than the one which formed the basis of the claim. Reference has been made by the Senior Government pleader to the case of *King-Emperor* v. *Balu Kuppayyan* (1), which is clearly distinguishable. There a search warrant was issued by a Magistrate with a view to the discovery of a register kept by the accused, containing documents not stamped in accordance with the provisions of the Stampt Act. The register was seized in the course of the search and brought in the Court. It is clear that the register was produced before the Magistrate or came before him in the performance of his functions as a Magistrate. The Rule must consequently be made absolute in part and the order of the Court below set aside in respect of all the hat-chitas other than that which forms the basis of the claim. The pages containing the hat-chita in question will be taken out of the volume and kept in the record; the remainder of the volume will be returned to the petitioners.

V.B./R.K. *Rule made partly absolute.*

1. (1902) 25 Mad 525.

A. I. R. 1918 Calcutta 1027 (1)

FLETCHER AND SMITHER, JJ.

Mohendra Lal Sinha—Plaintiff—Appellant.

v.

Krishna Kumari Debi and *others*—Defendants—Respondents.

Appeal No. 2238 of 1916, Decided on 10th May 1918.

Transfer of Property Act (4 of 1882), S. 108 (j)—Lease of homestead is transferable.

The interest of a lessee of a homestead is transferable under the Transfer of Property Act, unless it was in existence prior to the coming into operation of the Act. [P 1027 C 2]

Jyotish Chandra Sirkar—for Appellant.

Surendra Nath Guha and *Ram Mohan Mukerjee*—for Respondents.

Fletcher, J.—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Burdwan affirming the decision of the Munsif of the same place. The suit was brought for a rentof a homestead. That rent is due is admitted. The first two defendants are stated to be the original tenants. Defendants 3 and 4 are purchasers from the original tenants, the property having been sold to them in order to enable the original tenants to pay off a mortgage so it is stated by the Munsif due to the plaintiff. It is said that the holding is not capable of transfer. There is nothing to support that on the record. There is nothing to show that this was an interest in existence prior to the coming into operation of the Transfer of Property Act. If the case is governed by the Transfer of Property Act the interest is clearly transferable. I do not think that in a case like this we ought to send back the case to be re-heard de novo on the ground that the plaintiff wants to put in some further evidence, to enable him no doubt to eject these people who have purchased the property on furnishing money to pay off the mortgage, I do not think that the plaintiff ought to be allowed now to put in further evidence. He ought to have proved in the first Court that the interest came into existence before the date of the Transfer of Property Act. The appeal fails and is dismissed with costs.

Smither, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 1027 (2)

TEUNON AND CHOWDHURY, JJ.

Bhaggabhor Mondal and *others*—Plaintiffs—Appellants.

v.

Mohini Mohan Bannerjee and *others* Defendants—Respondents.

Appeal No. 3484 of 1913, Decided on 14th March 1916, from appellate decree of Dist. Judge, Jessore, D/- 16th June 1913.

Contract Act (9 of 1872), S. 11—Minor, mortgage in favour of, is not void—Transfer of Property Act (4 of 1882), S. 8.

A mortgage-bond executed by a person of full age in favour of minors as a security for a loan is not void and can be enforced at their instance. [P 1028 C 1]

There is nothing in the Transfer of Property Act which nullifies a transfer made by a person of full age in favour of a minor: 31 *Cal.* 282; (*P. C.*) and 20 *Cal.* 539 (*P. C.*), *Dist.* 38 *Mad.* 312: 33 *All.* 657; *Ref.* [P 1028 C 1]

Baidya Nath Dutt and *Mohini Nath Bose*—for Appellants.

Surendra Chandra Sen—for Respondents.

Judgment.—In this case it appears hat in Chait 1308 corresponding to year

1901 a mortgage bond was executed by the appellant before us in favour of two mortgagees. Both the mortgagees, it has been found, were minors at the time. They sued upon this mortgage-bond, obtained a decree and in the sale in execution of that decree they bought the property. The mortgagor now sues to have it declared that the mortgage-bond is void and to have the decree and the sale set aside. The only contention advanced on his behalf in this appeal is that, though he has taken the money of the minors, the mortgage bond is void and cannot be enforced at their instance. In support of that proposition the learned pleader who has appeared for the appellant has cited before the cases reported as *Mir Sarwarjan* v. *Fakhruddin Mohammd Chowdhuri* (1), *Mohori Bibee* v. *Dharamdas Ghose* (2) and also the case reported as *Navakoty Narayan Chetty* v. *Loyalinga Chetty* (3). No doubt in the cases decided by their Lordships of the Privy Council and reported as *Mahori Bibee* v. *Dharamdas Ghose* (2) and *Mir Sarwarjan* v. *Fakhruddin Mohammad Chowdhhury* (1), it has been held that a contract by a minor is not merely voidable but void. But in this case we are not concerned with any covenant which it is for the minors to perform. There is here no question of any reconveyance. The appellant has taken the minors' money and he now seeks to avoid the contract which he has made in their favour. We cannot find any thing in the Transfer of Property Act which nullifies a transfer made by a person of full age in favour of a minor. The minors are now of full age and they seek to have the contracts in their favour enforced, and we may, therefore, take it that the mortgage entered into was for their benefit.

In support of the view that they may enforce the mortgage we may refer to the cases that have been cited by the appellants in their own favour, that is to say the case in *Navakoty Narayan Chetty* v. *Loyalinga Chetty* (3) and also the case of *Ulfat Rai* v. *Gouri Shankar* (4). For these reasons we are of opinion that simply because of the minority of the respondents at the time when the mortgage in their favour was created we ought not to set aside the decree that has been made in their favour and the sale held thereunder. We, therefore, dismiss this appeal with costs.

V.B./R.K *Appeal dismissed.*

1. (1912) 39 Cal 232=13 I C 331=39 I A 1 (P C).
2. (1903) 30 Cal 539=30 I A 114 (P C).
3. (1910) 33 Mad 312=4 I C 383.
4. (1911) 33 All 657=11 I C 20.

A. I. R. 1918 Calcutta 1028

RICHARDSON AND WALMSLEY, JJ.

Eralijool Tea Co. Ltd. and *another*—Defendants—Appellants.

v.

Nagendra Nath Chowdhury—Plaintiff—Respondent.

Appeal No. 415 of 1915, Decided on, 5th June 1917,

(a) Easement—Right to water—Extent and scope of, enunciated.

Everybody has a right to do any thing on his own land with regard to the diversion, storage or the uses of water in any way he chooses, provided that when he ceases dealing with it on his own land or when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before. [P 1032 C 1,2]

A person has no right to obstruct the water of a natural stream, except to the extent to which he has had presciptive use thereof. [P 1032 C 2]

(b) Easement—Water course—Use of—Suit to restrain, where no damage is caused, is maintainable.

A plaintiff, whose natural rights in regard to watercourses are in danger of being infringed or further encroached upon by a new enjoyment on the part of the defendant, capable of being converted by user for the prescriptive period into a new right in the latter, has a good cause of action, apart from any question as to the amount of damage which he may have suffered or be likely to suffer. [P 1032 C 2]

(c) Specific Relief Act (1877), S. 55—Transferee from Hindu widow can sue for injunction during widow's life time restraining diversion of surface water so as to affect his land.

A plaintiff whose title to land is based upon a grant by a Hindu widow, which may or may not be valid against the reversioners, can during the life time of the widow maintain a suit for a permanent injunction restraining the defendant from diverting the course of the natural flow of surface water so as to affect his land. [P 1033 C 2]

(d) Limitation Act (1908), S. 27—Transferee from Hindu widow—S. 27, does not apply (*Obiter.*)

Obiter.—S. 27, does not apply to a donee or transferee from a Hindu widow in virtue of her powers as representing the estate, as in such a case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her interest for life. [P 1034 C 1]

S. R. Das, N. N. Sirkar, M. C. Naire and *Ambicapada Chowdhury*—for Appellants.

H. D. Bose, A. N. Chowdhury and *Hemendra Kumar Dass*—for Respondant.

Judgment.—The plaintiff and the principal defendant the Eralijool Tea Company, Limited, are the owners of adjacent tea gardens in the District of Sylhet. The other defendant is the Company's manager. In this judgment I shall speak of the defendant company as the defendant. The plaintiff's garden is on the east and the defendant's garden on the west of a low range of hills (known as the Borail Hills) running north and south. Near the middle of this range there is a gap and the land here forms a basin towards which the drainage of the defendant's garden from the north as well as the south naturally gravitates, though there was never any natural defined channel. The slope of the ground on the plaintiff's side of the hills is similar. On this side a stream known as the Bogajan Cherra flows from north to south to a point opposite the gap where it turns due east and eventually runs into the Son Bhil some miles away. A tributory stream from the south known as the Balia Cherra meets the Bogajan not very far from the point at which the lattar turns east. The gap and the basin and some of the land to the east, which is described in the Sch. 2 of the plaint, beloing to the defendant, but the defendant's land does not extend to the Bogajan from which it is separated by land belonging to the plaintiff, being the land described in Sch. 1 of the plaint. The suit was brought for a declaration, in thewords of the third and principal prayer of the plaint,

"that there is no nala or water passage for the drainage of water of the watershed and its slope towards the defendant's garden across the land of Sch. 1 belonging to the plaintiff."

The plaintiff also asked in the fourth prayer for a permanent injunction restraining the defendants

"from diverting the course of the water of the 'watershed' and its 'slope' towards their garden across the plaintiff's land along the bundh on dag No. 1 of Sch. 2 or by cutting nala across dag No. 2 of the said schedule or by any other means."

For a proper understanding of these prayers they must be read with paras. 4, 7, 8, 9 and 14 of the plaint. The plaintiff's case as made in the plaint is that the Borail Hills including the gap, forms a natural watershed between the plaintiff's garden on the east and the defendant's garden on west, so that if not interfered with the surface of water of the whole of the defendant's garden, including the land in the gap, would naturally find its way into the Kakra river on the west and would none of it flow to the east over the plaintiff's land into the Bogajan. The position thus taken by the plaintiff was controverted in paras 4, 7, 8 and 11 of the defendant's written statement. It may be stated at once that the finding of the learned Subordinate Judge on this part of the case is against the plaintiff and in favour of the defendant. The precise finding will be mentioned later when the issues are dealt with.

In paras. 9, 15 and 17 of the plaint, the plaintiff refere to the artificial works constructed by the defendant. The complaint made is substantially that the defendant had by means of an artificial drain protected by an embankment diverted the surface water of his garden or a considerable part of such water and caused it to flow to the east over the plaintiff's land. The answer to these paragraphs will be found in paras 9, 12 and 14 of the written statement. The most important is para. 9, in which the defendant claimed a prescriptive right to an easement and asserted, in the last sentence of the paragraph, that the operations undertaken on the defendant's garden had in the result "materially reduced the volume of water entering the Bogajan Cherra." On this part of the case the findings of the learned Subordinate Judge are largely in favour of the defendant but partly also in favour of the plaintiff. Paragraphs 15, 18 and 22-24 of the plaint set out the damage which plaintiff alleged that he had suffered. He attributed the inundation of his land in the years 1910 and 1911 and the consequent destruction of his tea bushes and his tenants' paddy to the state of things brought about by the defendant and he anticipated similar or greater damage in the future if that state of things were allowed to continue. The plaint also contains charges of trespass and so forth which need not now be noticed. Upon the pleadings a number of issues were framed. Nothing need be said about the formal issues (1) to (3), nor about issues (4) and (5) which relate to adverse possession and estoppel. As the learned Subordinate Judge has found, no question of adverse possession or estoppel really arises and no such question has been argued before us. Issues (7) to (11) relate to matters of fact, (7) to (10) referring to the land in its natural state and No. (11) to the works carried out by the defendants. The

most important issue in the case is No. (12), which relates to the easement claimed by the defendant. It is in these terms:

"Whether there was any easement right over the said drain (the drain mentioned in issue 11) enjoyed by the defendants without interruption and as of right for a period of over twenty years.? If so, was that with the knowledge of the plaintiff or his predecessors."

The next five issues Nos. (13) to (17) concern the plaintiff's title and will be made the subject of a brief reference hereafter. The remaining issues (18) to (21) relate to the reliefs claimed. Among these No. (19) raises the question of damage as follows:

Whether the overflow of water alleged in the plaint causes or is likely to cause; damage and loss to the plaintiff's property as alleged in the plaint."

It has been necessary to refer at some length to the pleadings and issues, because the first ground urged in support of the appeal is that the learned Subordinate Judge has decided the case upon a point which is not raised by the pleadings or issues and to which the evidence was not specifically directed. But before dealing with that argument, it will be well to state more particularly the facts found and proved, about which there is now little or no dispute. Firstly, then, the learned Subordinate Judge has found, and it is not now disputed, that apart from anything done by the defendant the natural outlet of the water collecting in the depression or basin in the gap, which the Subordinate Judge calls the Gossain Bhil, would be towards the east. When the basin fills, there being no artificial obstruction, the spill water would escape to the east and find its way by a channel, which may originally have been ill-defined, first across the defendant's land, then across the plaintiff's land into the Bogajan and so into the Son Bhil. As already mentioned this state of things is inconsistent with the general case made in the plaint and it is now conceded that the defendant has at least a right to a free passage to the east for any overflow from the basin, though there may be a controversy whether this right is properly described as a natural right or as an easement.

We next come to the group of facts relating to the defendant's interference with natural conditions. The defendant's garden dates from the year 1882 or 1883. The part to the south was first brought under tea. In order to protect the cultivated area from the hill-streams on the east, a water channel was excavated and an embankment was constructed on its west, the effect of which was to give a northern flow to the water from the hills before it reached the garden. The channel and the embankment were extended northwards pari passu with the extension of the area under tea. When the water ceased to be confined, it escaped into the low land on the west and thence owing to the slope of the ground into the basin in the gap. The manager of the garden in 1891 and 1892 was Mr. R. L. Cooke, an enterprising gentleman, by whom a new system of drainage was devised and with the permission of the defendant carried out. His object was to drain the basin or part of it and to make the land fit for tea cultivation. With this object he constructed a main drain leading from the basin a north western direction to the Kakra river. It was part of the plaintiff's case that the drain was a natural channel and it is shown on the map as the Magura Bhila. But whatever its name may be, it is now conclusively established and admitted that it is not a natural but an artificial channel made by the agents and servants of the defendant.

Mr. Cooke's next care was to prolong the channel and embankment on the west of the hills as far north as the gap. The channel so prolonged led into the old drain running eastward to the Son Bhil. The extended channel and embankment are shown on the map as nala A and embankment B, while the Subordinate Judge calls the latter the long bundh or L. B. Both this extension and the new drain to the north-west were completed before 1892 or in the early part of that year; that is to say, they were completed more then twenty years before the suit was brought. As regards these works that is not of much importance because so far the plaintiff takes no exception—probably no exception could be taken—to what the defendant did. The controversy is now at any rate confined to the final work constructed by Mr. Cooke in order to complete his system of drainage. He extended embankment B across the old drain leading east so as to shut off that drain and the water of nala A from the basin. It is this embankment (which the Subordinate Judge calls the small bundh to distinguish it from the long bundh or embankment B) which came to be the crux of the case. The ex-

tension had not been completed before 1893 and had therefore not been in existence for twenty years when the suit was brought. As to the evidence, reference may be made to the depositions of Mr. Bryning and Mohammad Idris and to five letters written by Mr. Cooke to the defendant company in the month of January to April 1892. Of the letters the most important is the last dated 4th April (Ex. C 4). This evidence shows generally what Mr. Cooke's plans were and how they were carried out, but for present purposes its principal significance lies in its bearing upon the small bundh and the object with which that work was undertaken.

The learned Subordinate Judge has found that the defendant has right, described as a natural right, to the unobstructed flow of water from the basin to the east including the water derived from nala A and that he has acquired a prescriptive right to keep free of weeds and grass a channel 8 cubits in width from the basin to the Bogajan. He has found however that the construction of the small bundh was a material alteration of or interference with the natural right, which substantially increased the burden upon the plaintiff's land. He has therefore made a decree which, while it does not give the plaintiff all the reliefs he asked for, is generally in his favour. In appeal it has been contended for the defendant that no case of increase of burden is put forward in the plaint and on the merits that no increase of burden has been established. As to the merits, it is at any rate relevant to inquire why Mr. Cooke made the small bundh and his reason cannot be better stated than in his own words, taken from his letter of 4th April 1892. In one paragraph he describes the state of things which existed before nala A and the drain to the west were finished. The water came into the garden and turned

"all the north land, shown as land now available for extension, into a lake and remaining so until it could drain off slowly into the Sone Bhil (sic.) but as the Sone Bhil flood level is two feet higher then the point where the old and new main drains meet each other, this north land remained practically a lake during the rains, and the water was generally standing up to the point in the area under tea marked with a cross."

The plan to which Mr. Cooke was referring is not forthcoming but "the point where the old and new main drains meet each other" is the junction of nala A and the old drain leading east. That point therefore, being two feet below the Sone Bhil flood level, formerly there was during the height of the rains no flow of water eastward. The water drained off gradually as the level, fell in the Sone Bhil. It may be gathered, I think, that the mere completion of nala A and embankment B would not alter that state of things. The water from nala A during the height of the rains would merely mingle with and swell the water in the basin and, as I have said, the right of the defendant to conduct water through nala A is conceded as well as his right to an outlet from the basin to the east. In the next paragraph Mr. Cooke refers to the small bundh, which according to his plans was to complete his system of drainage. He says this:

"The new drain on the east side (i. e., nala A already constructed) now confines the stream (from the hills on the east) and takes them into the Sone Bhil drain the mouth of which will be closed with a strong bundh when the new drainage system is completed, so that the Kakra main drain will only have to carry off the garden drainage and as there is a fall of seven feet from the lowest point in Eralijool to its junction with the Kakra it is evident that it will do this perfectly, and having no hill streams running into it, it will not silt up with sand."

The object of the small bundh is clear. It was intended in the first place to prevent the hill streams and the silt they brought down from being carried by nala A into the basin and so overloading the new drain to the north-west. The only escape for the silt-laden water of nala A was to be by the old drain to the east and in order to improve that drain, steps were taken at sometime or other after 1893 to deepen it where it crosses the lands of Sch. 2 and Sch. 1. Now I am disposed to be of opinion that the original channel by which water escaped from the basin to the Bogajan was sufficiently defined to merit the title of a natural watercourse, though the defendant may have since acquired a further prescriptive right recognised by the Subordinate Judge's decree to keep a certain width of the channel on the plaintiff's land free of water weeds and grasses. But the question whether the channel is a natural watercourse the defendant's right to its continued existence in its original state being then a natural right, or whether the right to the discharge of water from the basin by the channel is to be regarded as an

easement is of little importance. The existence of the right is admitted and the case turns rather on its extent than its nature. As the change caused by the erection of the small bundh occurred within twenty years of the suit, the defendant's right at the date of the suit must be measured with reference to the state of things in 1892. On the facts set out I find it difficult to resist the conclusion that the small bundh materially affected the benefit which the defendant had previously enjoyed. It is not sufficient to say, as was argued for the defendant, that the new drain to the north west diminished the volume of water which previously passed to the east.

There was a change in the quality of that water in so far as the quantity of silt suspended in it became greater. There must have been changes also in the character of the flow of the water. Almost certainly the rapidity of the current increased at any rate at certain seasons, and probaby there was steadier flow from mouth to mouth. The flow would be irrespective of the level of the water in the basin whereas formerly it had depended on that level. So too the holding up of the water by the erection of the small bundh, a change which interfered with the gravitation of the water, would to some extent at least counteract the effect previously attributed to the high flood level of the Sone Bhil. As to issue 19 the issue relating to "damage," I accept the finding of the learned Subordinate Judge that the evidence offered by the plaintiff falls far short of proving that the damage caused by floods in the particular years mentioned in the plaint is due to the small bundh. But apart from that, in my opinion, the facts are sufficient to bring the case within the principle of the Madras case cited by the Subordinate Judge: *Raja of Venkatagiri* v. *Raja Mudhukrishna* (1). The principle is compendiously stated by James, L. J., in the English case referred to in the judgment, *West Cumberland Iron & Steel Co.* v. *Kenyon* (2):

"I have always understood that everybody has a right on his own land to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before."

In the present case the small bundh so altered the nature of the original flow of water from the basin as to constitute a new state of things. The question whether the defendant is or is not entitled to the enjoyment of the flow in its altered condition depends upon user, and at the date of the suit the right had not been crystallized by user for the prescriptive period. An observation of Lord Robertson's in *White* v. *White* (3) may perhaps be applied mutatis mutandis to the present case:

"It is equally obvious that the conception of a mill as a growing concern, with expanding requirements, has no place in a discussion with other riparian proprietors about a servitude constituted by use . . . . . I hold that the respondents (mill-owners) have no right to obstruct the water of this river except to the extent to which they have had prescriptive use."

That observation seems to apply when an attempt is made, as here, to superimpose a new right upon an old right and it can make no difference in such a case whether the old right is a servitude or a natural right. A plaintiff, whose natural rights are in danger of being infringed or further encroached upon by a new enjoyment on the part of the defendant, capable of being converted by user for the prescriptive period into a new right in the latter, has good cause of action apart from any question as to the amount of damage which he may have suffered or be likely to suffer: *McCartney* v. *Londonderry and Lough Swilley Railway Co.* (4). It is not easy to find a case precisely in point, but I may refer to the observations of Lord Herschell and Lord Watson in *McIntyre* v. *McGavin* (5) and to the principle underlying the cases of *Sampson* v. *Hoddinott* (6), *Baird* v. *Williamson* (7) and *Young* v. *Bankier Distillery Company* (8). These considerations support the conclusion arrived at by the learned Subordinate Judge on the merits.

As to the pleadings, it is true that the plaint is founded on the theory that in its natural state the defendant's garden would drain itself towards the west and not towards the east. The theory assumes

1. (1905) 28 Mad 15.
2. (1879) 11 Ch D 782.
3. (1906) A C 72.
4. (1904) A C 301.
5. (1893) A C 268.
6. (1857) 1 C B (n s) 590.
7. (1863) 15 C B (n s) 376
8. (1893) A C 691.

that the small bundh coupled with embankment is a sort of artificial watershed interfering with the natural watershed between the defendant's garden on the one side and the plaintiff's garden on the other. No doubt the theory has been shown and found to be largely erroneous. Nevertheless, though the theory as a whole may be wrong, it does invite attention to the importance of the small bundh. That bundh was clearly struck at in para. 9 of the plaint and in the fourth of the reliefs claimed and, in my opinion, the defendants' right to retain it is clearly involved in the pleadings and in the important issue 12. In para. 9 of the written statement embankment B and the small bundh are treated as one embankment, constructed in January 1892, with the object of preventing "the passage of water both into and out of the said Bhil" (or basin). It is asserted that "prior to the year 1892" the drain to the east was a "natural outlet for the water from the land belonging to the defendant company." The right to the maintenance of the drain as altered by the embankment is claimed in substance as an easement, and it is added "that so far from the said drain and embankment prejudicially affecting the plaintiff's alleged property, they have in fact materially reduced the volume of water entering the Bogajan Cherra."

Clearly, issues 11 and 12 were framed in reference to para. 9 of the plaint and para. 9 of the written statement. The last part of issue 11 raises the question of the date of construction of the small bundh (which on the evidence may be taken to be the early part of 1893) and issue 12 relates to the rights by way of easement claimed by the defendant. It is true that there is no express issue whether the construction of the small bundh increased the burden upon the plaintiff's land, but the question here being not merely one of excess but of a change in the mode of enjoyment, is necessarily involved in the question of the defendant's right to the easement claimed. The easement depends upon user and there is evidence on the record directed not only to the length of the user but also to the nature of the user before and after the small bundh was erected. Upon that evidence a decision has been arrived at and regard being had to the whole record the contention that the learned Subordinate Judge decided the case upon a point not raised by the pleadings or issues and to which the evidence was not directed cannot, as it appears to me, be supported.

We have carefully considered whether a further inquiry should be directed generally as to the effect of the small bundh upon the plaintiff's land. We are of opinion in the circumstances that a further inquiry would carry the matter no further and is, therefore, unnecessary. We have also considered whether anything short of a mandatory injunction to remove the small bundh would suffice. But if the defendant is allowed to retain that dam, there would be a difficulty in directing the plaintiff to remove the dam which he constructed across the channel on his own land. The conclusions arrived at are sufficient to dispose of the appeal but it may be as well to add a few words on one or two other points touched upon in the argument before us. In the first place as to the plaintiff's title, it appears that the original owner of the property, whose daughter the plaintiff has since married, died in 1899. He was succeeded by his widow who gave the property to the plaintiff by deed dated 25th Magh 1316 (7th February 1910). The gift is expressed to have been made in pursuance of a promise by the widow on the occasion of the plaintiff's marriage to her daughter and on his agreeing to reside in her house as gharjawai, the plaintiff, it appears, belonged to a family higher in the social scale than that into which he married. The marriage took place in 1907 and his wife had since resided with the widow. It was argued for the plaintiff, on the authority of *Churaman Sahu* v. *Gopi Sahu* (10) and *Ramasami Ayyar* v. *Vengidusami Ayyar* (9), that the gift or transfer was binding on the reversioners entitlsd after the widow. If it was open to the widow as representing the husband's estate to make some such provision for her daughter, or son-in-law on their marriage, it might still be doubtful whether she acted reasonably and prudently in the exercise of her power. But neither the question of principle nor the question of fact need detain us, because as the learned Subordinate Judge has held in connexion with issues 15 and 16, whether the plaintiff's title is good against the reversioners or not, he has at least a sufficient title as against the defendant to support the suit.

On the assumption that the rever-

(9) (1899) 22 Mad. 113.

sioners are bound by the transfer, it was further argued for the plaintiff in connexion with the question of limitation that he was entitled to the benefit of S. 27, Lim. Act. On the facts found it is unnecessary for the plaintiff to have recourse to that section and we need not, therefore, decide the point. If an opinion had to be expressed, I should hold that the section does not apply to a donee or transferee from the widow in virtue of her powers as representing the estate. In such a case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her interest for life. It may be mentioned that in response to a suggestion from the Court during the hearing of this appeal, the parties made an endeavour to arrive at a settlement. We have no doubt that both parties did their best to find a way out of the difficulty, but in the result it was found impossible to reconcile their conflicting interests. In our opinion the appeal fails and must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1918 Calcutta 1034

FLETCHER AND NEWBOULD, JJ.

Dhanonjoy Bhuiya—Opposite Party—Appellant.

v.

Nimai Chand Das—Petitioner—Respondent.

Appeal No. 277 of 1915 Decided on 1st March 1917, from order of Dist. Judge, 24-Pergannas, D/- 10th June 1915.

Will—Construction—What is sufficient to imply appointment of guardian of person and property stated—Minor.

A testator by his will appointed his "trusted friend his executor and directed that "on my death he will take care of and supervise all my properties and manage my family and will educate and maintain my sons:"

Held: that the direction was sufficient to constitute the executor the guardian not only of the persons but also of the properties of the minor sons of the testator. [P 1035 C 1]

J. W. Chippendale—for Appellant.

Fletcher, J.—This is an appeal by the opposite party as he is called, against, an order of the learned District Judge of the 24-Pergannahs, dated 10th June 1915. The appeal arises out of an application that was made to the learned District Judge under the provisions of the Guardians and Wards Act. The application was made by the respondent to the present appeal, Nemai Chand Das, asking that he should be appointed the guardian both of the persons and the properties of the infant children of a deceased Hindu named Dina Nath Das. The application was opposed by the appellant before us, on the ground that he was the executor under the terms of the will of Dina Nath Das and that he was also, in accordance with the terms of that will, the guardian of both the persons and the properties of the minors. The learned Judge came to the conclusion that the appellant before us was not the guardian and appointed the respondent to this appeal guardian both of the persons and the properties of the minors. The sole question in this appeal is whether Dina Nath Das appointed the appellant before us as the guardian of his minor children, because it is quite clear that having regard to the terms of sub-S. (3), S. 7, Guardians and Wards Act, the Court could not appoint the present respondent as such guardian unless the appellant before us had not been appointed guardian by the terms of the will. The question therefore turns solely on whether the testator Dina Nath Das appointed the appellant as guardian of the persons and the properties of his minor children. The appointment clearly is not in express words and therefore it is necessary to consider the terms of the will. After the usual introductory statements that generally appear in the will of a Hindu and a statement of his family, the testator appointed the appellant who was stated to be his "trusted friend" the executor of his will. The will then proceeds as follows:

"On my death, he will take care of and supervise all my properties and manage my family and will educate and maintain my sons Surendra Nath Das and Nagendra Nath Das."

Those are the words which, if any, must be taken as an appointment of the appellant as the guardian of the persons and the properties of the minors. The learned Judge came to the conclusion that these words did not constitute the appellant the guardian of the persons and the properties of the minors. In that view, I am unable to agree. It was held by Vice-Chancellor Shadwell in the case of *Miller* v. *Harris* (1) that a request to a person to take upon himself the management and the care of the house and of his children is sufficient to constitute the person so requested to be the testamentary guardian of the infants; and

1. (1845) 14 Sim 540.

Lord Hardwicke in the case of *Mendes* v. *Mendes* (2) expresses the opinion that a direction that the wife should have the education and that the maintenance of the children might amount to the appointment of the wife as the guardian of the minors. In this case, the words seem to me clearly to appoint the appellant before us as the guardian both of the persons and the properties of the minors. The direction "to educate and maintain," in accordance with the opinion of Lord Hardwicke in *Mendes* v. *Mendes* (2), above referred to, certainly seems sufficient to constitute the appellant the guardian of the persons, and the direction "to take care of and supervise all my properties and manage my family" seems to constitute the appellant the guardian not only of the persons, but also of the properties of the minors. I am unable to agree with the view of the learned Judge of the Court below that, under this will, the appellant is not the guardian of the persons and the properties of the minors. I think we ought to set aside the order passed by the learned District Judge and allow the present appeal. The respondent to this appeal must pay to the appellant his costs both in this Court and in the lower Court. We assess the hearing fee in this Court at two gold mohurs.

Newbould, J.—I agree.

V.B./R.K. *Appeal allowed.*

2. (1747) 1 Ves Sen 89=27 E R 1910.

A. I. R. 1918 Calcutta 1035

CHATTERJEA AND SMITHER, JJ.

Adwaita Chandra Mondal and *others* —Defendants—Appellants.

v.

Krishnadhan Sarkar—Plaintiff—Respondent.

Appeal No. 449 of 1915, Decided on 23rd May 1917, from original decree of Dist. Judge, Pabna and Bogra, D/- 24th July 1915.

Probate—Will—Interpretation — Death of testator—Estate in possession of legatees for more than 12 years—No debts due to or by testator—Probate can still be granted if will is genuine and grant is necessary—Probate Court cannot decide if possession of legatees for 12 years was adverse.

The fact that since the death of the testator, his estate has been in the possession of the legatees according to the directions contained in the will for more than 12 years before an application is made for probate and that there are no debts due to or by the deceased testator, does not preclude the probate Court from granting probate in a case where the will is proved to be genuine and it is absolutely necessary for the legatee or person claiming through them to have their title established under the will by proving it. [P 1036 C 1]

It is not open to the probate Court to go into the question whether since the death of the testator the legatees have acquired, by adverse possession, statutory title to the testator's estate independently of the will. [P 1036 C 1]

Brajo Lal Chakrabarty and *Krishna Kamal Moitra*—for Appellants.

Jnanedra Nath Sarkar and *Bhupendranath Bose*—for Respondent.

Judgment.—This is an appeal against an order granting probate of a will dated 3rd June 1885. The testator died sometime between 1885 and 1892. By his will he gave 4 annas of his estate to his widow, 4 annas to each of his two daughters, and the remaining 4 annas to one Joy Hari Das, who is described as his foster-nephew, with the direction that on the death of any one of them, his or her share would devolve on the survivors. There is also a provision in the will that 12 bighas of land shall be appropriated for the purpose of the worship of the deities and other religicus ceremonies, for the entertainment of guests and the payment of annual pronami to the guru. The will was a registered one, but no application for probate was made until the year 1914. It appears that on the death of the widow and daughters of the testator, Joy Hari, the surviving legatee under the will, had some litigation with the nephews, i. e., the brother's sons of the testator, some of whom are the appellants before us in the present case. That litigation was compromised, the nephews of the testator taking one half of the estate and Joy Hari taking the other half. That was sometime before the present application was made by one Krishnadhan Sarkar, who was appointed executor (by implication) under the will. The appellants who are the nephews of the testator opposed the applications on the ground that the will was not genuine and secondly, that there was no estate left to be administered.

The Court below has found upon the evidence that the will is genuine. That finding has not been assailed before us in argument. What has been contended before us is that as there are no debts due to, or by the deceased, and the legatees under the will having been in possession according to the direction contained in the will for such a long period, no Letters of Administration ought to be granted.

We have been referred to the case of *Nursing Chunder Byak In the goods of* (1), *Lalit Chandra Chowdhury* v. *Baikuntha Nath Chowdhury* (2), *Lakshmi Narain Chatterjee* v. *Nanda Rani Debi* (3) and *Chandi Charan Mandal* v. *Banke Behari Mandal* (4). The first two cases however related to applications for Letters of Administration in case of intestate succession and in such a case, it is the duty of the Court in granting Letters of Administration to consider whether there is any estate to be administered or whether the estate had not been fully administered. The third case no doubt was one in which there was a will but the will had already been proved, and Letters of Administration with copy of the will annexed had been granted. Subsequently, the widow to whom Letters of Administration had been granted, made an application to the Judge under S. 90, Probate Act, for permission to raise money by sale of certain properties. It was held that S. 90 of the Act has no application where the estate has been fully administered, all the debts collected and all legacies paid. In the last case also the will had already been proved and probate granted and all that this Court held was that after the estate dealt with by the will had passed to the widow and more than 20 years had passed since the will was proved, the Court could presume that the estate was administered and on that ground refused Letters of Administration to the reversioner who applied for them after the death of the widow. Those cases therefore have no application to the present case, where it is absolutely necessary for the legatees or persons claiming through them to have their title established under the will by proving the will. It is contended on behalf of the appellants that if the legatees have already acquired statutory title independent of the will or if other interests have been acquired in the estate since the death of the testator, probate ought not to be granted. But we do not know whether any statutory title has been acquired, and it is not open to the probate Court to go into such matters. We do not express any opinion as to how far (if at all) the interests of other persons would be affected by this grant of probate, but we do not think that there is anything to preclude the probate Court from granting probate in case like this where the will was really executed by the testator. The appeal is a dismissed with costs, two gold mohurs.

V.B /R.K. *Appeal dismissed.*

1. (1899) 3 C W N 635.
2. (1910) 5 I C 395.
3. (1904) 3 I C 287.
4. (1906) 10 C W N 432.

A. I. R. 1918 Calcutta 1036

FLETCHER AND NEWBOULD, JJ.

Panchanan Das Majumdar — Judgment-debtor—Appellant.

v.

Kunja Behari Malo and *others*—Decree-holders—Respondents.

Appeal No. 55 of 1914, Decided on 2nd July 1917, against order of Sub. Judge., Khulna, D/- 22nd September 1913.

Civil P. C. (1908), O. 21, R. 64—Scope.

A Court has no jurisdiction to sell a property in execution which has not been duly attached.

[P 1035 C 1]

Mohini Mohan Chatterjee—for Appellant.

Jadu Nath Kanjilal and *Narendra Chandra Bose*—for Respondents.

Fletcher, J.—This appeal has been heard only against respondent 7 who purchased lot No. 32 for the sum of Rs. 40, the case against the other respondents having been compromised. Now the fact relied on in this case is that the Court below has found that there was, in fact, no attachment of this property before it was sold. It is urged therefore that having regard to O. 21, R. 64, Civil P. C., there being no attachment, the Court had no jurisdiction to sell the property. The case has been argued ex parte as the respondent 7 has not entered appearance and the other respondents have compromised the case; but we think that the cases that have been referred to as well as the terms of the order support the view taken by the appellant. O. 21, R.64, provides that any Court executing a decree may order that any property attached by it and liable to sale shall be sold. The Court having found that there was no attachment in this case, it is said that the Court had no jurisdiction to make the sale. The cases under the Code of Civil Procedure, 1859, render no assistance because that Code contained no provision corresponding with O. 21, R. 64, of the present Code or S. 284 of the Code of 1882. There being nothing corresponding to that section, the cases decided under the Code of 1859 do not help us at all in

the present case. Under the Code of 1882 a similar point was raised before the Judicial Committee in the case of *Macnaghten* v. *Mahabir Pershad Singh* (1), but that point does not seem to have been decided. Under the present Code, the point has been decided in Bombay in the case of *Sorabji* v. *Kala Raghunath* (2). At p. 163, (*of* 36 *Bom*), Scott, C. J., remarked that a property could only be brought to sale after it had been duly attached and that, if the attachment came to an end upon the payment into Court on 22nd September 1909, the property was not duly attached at the time of the sale in January 1910. The point has also been referred to by Lord Moulton in delivering the opinion of the Judicial Committee in the case of *Raja Thakur Barmha* v. *Jiban Ram Marwari* (3). At p. 164 (*of* 19 *C. L. J*) of the report Lord Moulton remarked:

"Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the schedule to which the attachment refers."

Although not exactly in point, it indicates the view of their Lordships that a property can only be sold when it has been duly attached. That, I think, is the only possible view to take with regard to the terms of O. 21, R. 64, Civil P. C. The appeal as against respondent 7 must therefore be allowed. We therefore reverse the order made by the learned Subordinate Judge so far as respondent 7 is concerned and set aside the sale made by him. The learned Subordinate Judge made no order as to the costs in the Court below. We also make no order as to the costs of this appeal. As regards other parties, let a decree be drawn up in terms of the petition of compromise.

Newbould, J.—I agree.

V.B./R.K. *Appeal allowed.*

1. (1863) 9 Cal 656=11 I A 25 (P C).
2. (1912) 36 Bom 156=12 I C 911.
3. (1913) 41 Cal 590=21 I C 936=41 I A 38 (PC).

A. I. R. 1918 Calcutta 1037

MOOKERJEE AND CUMING, JJ.

Kshetra Nath Bhuiya — Plaintiff—Petitioner.

v.

Kali Dasi Dasi—Defendant—Opposite Party.

Civil Rule No. 700 of 1915, Decided on 10th July 1916.

Provincial Small Causes Court Act (1887), S. 16 and Sch. 2, Cl. 31—Suit to recover specific sum of money does not become suit for account though accounts have to be examined for determining question in controversy—Reference should be made to High Court in cases of doubt as to form—Civil P. C. (1908), O. 46, Rr. 6 and 7.

Plaintiff sued defendant in the Court of a Munsif to recover a specific sum of money due on account of salary and house rent, and added that if the correctness of the amount was questioned the amount due might be determined on examination of the accounts. The defendant pleaded that the suit was cognizable by a Court of Small Causes, and the Munsif ordered the plaint to be returned to the plaintiff for presentation to the proper Court. The plaint was then presented in the Court of Small Causes, but the Judge of the Small Cause Court held that the suit was not cognizable by him and returned the plaint for presentation to the proper Court:

Held: (1) that the suit was one for the recovery of money and not for accounts and was cognizable by the Small Cause Court; (2) that the procedure adopted by the Small Cause Court Judge was wrong, inasmuch as if he entertained a doubt as to the forum in which the suit should be instituted, he should have referred the matter to the High Court for decision under R. 6, O. 46, and that if he was so confident of the correctness of his view as to entertain no doubt whatsoever in the matter within the meaning of R. 6, he might have sent the record to the District Judge with a request that action might be taken by him under R. 7, O. 46. [P 1038 C 2]

A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. [P 1038 C 2]

There cannot in essence be a suit for accounts by a plaintiff against a defendant, unless the defendant is under a liability to render accounts to the plaintiff. [P 1039 C 1]

Hirendra Nath Gangully—for Petitioner.

Judgment.—We are invited in this Rule to determine the forum where the plaintiff can obtain relief in respect of his claim. The plaintiff sues to recover from the defendant a sum of Rs. 466. He asserts that he was entitled to get Rs. 448 for salary, Rs. 367 as money borrowed for the benefit of the defendant, and Rs. 76 as house rent, that is, Rs. 891 in the aggregate; he then allows credit for Rs 425 and claims to recover Rs. 466. The plaint adds that if the correctness of the amounts is questioned, the amount due may be determined on examination of the accounts. The suit thus framed was instituted in the Court of the Munsif of Jessore on 11th December 1913. Summons was served upon the defendant in due course. She entered appearance and pleaded that the suit was cognizable by the Court of Small Causes and was con-

sequently not triable by the Munsif under S. 16, Provincial Small Cause Courts Act. An issue was thereupon raised, whether the suit was cognizable by a Court of Small Causes. The Munsif came to the conclusion that the suit was so cognizable, and, on 23rd December 1914, returned the plaint to the plaintiff for presentation to the proper Court. The plaint so returned was presented in the Court of Small Causes at Jessore on that very day. Summons was again served upon the defendant, who appeared and filed a written statement on 12th April 1915. As that written statement is not before us, we do not know whether objection was taken by the defendant to the jurisdiction of the Small Cause Court to entertain the suit.

It is plain that on the principle that no litigant is permitted to take up inconsistent positions in Court, such objection could not have been taken by her, for at her instance the Munsif had held that the Small Cause Court, and that Court alone, had jurisdiction to entertain the suit. We find however the following order recorded by the Small Cause Court Judge on 23rd April 1915: "This Court has no jurisdiction. Return for presentation to the proper Court." The Small Cause Court Judge does not assign, it will be observed, any reasons in support of his conclusion, he makes no endeavour to meet the grounds assigned by the Munsif in support of his order. The plaintiff took the plaint again to the Court of the Munsif and filed it on the same day. On 2nd June 1915 the Munsif held, and, in our opinion, very properly held, that so long as his previous order stood, he could not entertain the suit. Accordingly, he returned the plaint to the plaintiff a second time for presentation to the proper Court. The plaintiff thereupon applied to this Court and obtained the Rule now under consideration; his prayer is that either the Munsif or the Small Cause Court Judge be directed to entertain and try his suit which was instituted more than two and a half years ago.

Before we determine the question of the forum of the suit, we cannot but observe that the Subordinate Judge should never have followed the procedure he adopted to the manifest harassment of the plaintiff. He should have taken action under R. 6 or R. 7, O. 46 of the Code. R. 6 provides that where, at any time before judgment, a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit. The Munsif had held, in a carefully written judgment, that the suit was cognizable, not by his Court, but by the Court of Small Causes. If the Judge of the Court of Small Causes was of a different opinion, he might reasonably have entertained a doubt as to the forum where the suit should be instituted and thus referred the matter to this Court for decision. On the other hand, if the Small Cause Court Judge was so confident of the correctness of his view as to entertain no doubt whatsoever in the matter within the meaning of R. 6 (1), he might, at any rate, have sent the record to the District Judge with a request that action might be taken by him under R. 7. The lamentable result of the course adopted by the Small Cause Court Judge has been that the plaintiff has been driven from Court to Court and has not been able yet to obtain trial of his suit on the merits, while his summary order leaves us even now entirely in the dark as to the grounds for his view of the scope and nature of the suit.

As regards the nature of the suit, we are clearly of opinion that the view taken by the Munsif is correct. The suit as already stated, is for recovery of money and is, prima facie, cognizable by a Court of Small Causes. Reliance however appears to have been placed before the Munsif on Cl. 31 Sch. 2, Provincial Small Cause Coruts Act, which excludes from the jurisdiction of Small Cause Courts a suit for accounts. In our opinion, the present suit cannot be properly described as a suit for accounts. A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts, merely because in the determination of the question in controversy accounts may have to be examined. This has been pointed out in a long series of decisions, amongst others in *Hansari* v. *Ratni* (1), *Konduru Runga Reddi* v. *Subbiah Setty* (2), *Sankara Reddy* v. *Errama Reddi*

1. (1905) 27 All 200.
2. (1905) 28 Mad 394.
3. (1909) 4 I C 618.

(3), *Kailas Chandra* v. *Kiranendra Ghosh* (4), *Maroti* v. *Balaji* (5), *Kadar Rowther* v. *Vencatachellapathy Chetty* (6), *Indar Mal* v. *Baldeo Das* (7) and *Malaya Pillai Nadan* v. *Venganan Chetty* (8). There cannot in essence be a suit for accounts by the plaintiff against the defendant, unless the defendant is under a liability to render accounts to the plaintiff. This was recognized in the cases of *Chidrie Krisiappa* v. *Siddamsetti Yamanappa* (9), *Varadarajulu Chettiar* v. *Pattra Narayanaswamy Chetty* (10) and *Krishnaswami Aiyangar* v. *Poovanna Nadar* (11).

In the present case, there is no allegation that the defendant is under a liability to the plaintiff to render accounts in the well-known technical sense of the term. We are accordingly of opinion that this is not a suit for accounts and is cognizable by a Court of Small Causes. The result is that this Rule is made absolute, the order of the Small Cause Court Judge, dated 23rd April 1915, is set aside and the case is remitted to him in order that he may take cognizance of it and try it on the merits. The plaint which has been filed in this Court will be received here and transmitted to the Small Cause Court Judge. As the application has not not been contested by the defendant, there will be no order for costs.

V.B./R.K. *Rule made absolute.*

4. (1911) 10 I C 883.
5. (1912) 14 I C 786.
6. (1912) 14 I C 573.
7. A I R 1914 All 108=23 I C 424.
8. A I R 1914 Mad 100=24 I C 764.
9. (1912) 13 I C 159.
10. (1913) 20 I C 518.
11. (1915) 28 I C 955.

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FLETCHER AND TEUNON, JJ.

Allahabad Bank, Ltd.—Plaintiffs—Appellants.

v.

Moti Lal Barman and *others*—Defendants—Respondents.

Appeal No. 448 of 1915, Decided on 15th June 1916, from original decree of Sub-Judge, Howrah, D/-20th August 1915.

(a) Civil P. C. (1908), O. 34, R. 10—Mortgage suit—Preliminary decree—Money paid by mortgagee after preiminary decree either for rent or for supporting his title to mortgaged property, can be added to mortgage money.

When in a preliminary decree in a mortgage suit a Court, instead of directing an account to be taken, inserts the actual amount the mortgagor is liable to pay, the account is not adjusted once for all but may vary from time to time. [P 1040 C 1]

If after the preliminary decree in a mortgage suit the mortgagee pays to the landlord the rent due in respect of the mortgaged property, or properly spends any money either for supporting or defending the title to the mortgaged property, the amount so paid should be added to the amount found due on the mortgage in the preliminary decree, even though there was no express covenant in the mortgage-bond entitling the mortgagee to add such amount. [P 1040 C 1, 2]

(b) Civil P. C. (1908), O. 34 R. 10—Preliminary decree—Rent not paid—Mortgagee is not bound to keep mortgage property in jeopardy.

Semble.—After the preliminary decree in a mortgage suit the mortgagee is not bound to leave the mortgaged property in jeopardy (for non-payment of rent) until the Court decides the matter one way or the other (by the final decree). [P 1040 C 2]

Fletcher, J.—This is an appeal from the decision of the learned Subordinate Judge of Howrah, dated 10th August 1915. The appeal is preferred nominally against a decree absolute in a suit for sale brought to enforce a mortgage security. On 25th February 1913, defendant 1 along with defendant 2 who is a surety for him executed in favour of the plaintiff-appellant. The Allahabad Bank limited, a mortgage for Rs. 55,918-15-9. A suit was subsequently instituted by the Allahabad Bank and a preliminary decree was passed on 10th September 1914. That preliminary decree found the sum of Rs. 67,990-0-9 as due to the plaintiff Bank and fixed a period of two months for redemption. The decree being made ex parte defendant 1 applied to set it aside. That application was unsaccessful and the order was upheld by the High Court. Then on 6th January 1915, there was an order relating to the payment by the Plaintiff Bank of rents in arrears which the mortgagor did not pay. On 28th January 1915 the plaintiff Bank applied to the learned Subordinate Judge for the appointment of a Receiver. That was refused and, upon appeal to the High Court, that order was set aside. On 19th February 1915, the plaintiff Bank paid to the landlord the property included in the mortgage being a leasehold property. The sum of Rs. 8,987-5-6 in respect of rent. Thereupon he applied to the learned Subordinate Judge for leave to add the money so paid to the amount due on the mort-

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gage. But the learned Subordinate Judge on 20th August 1915, refused that application on the ground that there was no express covenant in the mortgage-bond entitling the plaintiff to add such arrears to the amount due on his mortgage. In substance, the appeal is preferred against the order.

Under O. 34, R. 2, Civil P. C., in a suit either for foreclosure or sale when the plaintiff succeeds, the Court has either to direct an account to be taken of what is due to the plaintiff for principal and interest upon the mortgage security and for the costs of the suit or to find the sum due. But as a matter of practice the latter course is followed in the Courts in moffussil. The learned Judge in this case having by his judgment decided that the plaintiff is entitled to succeed proceeds to calculate the amount due upon his mortgage and instead of directing an account to be taken, he inserts in the preliminary decree the actual amount which the defendant is liable to pay. That, of course, is a method which has certain advantages. That the account is not adjusted once for all appears quite clear from the other rules of the Order. For instance, O. 34, R. 10, mentions the final adjustment of the amount. So, the amount may from time to time vary. The present application is to add this money that was spent for the preservation of the property to the amount due on the mortgage. The mortgage is a mortgage of a leasehold property. The mortgagor was bound by the terms of the law to pay the rent becoming due under the lease and it has always been held that money so paid by the mortgagee can be added to the amount due on the mortgage. That is the view expressed by Sir Rash Behary Ghose in his treatise on the Law of Mortgage in British India and it may also be found in any text book on the subject. The same view has been supported in many decisions of this Court and I am not satisfied that Dr. Mitter's view that the cases in the Madras and the Bombay High Courts really cast a doubt upon that view at all is tenable. There cannot be, I think, any doubt that in the account the mortgagee can claim money properly paid by him for either supporting or defending the title to the mortgaged property. Money paid for rent has always been held to be part of the mortgage-money. It seems to me that, in substance, that is what the plaintiff has been asking for in this case, namely, to be allowed to add the money that he has paid to the landlord for rent in respect of the mortgaged property. If that is so, that money is a portion of the money secured by the mortgage. That being so, of course, the question that Dr. Mitter has raised about the final decree in a foreclosure suit being really a matter in execution cannot possibly arise.

The next point is a question of fact, namely, whether this money was, in fact, paid for the preservation of the property. The rent was paid obviously to preserve the property. It is said that the landlord having obtained a rent-decree could only execute that decree in a particular way. Whether that is so or not, it does not matter. I do not think that the mortgagee is not authorized to preserve the property from being lost for non-payment of rent. Dr. Mitter has cited no authority that the mortgagee is bound to leave the property in jeopardy until the Court decides the matter one way or the other. I see no reason why we should lay down for the first time such a rule. I think the learned Subordinate Judge was manifestly wrong in not allowing the plaintiff the money which he has clearly paid for the purpose of preserving the property. I think the present appeal ought to be allowed and this amount of Rs. 8,086-5-7, which has been paid by the plaintiff mortgagee for the rent of the property, ought to be added to and form a part of the money found due on the mortgage. That being so, the present appeal must be allowed. Defendant respondent 1 must pay to the plaintiff-appellant his costs in this Court and in the lower Court incurred in the application. These costs will be added to the mortgage security. The period of redemption is also extended to three weeks from this date.

Teunon, J.—I agree.

V.B./R.K. *Appeal allowed.*

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